No. ____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2020

RICHARD L. SEALEY,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI
Capital Case

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-Capital Case-

QUESTION PRESENTED

At the penalty phase of Mr. Sealey's capital trial, the State ended its case in aggravation earlier than expected. The defense made a motion for a brief continuance in order to secure the testimony of a vital witness who had not yet arrived from out of state, but the court denied the motion. The jury heard no witnesses in mitigation. Sealey was sentenced to death.

The questions presented by the petition are:

(1) What is the proper standard for determining whether a trial court's denial of a defense motion for a continuance during the penalty phase of a capital trial violates due process and renders a capital trial fundamentally unfair?

(2) What prejudice showing is required to obtain a new trial following an unconstitutional denial of a justifiable motion for a continuance?

(3) In assessing the prejudice flowing from appellate counsel's ineffectiveness in failing to raise a claim on appeal, must the reviewing court focus on the probability that the omitted claim would have resulted in reversal on appeal, as this Court held in *Smith v. Robbins,* 528 U.S. 259 (2000), or must the reviewing court weigh whether there was a reasonable probability of a different verdict *at trial* in the absence of the underlying error, as the Eleventh Circuit held here?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition arises from a habeas corpus proceeding in which the petitioner, Richard Sealey, was the petitioner before the United States District Court for the Northern District of Georgia, as well as the petitioner-appellant before the United States Court of Appeals for the Eleventh Circuit. Mr. Sealey is a prisoner sentenced to death and in the custody of Benjamin Ford, Warden of the Georgia Diagnostic and Classification Prison ("Warden"). The Warden and his predecessors were the respondents before the United States District Court for the Northern District of Georgia, and the respondent-appellee before the United States Court of Appeals for the Eleventh Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard L. Sealey ("Sealey") respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

INTRODUCTION

At the conclusion of the State's penalty phase presentation in Richard Sealey's capital trial, his counsel moved for a short continuance so that they could secure the appearance of their only mitigation witness, who had not yet arrived from the U.S. Virgin Islands. The trial court denied the motion. Because counsel had only prepared one witness, no mitigation witnesses testified. Sealey was sentenced to death.

On direct appeal, counsel failed to challenge the trial court's ruling. Consequently, when Sealey raised the claim in habeas corpus proceedings, both the state and district courts held that the claim was procedurally defaulted.

Sealey argued throughout the postconviction proceedings that appellate counsel's ineffectiveness provided the cause and prejudice necessary to overcome the default of the claim. The Eleventh Circuit

analyzed cause and prejudice under the familiar two-prong test for ineffective assistance of counsel announced in *Strickland v. Washington,* 466 U.S. 688 (1984). *Sealey v. Warden, Ga. Diagnostic Priso*n, 954 F.3d 1338, 1366 (11th Cir. 2020), Pet. App. 52-55. The court correctly observed that, in the appellate ineffectiveness context, applying this rubric requires "proceed[ing] to the underlying merits of Sealey's procedurally default claim[]." *Id.*

But the court made two vital missteps in analyzing the merits of the continuance denial claim, each of them implicating an issue of constitutional or federal law of vital import that has split the lower courts and contravenes this Court's capital jurisprudence. The court "conclude[d] that Sealey cannot prove that his appellate counsel were ineffective in failing to raise the continuance claim because it lacked merit." *Id.* at 1367, Pet. App. 53. The trial court's failure to give the defense a brief continuance to marshal their witness was not, in the view of the Eleventh Circuit, unconstitutional, nor even an abuse of discretion. *Id.*, Pet. App. 53-54. Therefore, the court held that it was not deficient for appellate counsel to omit the claim. The court's holding creates a split with the decisions of the Sixth Circuit, and deviates

substantially from the teachings of this Court's capital case decisions. This Court should grant *certiorari,* first, to promulgate a test for evaluating continuance denial claims, one that accounts for the unique function served by the penalty phase of a capital case.

When the Eleventh Circuit turned to *Strickland* prejudice, it weighed whether, had the trial court granted the continuance, there was a reasonable probability of a different result *at Sealey's trial*. *Id*., Pet. App. 54. But the relevant *Strickland* prejudice test here is whether "he would have prevailed *on his appeal*" had counsel simply raised the continuance claim. *Robbins*, 528 U.S. at 286 (emphasis supplied).

To answer that question, the court was again required to evaluate the merits of the underlying claim, *i.e*., whether Sealey demonstrated sufficient prejudice to prevail on his continuance claim on direct appeal. The required showing at that stage is simply actual prejudice, *see, e.g., United States v. Verderame*, 51 F.3d 249, 252 (11th Cir. 1995), *Kinder v. Bowersox,* 272 F.3d 532, 541 (8th Cir. 2001), not *Strickland*'s more onerous "reasonable probability of a different result at trial" standard. A meritorious direct appeal claim, in other words, would have had a lower threshold for prejudice. This Court should grant *certiorari*,

second, to reaffirm that this is the proper analysis when appellate counsel's ineffectiveness provides the cause and prejudice necessary to overcome a valid state procedural default.

Moreover, even if the Eleventh Circuit had correctly used the prejudice test that would have applied on direct appeal, the court would have found no uniform standard to guide its determination of whether there was prejudice sufficient to warrant relief. *Compare, e.g., Middleton v. Roper,* 498 F.3d 812, 817 (8th Cir. 2007) (acknowledging the state court's detailed findings regarding how the continuance denial impacted the defense's ability to respond to the State's case but setting forth no prejudice standard) *with United States v. Martin,* 740 F.2d 1352, 1361 (6th Cir. 1984) (requiring "actual prejudice" and defining it as "whether additional time would have produced more witnesses or have added something to the defendant's case."). No clear standard has been enunciated in this Court's precedents to guide the lower courts in determining what degree of prejudice warrants a new trial or sentencing. This Court should grant *certiorari*, third, to announce an administrable test for evaluating the constitutionality of such rulings, and grant Sealey a new sentencing trial under that framework.

OPINIONS BELOW

The Eleventh Circuit decision is reported as *Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338 (11th Cir. 2020), and is reproduced in the appendix at Pet. App. 1. The unpublished order denying rehearing, entered on June 9, 2020, is reproduced in the appendix at Pet. App. 63.

The unpublished opinion of the United States District Court for the Northern District of Georgia denying relief is reproduced in the appendix at Pet. App. 65.

The unpublished order of the Georgia Supreme Court summarily denying a petitioner a certificate of probable cause to appeal the state habeas court's denial of habeas relief is reproduced in the appendix at Pet. App. 167.

The unpublished order of the Superior Court of Butts County, Georgia, denying Sealey habeas relief is reproduced in the appendix at Pet. App. 168.

The opinion of the Supreme Court of Georgia on direct appeal is reported at *Sealey v. State*, 277 Ga. 617, 593 S.E.2d 335 (Ga. 2004), and is reproduced in the appendix at Pet. App. 240.

JURISDICTION

The Eleventh Circuit entered judgment on March 31, 2020, Pet. App. 1, and denied a timely petition for rehearing and rehearing *en banc* on June 9, 2020, Pet. App. 63. On March 19, 2020, Chief Justice Roberts extended the time within which to file a petition for writ of *certiorari* by sixty days in light of the COVID-19 pandemic.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

The Sixth Amendment to the United States Constitution, which provides: "In all criminal proceedings, the accused shall enjoy the right…to have the Assistance of Counsel for his defence."

The Eighth Amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution, which provides: "No state shall…deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In August 2002, Richard Sealey was convicted of the murders of his girlfriend's grandparents. During the penalty phase, the State's case in aggravation ended more than a full day early, catching defense counsel flat-footed. Their sole mitigation witness, Sealey's nephew, was still at home on the island of St. Croix when the State rested. The defense begged the trial court for a continuance in order to permit the witness's arrival. The motion was denied. The penalty phase moved forward, and the defense introduced only a few photos and letters—without explanation—in support of their mitigation case.

Though the continuance denial was one of the most consequential rulings of the entire trial, counsel inexplicably failed to challenge it on direct appeal. As a result, when Sealey later raised the claim in state and federal habeas corpus proceedings, it was barred as defaulted.

A. Trial

Petitioner Richard Sealey was convicted by a Clayton County, Georgia jury of the murders of Johnnie and Fannie Mae Tubner. The State's case rested primarily on the testimony of two cooperating co-defendants, Wajaka Battiste and Gregory Fahie. Battiste testified that

in January 2000, he gave a ride to Fahie, Sealey and Sealey's girlfriend, Deandrea Carter, to the home of Carter's grandparents, the Tubners. D.17-14:62.[1] Before they left, Carter called to confirm that the Tubners were home. *Id.* at 59-62. During the car ride, Carter indicated that she was going to obtain "money" while Sealey kept her grandparents occupied. *Id.* at 64. Battiste remained in the car while the others entered the Tubner home.

Fahie testified that while inside, he asked to use the Tubner's bathroom. D.17-16:122-24. When he emerged, Mr. Tubner was lying on the floor bleeding. *Id.* at 127. Sealey told Fahie that there was "a million dollars" in the house and instructed him to begin searching. *Id.*at 130. When the search turned up nothing, Fahie tried to persuade Sealey to leave, *id.* at 138, D.17-17:57, but Carter urged him on. She brought Sealey an axe and told him "you got to do it" and "go ahead and kill them." D.17-16:140. On the car ride back to the motel, Sealey told

[1] Record citations in this petition refer to the district court record below in *Sealey v. Warden*, No. 1:14-cv-00285-MB (N.D. Ga.), and are in the following form: District Court Docket Number–Attachment Number: page number range according to the pagination as assigned by the court's ECF system. For example, the citation "D.17-14:62" refers to Respondent's Notice of Filing at Docket Entry 17, Attachment 3, page 62. All documents are available on the PACER system.

the others that Mr. Tubner "was a wicked man" who had mistreated Carter and her mother. D.17-17:8. *Id.*

In response to the State's case, the defense argued that Fahie's testimony was unreliable and that other codefendants were more culpable than the prosecution's case had indicated. D.17-18:125-133. The defense also affirmatively tried to implicate another Tubner family member. D.17-16:49.

The jury rejected these arguments and convicted Sealey on all counts on Friday, August 23, 2002. D.17-20:8-9.

Prior to trial, Sealey's trial counsel had travelled to St. Croix, where Sealey was raised, and met with three of his relatives there. D.20-19:27. Though all three family members indicated they were willing to testify on Sealey's behalf, counsel inexplicably arranged for the appearance of only one of them: Sealey's nephew, Ronald Tutein. D.19-22:71.

On August 24, 2002, the Saturday following the jury's Friday guilty verdict, someone from the defense team contacted Tutein regarding the "last minute[] details" of his travel. D.20-19:91. The sentencing phase commenced on the following Monday, August 26, and

by late afternoon, the State had rested its case in aggravation. D.17-22:14-18. But the defense had no witnesses ready. Tutein was still on St. Croix. D.19-26:91.

The defense moved for a continuance "because of the change in scheduling." D.17-22:14. Lead counsel stated that they "thought in good faith on both sides that this…process would have taken a little longer" and claimed that Tutein could not leave until the next day because he had a doctor's appointment.[2] *Id*. Given that there was only one flight each day from St. Croix to Atlanta, Tutein would need to travel the following day, Tuesday, and would not be available to testify until Wednesday, August 28. *Id.*

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[2] Later, at the state habeas corpus evidentiary hearing, Tutein testified under oath that he did not have a doctor's appointment that would have interfered with his appearance at trial. He "made it clear that whenever [the trial attorneys] needed [him] they can call [him]" and he would "be ready anytime." D.19-20:57. In fact, Tutein testified, he was already packed and ready to leave when counsel's office called to tell him it was too late and he would not be able to testify. *Id.*

Trial counsel's files corroborate Tutein's memory. Time records show counsel's staff telephoned Tutein on Tuesday, August 27 and told him that the "prosecution ended one day early; not enough material to fill entire day...cannot testify as it will be too late." D.20-17:32. Handwritten notes likewise read "unable to testify / prosc 1 day early / not enough to stall ..." D.21-2:37.

After a short colloquy in which the court asked defense counsel to confirm that an airline ticket had "been open [to Tutein] for a long time," D.17-22:16-17, the court denied the motion for a continuance, *id.* at 22. As a result, other than a few letters and photographs of Sealey's childhood home that were introduced without context or explanation, the defense offered no mitigating evidence. D.17-23:40-41. Defense counsel's closing argument centered not on Sealey's personal traits, but on residual doubt about the credibility of his codefendants, and upon historical figures such as Jesus, Socrates, and Charles Manson, "seemingly in an effort to show the risk of the death penalty being imposed arbitrarily." *Sealey,* 954 F.3d at 1348, Pet. App. 11. The jury returned a death verdict on August 27, 2002. D.17-23:77-79.

B. Direct Appeal

Sealey was represented on appeal by John Beall, the same attorney who served as lead counsel at trial. D.18-5:1. The appeal enumerated ten errors but—remarkably—omitted the trial court ruling denying a penalty phase continuance. *Id.* at 5-7. Sealey's convictions and sentence were affirmed on March 1, 2004. *Sealey v. State,* 277 Ga. 617, 593 S.E.2d 335 (Ga. 2004), Pet. App. 240-246.

C. The State Habeas Proceedings

During the state habeas proceedings, Sealey claimed that the trial court's ruling denied him due process, a fundamentally fair trial, and the right to counsel. D.19-5:37-38. On July 26, 2012, the state habeas court entered a final order dismissing the petition. The court held that the continuance claim was defaulted under Georgia law because Sealey had failed to raise it on appeal. D.27-14:56, Pet. App. 222-23. The Georgia Supreme Court denied Sealey's timely-filed application for certificate of probable cause to appeal the denial of habeas relief without opinion on June 17, 2013. D.27-19, Pet. App. 167. This Court denied a timely filed petition for writ of *certiorari*. *Sealey v. Chatman*, 571 U.S. 1134 (2009).

D. The Federal Habeas Proceedings

On November 9, 2017, the district court below found that Sealey's continuance claim was defaulted and further, that he had not overcome that default. D.66:55-56, Pet. App. 119-20.

The Eleventh Circuit Court of Appeals affirmed the denial of relief on March 31, 2020. *Sealey,* 954 F.3d at 1338, Pet. App. 1. It, too, ruled that the continuance claim was defaulted. *Id.* at 1364, Pet. App. 48.

The court further held that Sealey was unable to overcome the default by showing that his appellate counsel had performed deficiently in failing to raise the claim on direct appeal or that he was prejudiced by that failure. *Sealey*, 954 F.3d at 1366-67, Pet. App. 52-54. The court "concluded that Sealey cannot prove that his appellate counsel were ineffective in failing to raise the continuance claim because it lacked merit." *Id.* at 1367, Pet. App. 53. According to the Eleventh Circuit, the trial court's continuance denial ruling was constitutional because it was neither "arbitrary" nor "unreasoning." *Id.*, Pet. App. 53-54. Appellate counsel, then, could reasonably decline to include the ruling in Sealey's appeal since it was not error, much less constitutional error. *Id.*

Turning to the prejudice from appellate counsel's omission of the claim (which would double as prejudice to overcome the default), the panel concluded that "Sealey wouldn't have succeeded on his continuance claim had it been raised on direct appeal." *Id.* And yet to reach that conclusion, the panel did not train its *Strickland* prejudice inquiry on the probable result of Sealey's direct appeal at all. Rather, the court conducted a *Strickland* prejudice analysis of the *penalty phase* of Sealey's trial, holding that "Sealey cannot show that Tutein's

testimony would have changed the outcome of sentencing" had the trial court granted the continuance and allowed Tutein to testify. *Id.* But Sealey would not have been held to that standard on direct appeal. The Eleventh Circuit never even mentioned the prejudice showing that would have been required of Sealey had he raised the claim then.

On April 21, 2020, Sealey filed a petition for rehearing and rehearing *en banc* identifying the error in the court's analysis of prejudice to overcome the default. The petition was denied on June 9, 2020. Pet. App. 63. This petition follows.

REASONS FOR GRANTING THE WRIT

This Court has held that although trial courts are afforded discretion regarding continuances, "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (citing *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (internal quotations omitted)). "There are no mechanical tests" to determine whether a court's insistence on expeditiousness is so arbitrary that it violates a defendant's right to counsel or due process. *Ungar*, 376 U.S. at 589 (citing *Nilva v. United States*, 352 U.S. 385

(1957)). Rather, "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.*

This case presents an important opportunity for the Court to clarify how such claims should be evaluated when they arise in the context of the penalty phase of a capital case. Here, the denial of a modest continuance resulted in the jury being denied mitigating evidence altogether. This Court's capital case jurisprudence has "firmly established that sentencing juries must be able to give meaningful consideration and effect to *all* mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman,* 550 U.S. 233, 246 (2007) (emphasis supplied). Yet the trial court's ruling in Sealey's case accomplished what Georgia would have been prohibited from doing by statute: it kept relevant mitigating evidence from reaching the sentencing jury. *See Lockett v. Ohio,* 438 U.S. 586, 604 (1978). If the answer to whether a continuance ruling violates due process "must be found in the circumstances present in every case,"

Ungar, 376 U.S. at 589, then the fact that the ruling precluded virtually all mitigating factors from the jury's consideration must carry considerable weight. This case presents an opportunity to reaffirm that a court's need for efficiency cannot abrogate the need for counsel to present "*all reasonably available* mitigating evidence," *Wiggins v. Smith,* 539 U.S. 510, 524 (2003), in a capital case. Further, this case presents an important—and related—opportunity to clarify the proper analysis of prejudice.

I. The Eleventh Circuit's Decision Rests Upon Its Analysis of the Merits of Sealey's Continuance Denial Claim.

Sealey's claim was defaulted when his counsel failed to raise it on direct appeal. As the Eleventh Circuit acknowledged, *Sealey,* 954 F.3d at 1365, Pet. App. 49-50, a federal court can reach a defaulted claim if there is "cause" for and "prejudice" from the default. And "attorney error that constitutes ineffective assistance of counsel is cause." *Coleman v. Thompson,* 501 U.S. 722, 753-54 (1991)). This is because "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *Murray v. Carrier,* 477 U.S. 478, 488 (1986). In other words, appellate counsel's unreasonable failure to raise a

meritorious claim can provide cause to overcome its default in later proceedings. *Smith v. Robbins,* 528 U.S. 259, 285 (2000). In that circumstance, prejudice to overcome the default mirrors *Strickland* prejudice. *Id*. The petitioner "must show a reasonable probability that, but for his counsel's unreasonable failure" to raise the claim, "he would have prevailed on his appeal." *Id*. at 286.

Applying those principles, the Eleventh Circuit held that because the continuance claim lacked merit, appellate counsel did not perform deficiently in failing to raise it. *Sealey,* 954 F.3d at 1367, Pet. App. 52-54. Thus, the lower court's holding turned solely on its analysis of the substantive claim. The merits of the continuance denial claim—and the proper standards for evaluating it—are squarely raised by the facts of Sealey's case. This case is an apt vehicle for this Court to set forth the correct analysis of claims that the denial of a penalty phase continuance violated a capital defendant's constitutional trial rights.

II. The Lower Courts' Handling of Continuance Denial Claims Involving Mitigating Evidence in Capital Cases Is an Issue of Exceptional Importance That Warrants This Court's Review.

The Eleventh Circuit's conclusion that Sealey's continuance denial claim lacked merit was wrong and failed to guard important capital

trial rights. The ruling ignored this Court's teachings with respect to the role of mitigating evidence, demonstrated the amorphous and unworkable nature of the current standard for evaluating such claims, and created a split with the decisions of the Sixth Circuit. This Court should intercede.

A. Mitigating evidence is "a constitutionally indispensable part of the process of inflicting the death penalty."[3]

The exceptional and irrevocable nature of the death penalty requires "extraordinary measures" to ensure the reliability of the capital sentencing decision. *Eddings v. Oklahoma,* 455 U.S. 104, 188 (1982) (O'CONNOR, J., concurring). The purpose of the penalty phase of a capital trial is to insure that the sentence derives from a consideration of the particularized characteristics of the defendant. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Because a sentence of death is "unique in its severity and irrevocability," the jury should have "as much information before it as possible when it makes a sentencing decision," *Gregg v. Georgia*, 428 U.S. 153, 187, 204 (1976), in order to

[3] *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976).

"give a reasoned moral response to the defendant's background, character and crime," *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989).

Therefore, "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 and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (plurality opinion). "When this evidence is kept from the jury, the defendant's ability to receive an individualized sentence" is unconstitutionally infringed. *Eddings*, 455 U.S. at 112. Therefore any procedure that "fails to allow the particularized consideration of … [the defendant's] character and record" is unconstitutional. *Woodson,* 428 U.S. at 303 (plurality opinion). This is true even if the mitigating evidence that was precluded from consideration "d[oes] not rebut either deliberateness or future dangerousness …"*Abdul-Kabir*, 550 U.S. at 259. Yet here—as a direct result of the trial court's denial of a quite modest continuance of a single day—"the jurors who sentenced [Sealey] determined whether he would live or die 'knowing hardly anything about him other than the facts of his crimes.'" *Lance v. Sellers,* 139 S.Ct.

511, 515 (2019) (SOTOMAYOR, J., dissenting from the denial of *certiorari*) (quoting *Porter v. McCollum*, 558 U.S. 30, 33 (2009)).

B. The Eleventh Circuit's decision—which failed to account for the role of mitigating evidence—is wrong.

The Eleventh Circuit's analysis did not account for this body of law, nor even acknowledge the role of mitigating evidence. Instead, applying *Slappy,* the court centered its analysis on whether the trial judge's "insistence upon expeditiousness" could be deemed "arbitrary" or "unreasoning." *Sealey,* 954 F.3d at 1367, Pet. App. 53-54. The court observed that the trial judge made an effort to understand why Tutein was not available, and then concluded that the trial court was within its discretion to proceed without his testimony. *Id*. As a result, the Eleventh Circuit reasoned, Sealey's claim—that the trial court's ruling denied him a fundamentally fair trial and violated due process—lacked merit. Direct appeal counsel, then, could reasonably omit the claim.

While there may be "no mechanical tests" for determining when a continuance denial ruling violates a defendant's constitutional rights, *Ungar*, 376 U.S. at 589, any framework for addressing the claim must adequately weigh the rights that are sacrificed for the sake of expeditiousness. The Eleventh Circuit's treatment of the *Slappy*

decision below makes plain the need for this Court to announce such a framework.

In *Slappy,* the deputy public defender who represented him was hospitalized for surgery shortly before trial and another attorney in the public defender's office was appointed in his stead. 461 U.S. at 5. *After the trial commenced,* the defendant himself moved for a continuance based on the substitution. *Id.* at 6. The Eleventh Circuit relied on *Slappy* to deny relief in Sealey's case, pointing out that this Court "ultimately found no Sixth Amendment violation" even though the continuance was based upon "appointed counsel [being] substituted only six days before trial." *Sealey,* 954 F.3d at 1366-67 (citing *Morris v. Slappy*, 461 U.S. 1, 3–4 (1983)), Pet. App. 53. But in *Slappy*, trial counsel had the benefit of his colleague's investigation and assured the court that he was prepared and ready to proceed. 461 U.S. at 6. It was only the defendant himself—not counsel—who sought a continuance. *Id*. Given that Slappy had pointed to no specific harm resulting from the trial court's ruling, this Court held that the trial court did not abuse its discretion. *Id*. at 12.

In contrast, Sealey's trial counsel pleaded with the trial court for a brief delay to permit the arrival of the defense's only mitigation witness. The trial judge's denial relied on delay. D.17-22:21-22. But the court denied the continuance and concluded proceedings for the day on Monday at approximately 3:40 p.m., which means that the trial court would have only had to recess proceedings for a single day (Tuesday) to accommodate Tutein. *Id.* While it was true that defense counsel should have had their witness ready, it was apparent that the State's case concluded more quickly than the parties had expected. D.17-22:14 (defense counsel: "Your Honor, it's my understanding that the State is going to rest here in just a minute with respect to the sentencing. I will need, because of the change in scheduling, we had thought in good faith on both sides that…this process would have taken a little longer."). The trial court could have easily corrected counsel's clumsy mistake—and avoided its catastrophic effects—by recessing court for a single day in a case that had been pending for two and a half years. The trial court's "myopic insistence upon expeditiousness in the face of a justifiable request for delay" rendered Sealey's rights to counsel and to present mitigating evidence "an empty formality," *Ungar*, 376 U.S. at 589, and

therefore did not fall within the trial court's "broad discretion … on matters of continuances." *Slappy,* 461 U.S. at 11.

In reaching the opposite conclusion, the Eleventh Circuit failed to weigh the inconvenience of a brief delay against the deprivation of a meaningful opportunity to present mitigating testimony. This Court should grant *certiorari* to require that courts conduct precisely that weighing process when a "justifiable request for delay" is made in the context of the penalty phase of a capital trial.

C. The Sixth Circuit has promulgated a workable test for determining whether the denial of a penalty phase continuance violates due process.

When confronted with the same claim, the Sixth Circuit—splitting with the Eleventh—held that a trial court cannot sacrifice the right to marshal mitigating evidence for the sake of expeditiousness or convenience. *Powell v. Collins*, 332 F.3d 376, 396 (6th Cir. 2003).

In *Powell*, a psychologist who had evaluated Powell for competency prior to trial testified that he was capable of "intentional, purposeful acts" but may suffer from mild brain dysfunction, though the psychologist had not interviewed any of Powell's family or friends and had not done any of the tests necessary to detect a brain defect. *Id.* at

384. The trial court refused to permit a continuance of the penalty phase to allow for any testing or follow up. *Id.* at 383. As a result, the only mitigation evidence presented on Powell's behalf was the psychologist's testimony. According to the Sixth Circuit, the trial court's ruling deprived Powell of a fundamentally fair adjudication, violating due process. *Id.* at 397.

To reach this conclusion, the Sixth Circuit utilized the framework promulgated by the D.C. Circuit in *United States v. Burton,* 584 F.2d 485 (D.C. Cir. 1978). Per the *Burton* test, "the factors to be considered by the court in determining whether a continuance was properly denied" include:

- "the length of the requested delay,"
- "whether other continuances had been requested and granted,"
- "the convenience or inconvenience to the parties, witnesses, counsel, and the court,"
- "whether the delay was for legitimate reasons or whether it was 'dilatory, purposeful or contrived,'"
- "whether the defendant contributed to the circumstances giving rise to the request,"
- whether denying the continuance would "result in identifiable prejudice to the defendant's case," and

- "the complexity of the case."

Powell, 332 F.3d at 396 (quoting *Burton*, 584 F.2d at 490-91). The court explicitly described this evaluation as a "balancing test" that required that each factor be carefully weighed to discern whether the defendant received a fundamentally fair trial. *Id.*

Applying the *Burton* rubric, the Sixth Circuit noted that the requested delay "was not dilatory or contrived" and would not have inconvenienced the psychologist or any other witness. *Powell*, 332 F.3d at 397. The court then found that any inconvenience to Powell's jury or the court "pale[d] when compared to the gravity and magnitude of the issue involved—i.e., whether the death penalty should be imposed." *Id.*

The Sixth Circuit's analysis gives weight and meaning to the "constitutionally indispensable" role of mitigating evidence in a capital case, even an especially aggravated one, and it provides the lower courts with an administrable test. This Court should grant *certiorari* to provide the lower courts such a framework for weighing when the refusal to provide a necessary continuance offends due process, particularly in the penalty phase of a capital case.

III. The Eleventh Circuit Misapplied The Cause and Prejudice Test to Defeat Federal Review of a Meritorious Constitutional Claim.

Had the Eleventh Circuit weighed the deprivation of Sealey's right to present mitigating evidence and concluded that it was too steep a price to avoid a minimal delay, the question nevertheless would have remained: Had Sealey shown prejudice? Appellate counsel's omission of a meritorious continuance denial claim would have amounted to *Strickland* deficiency in preparing his appeal, and consequently, it would have served as cause to overcome the default. But Sealey would still have been required to show prejudice to overcome the default. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). Where appellate counsel's deficiency is the alleged cause, the requisite prejudice mirrors *Strickland*'s requirement of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Robbins,* 528 U.S. at 285-86.

A. The prejudice standard applicable to the underlying claim is the relevant standard, not *Strickland*.

In analyzing the prejudice from appellate counsel's ineffectiveness, the relevant "proceeding" is the appeal. *Robbins,* 528 U.S. at 285. The reviewing court evaluates whether, absent appellate

counsel's failure to raise a meritorious claim, there is a reasonable probability that the petitioner "would have prevailed on his appeal." *Id*. *See also Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). The Eleventh Circuit has previously acknowledged that this Court's decision in *Robbin*s "makes clear that a defendant is *not* required to show a reasonable probability of a different outcome at trial had it been conducted without the constitutional infirmity." *Hall v. Warden, Lee Arrendale State Prison*, 686 Fed. App'x 671, 678 (11th Cir. 2017) (emphasis supplied), and instead, the reviewing court must look to the law governing the specific error to determine the relevant prejudice standard,[4] *Eagle v. Linahan*, 279 F.3d 926, 943 (11th Cir. 2001) ("To

[4] In some instances, that will mean no showing of harm separate from the error itself. *See, e.g., Orazio v. Dugger*, 876 F.2d 1508, 1511 (11th Cir. 1989) (finding that appellate counsel's failure to raise a *Faretta* claim was prejudicially deficient performance, and "given the nature of the constitutional right involved—the right to proceed in one's own defense—a denial of the opportunity to obtain review of that claim is necessarily prejudicial"); *Hall*, 686 Fed. App'x at 682 (appellate counsel's failure to raise claim based upon defendant's inability to confer with her attorney was prejudicially deficient performance because the violation—the constructive denial of counsel—is presumptively prejudicial); *Shaw v. Wilson,* 721 F.3d 908, 918 (7th Cir. 2013) (appellate counsel's failure to raise a claim that the State's out-of-time amendment to the information was facially invalid was prejudicial). In other instances, that will mean a detailed analysis of the trial error's impact in light of the relevant prejudice standard. *See, e.g*.,

determine whether the failure to raise a claim on appeal resulted in prejudice, we review the merits of the omitted claim."). Yet the court failed to apply this straightforward analysis to Sealey's claim.

Instead, the court weighed the likelihood of a different outcome at Sealey's sentencing trial. *Sealey,* 954 F.3d at 1367 ("Had the trial court granted his request for a continuance to allow for Tutein's arrival, Sealey cannot show that Tutein's testimony would have changed the outcome at sentencing, given the weak nature of the testimony compared to the heinous nature of the crimes and other aggravating circumstances."),[5] Pet. App. 54. The court failed to look to the prejudice standard governing the continuance claim.

Neil v. Gibson, 278 F.3d 1044, 1060-61 (10th Cir. 2001) (examining each of the instances of alleged prosecutorial misconduct that appellate counsel failed to raise on appeal under the standard announced in *Darden v. Wainwright,* 477 U.S. 168, 181 (1986)); *Chrysler v. Guiney*, 806 F.3d 104 (2nd Cir. 2015) (analyzing Confrontation Clause claim under the standards that would have applied to state court's treatment of the claim on direct appeal); *Overstreet v. Warden*, 811 F.3d 1283, 1287-88 (11th Cir. 2016) (applying Georgia caselaw to Overstreet's defaulted claim and noting "absent a departure from precedent, [his] kidnapping convictions would have been reversed" had the claim been raised).

[5] The Eleventh Circuit wrongly suggests that Sealey argued that prejudice to the outcome of the sentencing proceedings was the correct prejudice standard. The court wrote that "Sealey acknowledges that he

Had Sealey raised his claim on direct appeal, the Georgia courts, applying Georgia caselaw, would have imposed upon Sealey "the burden to show that he was harmed by that denial." *Columbus v. State*, 270 Ga. 658, 665, 513 S.E.2d 498, 506 (Ga. 1999). Under the relevant Eleventh Circuit precedents, Sealey would have been required to demonstrate that the denial caused him "specific substantial prejudice" in presenting his defense. *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1326 (11th Cir. 2002), *Verderame*, 51 F.3d at 252; *United States v. Bergouignan*, 764 F.2d 1503, 1508 (11th Cir.1985). This can be shown by demonstrating that counsel was given inadequate time to garner necessary documents and witnesses. *Verderame,* 53 F.3d at 252.

Sealey could have made the Georgia and Eleventh Circuit showings needed to prevail on appeal. The force and effect of the trial

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'must also show that the denial [of the continuance] resulted in actual prejudice.'" *Sealey,* 954 F.3d at 1367, Pet. App. 54 (citing Br. of Petitioner at 104–05 and *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1326 (11th Cir. 2002)). But the opinion neglected both the operative portion of the sentence quoted from Sealey's brief and the operative holdings upon which Sealey relied. In full, the sentence from Sealey's brief read that Sealey must show "actual prejudice, which may be demonstrated by 'showing that additional time would have made relevant witnesses available or otherwise benefited the defense.'" In other words, Sealey argued the "specific substantial prejudice" standard that would have applied on direct appeal, not *Strickland* prejudice.

court's ruling was to deny Sealey an opportunity to present mitigating evidence entirely. The Eleventh Circuit's mechanical error prevented review of a meritorious constitutional claim, and should not stand.

B. This Court should clarify the proper standard for evaluating prejudice from the denial of a continuance.

More crucially, this Court should grant *certiorari* to establish a uniform prejudice standard for the evaluation of continuance denial claims. The standard announced in *Ungar,* 376 U.S. at 589, and followed in *Slappy*, 461 U.S. at 11-12, explicitly declined to set forth a "mechanical test" for determining when the denial of a continuance violates due process. And those cases failed to set forth *any* standard whatsoever for measuring when the harm flowing from such a violation mandates a new proceeding.

The Sixth Circuit has simply stated that the standard is "actual prejudice," *Powell,* 332 F.3d at 396, which may be demonstrated by showing that "additional time would have produced more witnesses or have added something to the defendant's case." *United States v. Martin,* 740 F.2d 1352, 1361 (6th Cir. 1984); *Esparza v. Sheldon,* 765 F.3d 615 (6th Cir. 2014). Other circuits hold the petitioner to a generalized burden to demonstrate harm, but have not articulated the quantum of

prejudice necessary to prevail. *See, e.g., Kinder,* 272 F.3d at 541; *Reed v. Stephens*, 739 F.3d 753 (5th Cir. 2014); *United States v. Allen*, 247 F.3d 741, 771 (8th Cir. 2001) (judgment vacated on other grounds, *Allen v. United States,* 536 U.S. 953 (2002)); *United States v. Bauer,* 84 F.3d 1549, 1562 (9th Cir. 1996); *Burton,* 584 F.2d at 498.

Here, where Sealey may not have been able to meet *Strickland*'s onerous "reasonable probability of a different result" at sentencing standard, his claim clears any lower bar. The trial court's failure to grant a brief continuance cemented the harm from trial counsel's inept preparation and ensured that the jury would hear no mitigating evidence. The Eleventh Circuit's prejudice analysis does not mention this fact. The witness whom defense counsel failed to ensure would arrive in time, Sealey's nephew Ronald Tutein, would have been credible in the eyes of jurors. He was a deputy marshal in the Virgin Islands. D.19-20:49-50. He loved and cared for his uncle and would have begged for his life; his testimony would have conveyed to the jury that Sealey was not a monster. *Id.* at 49-56. Tutein described his uncle as someone who cared for his younger relatives and he could have testified that Sealey had been changed by his prison experience and

consequently had dissuaded Tutein from violence and encouraged him to stay on a positive path. *Id.* at 53-55. This is a side of Sealey that reasonable jurors could not have imagined, much less weighed, in the absence of any mitigation evidence whatsoever.

This is "actual" prejudice under any formulation. There is a qualitative difference in the prejudice calculus where the jury was offered no reason to spare the defendant's life. *See*, e.g., *Lance v. Sellers*, 139 S. Ct. 511, 516 (2019) (SOTOMAYOR, J., dissenting from the denial of certiorari) ("There is a stark contrast between no mitigation evidence whatsoever and the significant…evidence that adequate counsel could have introduced…"). In fact, during the state postconviction proceedings, Sealey's trial jurors testified that the total lack of mitigating evidence impacted their decision-making. *See, e.g.*, D.21-8:13 (juror expressing surprise that the defense "didn't get just one relative, or a friend, or somebody, to get up and say, this person is somebody I care about, please don't kill him," and observing "it would have made a difference"); *see also* D.21-8:2-17. As this Court has held, even imperfect evidence may "add[] up to a mitigation case that bears no relation to the

few naked pleas for mercy actually put before the jury." *Rompilla v. Beard*, 545 U. S. 374, 393 (2005); *see also Porter*, 558 U.S. at 41.

This Court should grant *certiorari* to bring this area of law into compliance with this Court's capital case precedents, which hold the role of mitigating evidence sacrosanct. This case is an excellent vehicle for promulgating a workable framework for evaluating when the denial of a continuance violates due process and the right to counsel; and an ideal context for announcing when that constitutional violation was so prejudicial that a new trial or sentencing is required. Sealey was deprived of the "individualized sentencing determination required by the Eighth Amendment," *Penry,* 492 U.S. at 316, and sentenced to death by jurors who "kn[ew] hardly anything about him other than the facts of his crimes," *Porter*, 558 U.S. at 33, all because the trial judge refused to pause the proceedings for *one* day. Sealey respectfully asks this Court to intervene.

CONCLUSION

This Court should grant the petition for writ of *certiorari*.

Respectfully submitted, this the 6th day of November, 2020.

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