No. 20-6294

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

REPLY IN SUPPORT OF 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?

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ARGUMENT IN REPLY

The jury that sentenced Richard Sealey to death heard no mitigating evidence. Owing to his attorneys' error, the only witness whose testimony they had secured did not arrive in time to testify. The trial court refused to provide a short recess in the trial, which at that point had spanned two weeks, to permit the witness's arrival. As set forth in the Petition, this "arbitrary [] insistence on expeditiousness in the face of a justifiable request for delay," *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983), violated Mr. Sealey's rights to counsel and due process.

Mr. Sealey's continuance claim was procedurally defaulted when his counsel failed to raise it on appeal to the Supreme Court of Georgia, D.27-14:56, and so the court below analyzed the claim by determining whether appellate counsel's ineffective assistance provided cause and prejudice to overcome that default. *Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338, 1366 (11th Cir. 2020), Pet. App. 52-55. That determination rests on an analysis of the merits of the continuance claim itself; if the claim lacked merit, then counsel was not deficient in failing to include it on appeal, and Mr. Sealey was not prejudiced by its omission on appeal. *Coleman v. Thompson,* 501 U.S. 722, 753-54 (1991).

As set forth in the Petition, the Eleventh Circuit made two errors in that analysis. First, in concluding that the continuance denial claim lacked merit (and therefore appellate counsel was reasonable to omit it), the court wholly failed to weigh the trial rights that were sacrificed when the court denied the continuance, specifically the right to present mitigating evidence. Second, in determining that Mr. Sealey was not prejudiced by the omission of the claim on appeal, the court considered whether there was a reasonable probability of a different result *at trial*, when a proper analysis of appellate ineffectiveness would have focused on whether there was reasonable probability of success *on appeal*.

I. The Eleventh Circuit's Decision—Which Failed To Account For The Role Of Mitigating Evidence—Is Wrong.

The Eleventh Circuit evaluated whether the trial court's decision was "arbitrary" or "unreasoning" by training its analysis on the *reasons* for the delay—pointing out that the trial court endeavored to understand *why* Tutein was unavailable—and on the consequences of continuing the trial. *Sealey,* 954 F.3d at 1367, Pet. App. 53-54. This is only half of the correct analysis. Neither the Eleventh Circuit nor the trial court placed any countervailing weight on the constitutional rights at stake.

Mr. Sealey's jury was not sequestered. As the Warden points out, the trial court "provided a two-day recess" after the guilt phase. D.17-20:15. When the jury returned its guilty verdict at 4:00 p.m. on Friday afternoon, the court *sua sponte* released the jurors until Monday morning because they "had been here all week and most of last week too" and "it would be best for everyone to go home and rest over the weekend." *Id.* Thus, after having jurors return home for two days, and then recessing at 3:40 on Monday so that Mr. Sealey could consider whether to testify, D.17-22:22, the court refused to recess the unsequestered jurors *for a single additional day*—Tuesday—so that Mr. Sealey's mitigation witness could arrive from the Virgin Islands, *id.*

The Warden suggests that the misscheduled mitigation witness, Ronald Tutein, may have chosen other priorities over testifying, and that trial counsel's neglect was not the cause of the delay. BIO 23, n. 10. The record forecloses that narrative.[1] And in any event, it is beside the

[1] The Warden relies on the testimony of trial counsel, Mr. Beall, that he "had the 'sinking feeling' that Tutein chose to do something else instead of coming to Sealey's trial." BIO 23, n.10 (citing D.19-22:110; D.21-8:72). Respondent neglects to mention that in quoted passage, Mr. Beall admitted he "really d[id]n't have a clear memory" of why Mr. Tutein was not present. D.21-8:71. Mr. Beall's co-counsel, Mr. Roberto, who handled the penalty phase, admitted that "Tutein didn't make it because maybe [they] didn't have [their] act together...." D.19-23:34. Mr. Tutein himself testified unequivocally

point. No matter who bore responsibility for the witness's absence, the trial court could have rectified the error with minimal inconvenience to the parties and the jurors. The court not only failed to protect the constitutional rights at stake, but failed to even consider them. D.17-22:21-22. As a result, the jury heard not a single plea for mercy.

"With nothing to put on the mitigating side of the scale, the jury was almost certain to choose a death sentence." *Canaan v. McBride*, 395 F.3d 376, 386 (7th Cir. 2005). The jurors themselves confirmed that the lack of mitigating evidence drove their selection of sentence. D.21-8:3, 5, 9, 13, 16. As one juror recalled: "I was surprised they 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. I was waiting for somebody to say that and it would have made a difference to me." D.21-8:13.

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he did not have a scheduling conflict, and "since [he] knew what Richard was facing, [he] would have been there no matter what." D.19-26:91. He "made it clear that whenever they needed [him], they can call..." D.19-20:57.

In addition, trial counsel's file reflects that they purchased an airline ticket that permitted Mr. Tutein to leave on any day beginning Thursday, August 22 (the day the guilt phase went to the jury). D.17-22:19. The file also reflects that *they did not direct him to leave until Tuesday, August 27*, when it was too late. D.20-17:32 ("prosecution ended one day early...cannot testify as it will be too late"); D.21-2:37.

Faced with this record, the Warden miscasts Mr. Sealey's argument in support of *certiorari* review. The Warden contends that Sealey advocates for a standard that holds it "is per se prejudicial…to deny a continuance to allow the defense to secure a [mitigation] witness." BIO 21. But that is plainly not Mr. Sealey's position. Nor does he argue that "the court of appeals should have applied this Court's precedent regarding the presentation of mitigating evidence." *See id.*

Mr. Sealey submits simply that, in applying the rule that "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates" the right to counsel and due process, *Morris*, 461 U.S. at 11-12, *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), a reviewing court must account for the nature of the trial right at stake when the continuance is denied. In the context at bar, that requires accounting for this Court's holdings that mitigating evidence is essential to the capital jury's determination under the Eighth Amendment. Mr. Sealey argues that that fact "must carry considerable weight" in the analysis. *See* Pet. 16.

As Respondent acknowledges, the Eleventh Circuit condoned the trial court's reasoning, which focused on the need to avoid delay and on

defense counsel's negligence. BIO 23 (citing D.17-22:21-22). Both the trial court and the Eleventh Circuit failed to include constitutional concerns in the calculus at all. The Warden ignores this omission, which permits him to frame the question as one of an abuse of discretion[2] rather than constitutional error. *See, e.g.,* BIO 24. The trial court has discretion on matters of scheduling, but the need to avoid delay must be "compared to the gravity and magnitude of the issue involved." *Powell v. Collins*, 332 F.3d 376, 396 (6th Cir. 2003).

II. The Sixth Circuit Has Promulgated A Workable Test For Determining Whether The Denial Of A Penalty Phase Continuance Violates Due Process.

The Sixth Circuit properly applied the principle that Mr. Sealey advances, creating a split with the Eleventh Circuit. *Powell, ibid.* The *Powell* Court acknowledged the need for expeditiousness but weighed

[2] The Warden also writes that the trial court's decision is an exercise of discretion that should be insulated from review because "the more general the rule," as this one is, "the more leeway courts have…" BIO 24 (citing *Renico v. Lett,* 559 U.S. 766, 778 (2010) and *Yarbrough v. Alvarado*, 541 U.S. 652, 664 (2004)). But the cases cited by the Warden do not concern the abuse of discretion standard. They instead concern a provision of the AEDPA—Section 2254's provision that a federal court may not grant habeas relief where there is a prior state court judgment on the merits of a claim unless that judgement unreasonably applied federal law. In applying that provision, the federal court is required to grant the state court "leeway" where the constitutional rule at issue is a general one. *Id.*

that need against the Eighth Amendment's concerns, finding that any inconvenience to the jury "pale[d] when compared to the gravity and magnitude of the issue involved—i.e., whether the death penalty should be imposed." *Id.* at 397.

Respondent attempts to recast *Powell* as a decision about *Ake* rights. BIO 26-27. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). But that's the very point: in scrutinizing the constitutionality of the continuance denial decision, the Sixth Circuit weighed the trial rights that were lost to the need for expediency, specifically, the right to the assistance of an expert and the right to present mitigating evidence.[3] *Powell*, 332 F.3d at 398. The Eleventh Circuit's decision here creates a clear split with the Sixth Circuit, requiring this Court's intervention.

III. The Eleventh Circuit Misapplied The Cause And Prejudice Test To Defeat Federal Review Of A Meritorious Constitutional Claim.

The proper test for determining prejudice to overcome the default mirrored *Strickland* prejudice to the outcome of Mr. Sealey's appeal:

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[3] As set forth in the Petition, the Sixth Circuit utilized the "balancing test" set out in *United States v. Burton,* 584 F.2d 485 (D.C. Cir. 1978), which provides a useful framework for implementing *Morris. Powell,* 332 F.3d at 396. The Warden complains that Mr. Sealey did not cite *Burton* in the court below, but *Powell's* analysis stems directly from *Burton*. Petitioner relied upon *Powell* throughout the proceedings.

whether, absent appellate counsel's failure to raise the meritorious continuance claim, there is a reasonable probability that Petitioner "would have prevailed on his appeal." *Smith v. Robbins,* 528 U.S. 259, 285 (2000). That required applying the prejudice standard that would have applied on appeal. *Id.* The Eleventh Circuit botched that analysis, focusing instead on whether there was a reasonable probability of a different outcome *at trial*. *Sealey,* 954 F.3d at 1367, Pet. App. 54.

The Warden disputes this, claiming that the court "never stated that 'actual prejudice' for his underlying claim was synonymous with *Strickland* prejudice." BIO 33. The court did not need to so state. The court *applied* a standard "synonymous with *Strickland* prejudice," writing that "Sealey cannot show that Tutein's testimony would have changed the outcome at sentencing." *Sealey,* 954 F.3d at 1367. Indeed, the Warden quotes the relevant passage in which the court applied the *Strickland* prejudice test to the trial result, BIO 34, and then writes that this Court should weigh Tutein's testimony in light of the facts of the crime and the aggravation presented at trial to determine prejudice, *id*. As shown in the Petition, this analysis is contrary to *Robbins*, and both the Eleventh Circuit and the Warden are wrong to utilize it.

IV. This Case Is An Excellent Vehicle For Resolving The Constitutional Question.

A. The Lower Court's Resolution Of The Constitutional Claim Is Not Independent Of Federal Law.

Respondent further argues that the state courts of Georgia resolved Mr. Sealey's constitutional claim on the basis of a state procedural rule that places it beyond this Court's jurisdiction. BIO 3, 19. A state court decision is beyond federal review "if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." *Harris v. Reed*, 489 U.S. 255, 260 (1989). However, "[w]hen application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded.'" *Foster v. Chatman,* 136 S. Ct. 1737, 1746 (2016) (quoting *Ake*, 470 U.S. at 75).

The Georgia habeas court ruled that consideration of the claim was barred by Georgia's procedural default rule. D.27-14:56, Pet. App. 222-23. A state procedural bar can be overcome, and the federal court may review its merits, if there is both adequate cause and prejudice. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Here, the Eleventh

Circuit's resolution of cause and prejudice was inextricably intertwined with its resolution of two separate constitutional questions.

Mr. Sealey alleged, and the lower courts considered, that his appellate counsel's ineffective assistance in failing to raise a meritorious claim on appeal constituted "cause" to overcome the state procedural bar. *Coleman*, 501 U.S. at 748 (cause is established where trial and/or appellate counsel rendered ineffective assistance in failing to timely present the claim). The Sixth Amendment right to effective counsel is plainly a federal constitutional question.

Furthermore, as the Eleventh Circuit opinion reflects, in order "[t]o assess [appellate] ineffectiveness, …[they] proceed[ed] to the underlying merits of Sealey's procedurally defaulted claims." *Sealey,* 954 F.3d at 1366; Pet. App. 52. The court then analyzed the "continuance claim's underlying merits," *id.*, which included determining whether the ruling "deprived [Sealey] of due process, a fair trial and the effective assistance of trial counsel," *id.* Again, these are federal constitutional questions, and application of Georgia's procedural default bar depended upon their adjudication. The state law holding is not independent of the federal questions. *Ake,* 470 U.S. at 75.

B. The Eleventh Circuit Held That The Constitutional Claim Was Properly Exhausted.

Contrary to the Warden's suggestion, Mr. Sealey properly exhausted his federal constitutional claims. The Eleventh Circuit correctly disposed of the Warden's complaints below. The court observed that the continuance denial claim was adjudicated in the state post-conviction court, *Sealey*, 954 F.3d at 1349, 1353, Pet. App. 12, 22, as was the ineffective assistance of appellate counsel claim that provided the cause and prejudice necessary to overcome its default, *id.* at 1365, 50-51 ("We also conclude that Sealey properly exhausted his ineffective-assistance-of-appellate-counsel claim because the state court actually considered and denied it"). "There is no better evidence of exhaustion than a state court's actual consideration of the relevant constitutional issue." *Sandstrom v. Butterworth,* 738 F.2d 1200, 1206 (11th Cir. 1984).

C. *Teague v. Lane* Is Not Relevant To The Constitutional Question Presented.

"In general, …a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane,* 489 U.S. 288, 301 (1989). Mr. Sealey's constitutional right to present mitigating evidence was established

nearly 25 years before his 2002 trial, *Lockett v. Ohio,* 438 U.S. 586, 604 (1978), and his right not to have his constitutional trial rights sacrificed in the name of expeditiousness was established decades before that, *Ungar*, 376 U.S. at 589. So, too, was the right to effective appellate counsel. *Evitts v. Lucey,* 469 U.S. 387 (1985), *see also Sealey,* 954 F.3d at 1365 ("No one disputes that Sealey had a right to counsel during his…direct appeal."). Nevertheless, Respondent alleges that Mr. Sealey seeks to avail himself of new rule of constitutional law.

Mr. Sealey is not asking this Court to create a "new rule of criminal procedure," *see* BIO 29, that should have been followed during his trial or appeal. He asks only that this Court clarify the proper weighing of the relevant factors when applying *the existing rule*. This Court's decisions often provide guidance to lower courts resolving federal constitutional questions presented in habeas corpus proceedings. *See, e.g., Andrus v Texas,* 140 S. Ct. 1875 (2020); *McWilliams v. Dunn,* 137 S. Ct. 1790 (2017); *Foster,* 136 S. Ct. at 1737; *Kyles v. Whitley,* 514 U.S. 419 (1995). Such decisions do not create new procedural rules and do not undermine *Teague*'s concern with finality. If a decision merely articulates an outcome that was "dictated by

precedent existing at the time the defendant's conviction became final," it does not announce a new rule. *Teague,* 489 U.S. at 301.

Mr. Sealey's conviction became final in 2004. *Sealey v. State*, 593 S.E.2d 335 (Ga. 2004). Firmly established constitutional principles dictated that Mr. Sealey was entitled to a new sentencing proceeding when the trial court precluded the defense from presenting any mitigating evidence by refusing his request for a brief continuance. *Morris*, 461 U.S. at 3-4; *Ungar*, 376 U.S. at 589. *See also Livington v. State,* 467 S.E.2d 886, 888 (Ga. 1996) (finding that a new trial was required where the trial court's denial of a continuance precluded the defendant from preparing a defense in light of the short time between indictment and trial and the prosecutor's refusal to timely comply with the discovery statute); *Williams v. State,* 241 S.E.2d 261, 263 (Ga. App. 1977) (finding that the denial of a continuance required reversal where, because of confusion and the late association of counsel, the defendant's witness was directed to appear on Thursday, rather than Wednesday when needed).

This Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (overruled on other grounds by *Atkins v. Virginia,* 536 U.S. 304 (2002)),

is instructive. Penry claimed that his Eighth Amendment rights were violated because the jury in his capital murder trial was unable to give effect to his mitigating evidence when answering Texas's statutory special issues at sentencing. The State argued that Penry's claim was barred by *Teague*. *Id.* at 318-19. But by 1986, when Penry's sentence became final, this Court had established that "in capital cases[,] the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender…as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Subsequent decisions from this Court, all predating Penry's sentence, reaffirmed this requirement. *Lockett v. Ohio*, 438 U.S. at 586; *Eddings v. Oklahoma*, 455 U.S. 104 (1982). At the same time, however, no decision prior to Penry had held that courts must instruct juries to consider specific mitigating evidence in a particular case. Yet this Court concluded that the rule Penry sought to benefit from "d[id] not 'impos[e] a new obligation' on the State of Texas," and therefore did not run afoul of *Teague*. *Id.* at 315 (quoting *Teague*, 489 U.S. at 301).

Likewise, relief on Mr. Sealey's continuance denial claim was dictated by existing precedent. Existing law has long established that capital defendants have an inviolable right to counsel, *see, e.g., Williams v. Taylor,* 529 U.S. 362, 394-94 (2000), and to present mitigating evidence, *see, e.g., Lockett,* 438 U.S. at 604. By the time of Mr. Sealey's 2002 trial, it also was firmly established that those rights could not be sacrificed merely for the sake of expeditiousness without violating due process and the right to counsel. *Ungar,* 376 U.S. at 589. "There is surely nothing new about this principle ...." *Bousley v. United States*, 523 U.S. 614, 620 (1998).

Mr. Sealey asks this Court to plainly express the standard for weighing the defendant's trial rights against the need to avoid unnecessary delay. *Teague* does not bar that request.

CONCLUSION

For each of the reasons stated herein and in Mr. Sealey's petition for writ of certiorari, this Court should grant the petition and reverse the decision of the Eleventh Circuit.

Respectfully submitted, this the 16th day of March, 2021.

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