CAPITAL CASE
No. 21-

IN THE
Supreme Court of the United States

JAMES E. BARBER,
Petitioner,
v.
COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

This case concerns the prejudice resulting from ineffective assistance of counsel during the penalty phase of a capital case. For petitioner James Barber, it is undisputed that (1) the jury "never heard" new and non-cumulative mitigation evidence about, for example, Barber's serious mental health issues and suicide attempts, (2) there was no new aggravation evidence presented in post-conviction proceedings, and (3) at least one juror, presumed to follow the instructions and having heard much more limited mitigation evidence and the same aggravating evidence, had already voted in favor of a life sentence. Disregarding that split verdict and implicating widespread disarray in the prejudice standards that lower courts apply to capital sentencing cases, the court of appeals held that "[t]he aggravating circumstances in this case are simply too great to permit us to find a probability of a different outcome." Pet. App. 17a. The question presented is:

What is the proper legal standard for assessing the prejudice resulting from deficient assistance of counsel in capital sentencing proceedings, particularly when at least one juror voted in favor of a life sentence without the omitted mitigating evidence and with identical aggravating evidence.

RELATED PROCEEDINGS

United States Supreme Court:

Barber v. *Alabama*, 549 U.S. 1306 (2007)

United States Court of Appeals (11th Cir.):

Barber v. *Comm'r, Ala. Dep't of Corr.*, No. 19-12133 (June 25, 2021), reh'g denied (Sept. 8, 2021)

Barber v. *Comm'r, Ala. Dep't of Corr.*, No. 19-12133-P (Jan. 16, 2020)

United States District Court (N.D. Ala.):

Barber v. *Dunn*, No. 5:16-cv-00473-RDP (Mar. 8, 2019), recons. denied (May 2, 2019)

Supreme Court of Alabama

Ex parte Barber, No. 1141028 (Sept. 25, 2015)

Ex parte Barber, No. 1041603 (Sept. 22, 2006)

Alabama Court of Criminal Appeals:

Barber v. *Alabama*, No. CR-03-0737 (Apr. 10, 2015), reh'g denied (June 19, 2015)

Barber v. *Alabama*, No. CR-03-0737 (May 27, 2005), reh'g denied (July 8, 2005)

Alabama Circuit Court:

State v. *Barber*, No. CC-02-1794 (Apr. 21, 2014)

State v. *Barber*, No. CC-02-1794 (Jan. 9, 2004)

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PETITION FOR A WRIT OF CERTIORARI

James E. Barber respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion affirming the denial of the habeas petition (Pet. App. 1a–18a) is reported at 861 F. App'x 328. The Eleventh Circuit's order denying the petition for rehearing en banc (Pet. App. 228a) is unreported. The Northern District of Alabama's opinions (Pet. App. 19a–126a and Pet. App. 229a–240a) are unreported and available at 2019 WL 1098486 and 2019 WL 1979433, respectively.

JURISDICTION

The Eleventh Circuit entered judgment on June 25, 2021, and denied a timely filed petition for rehearing en banc on September 8, 2021. On November 24, 2021, Justice Thomas extended the time to file a petition for a writ of certiorari until January 6, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution 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.

U.S. Const. amend. XIV, § 1.

Section 2254(d) of U.S. Code title 28 provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

INTRODUCTION

The prejudice standard for analyzing counsel's deficient performance in capital sentencing cases has strayed irretrievably from *Strickland* and its progeny, spawning extensive confusion in the lower courts. It needs a reboot.

Nearly 40 years ago, this Court held that a capital defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and added

that a "reasonable probability" is simply a "probability sufficient to *undermine confidence* in the outcome." *Strickland* v. *Washington*, 466 U.S. 668, 693–94 (1984) (emphasis added). In the capital sentencing context, the relevant "outcome" is the defendant's sentence of death rather than life.

In the ensuing decades, however, the prejudice standard—often dispositive in deciding which capital defendants live and which do not—has been contorted in fundamentally irreconcilable ways. Sometimes, courts ask precisely *what* would have led to a different sentence, including how many jurors would have needed to vote differently to change the outcome; other times, courts do not. Sometimes, courts treat the prejudice standard as an exercise in comparing the evidence to the particular facts of this Court's precedent; other times, courts do not. Sometimes, courts ask whether there is a "substantial likelihood" of a different sentence; other times, courts ask about a "reasonable probability." The resulting chaos in the lower courts has been described as, for example, "wildly inconsistent,"[1] and "inconsistently apply[ing] the *Strickland* penalty-phase test for prejudice."[2] In any given case, the outcome turns not so much on the defendant's own circumstances but on which of the many divergent

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[1] Michael L. Perlin, et al., *"A World of Steel-Eyed Death": An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 53 U. Mich. J. L. Reform 278 (2019).

[2] Sarah Gerwig-Moore, *Remedial Reading: Evaluating Federal Courts' Application of the Prejudice Standard in Capital Sentences from "Weighing" and "Non-Weighing" States*, 20 U. Pa. J. Const. L. Online 7 (2018).

legal standards that a panel of appellate judges happens to choose and apply.

This case is emblematic. In post-conviction proceedings, Barber presented new and non-cumulative mitigation evidence about, for example, serious mental health issues and suicide attempts, while the State presented no new aggravation evidence. At trial, moreover, one juror considering the same aggravation evidence and a much more limited mitigation record had voted to spare Barber's life. Ignoring that juror's life vote and suggesting that the unaltered aggravation evidence necessarily precluded any possible prejudice, the Eleventh Circuit briefly concluded that "[t]he aggravating circumstances in this case are simply too great to permit us to find a probability of a different outcome." Pet. App. 17a.

That decision meets all of the criteria for certiorari. It reflects and deepens intractable conflicts among lower courts about the proper prejudice standard in capital sentencing cases, leaving defendants with materially-indistinguishable facts to face profoundly different life-or-death results. It is wrong and contrary to this Court's precedent. And it raises issues of great importance about the Sixth Amendment standards governing capital sentencing proceedings nationwide. Certiorari should be granted.

STATEMENT OF THE CASE

A. Barber's Capital Trial, Direct Appeals, and Postconviction Proceedings

At trial, Barber's appointed counsel pursued an innocence defense that he later admitted was "impossible" given the State's evidence of Barber's bloody hand print at the crime scene and a videotaped confession.

Pet. App. 155a. In 2003, an Alabama jury found Barber guilty of capital murder.

For the penalty phase, trial counsel hired a forensic psychologist, Dr. Marianne Rosenzweig, to conduct a mitigation investigation. Pet. App. 56a. From her short investigation, however, the jury heard only limited and misleading evidence that painted Barber as a hopeless drug addict who was not worthy of mercy. The jury did not hear, for example, about Barber's multiple suicide attempts. Nor did the jury hear about his personal and family history of mental illness, his early exposure to destructive role models, or his upbringing in a neglectful home with largely absent parents. Nor did the jury hear about the true extent and severity of Barber's drug-and-alcohol problems, which began at his family's behest when he was in the third grade and continued to escalate into adulthood. Dr. Rosenzweig later testified, candidly, that her investigation—just six hours of interviews, only two of which were spent with Barber—was one of the shortest of her career and that she ideally would have talked to "a lot more people." ECF No. 15-64 at 14–15, 33, 64–66.

Two days after the guilty verdict, a divided jury recommended that Barber be sentenced to death. Pet. App. 10a. The trial judge accepted the recommendation, relying on two aggravating factors: (1) "[t]he capital offense was committed while the Defendant was engaged in the commission of a robbery in the first degree" (because Barber took the victim's purse on his way out) and (2) "[t]he capital offense was especially heinous, atrocious or cruel as compared to other capital offenses." Pet. App. 221a–227a. According to the State's testimony, the latter factor was justified because Barber had beaten an elderly woman with a hammer "for no other reason than to take what small

amount of money he could get to purchase drugs with." Pet. App. 5a, 17a. The trial judge also found one statutory and four non-statutory mitigating circumstances. Pet. App. 225a–226a.

After exhausting all direct appeals, Barber filed a post-conviction petition in state court alleging, among other things, that he had received ineffective assistance of counsel during the penalty phase of his trial. Pet. App. 26a. The Alabama Circuit Court held a two-day evidentiary hearing in June 2012. Nearly two years later, the court denied Barber's petition in full. Pet. App. 153a–220a. In April 2015, the Alabama Court of Criminal Appeals (CCA) affirmed, Pet. App. 127a–152a, and the Supreme Court of Alabama denied Barber's petition for a writ of certiorari, Pet. App. 26a.

B. Federal Habeas Proceedings

Barber petitioned the Northern District of Alabama for habeas corpus relief. The district court denied the petition. Pet. App. 19a–126a. For the penalty-phase deficiency prong, the district court effectively sided with Barber. It recognized that the state court "likely misstate[d] the appropriate standard for evaluating *Strickland* claims," and noted that it was "at least a close question whether trial counsel met [their] obligation with an investigation consisting of a two-hour interview with Barber; four hours interviewing Barber's mother, two brothers, and a former employer; and at best limited (and unsuccessful) attempts to review records concerning Barber's personal history." Pet. App. 61a–64a.

The district court nevertheless held that these errors were "immaterial" because the "state court reasonably concluded that Barber failed to show prejudice." Pet. App. 64a. In denying Barber's motion for reconsideration, the district later made clear that it had decided

the penalty-phase prejudice issue with deference to the state court's decision rather than "de novo." Pet. App. 235a–236a. After the district court declined to issue a certificate of appealability (COA), Pet. App. 229a–240a, the Eleventh Circuit granted a COA on Barber's penalty-phase ineffective assistance claim, Pet. App. 13a.

On June 25, 2021, the Eleventh Circuit affirmed the district court's denial of habeas relief. The panel assumed that "trial counsel's performance was deficient," and that the state court's "prejudice determination was based on an unreasonable application of clearly established law." Pet. App. 15a. Despite labeling both points as assumptions, the Eleventh Circuit recognized that they were "likely true: the CCA appears to have applied standards contrary to *Strickland* in assessing both prongs of Barber's ineffective assistance of counsel claim[s]." *Id.* n.3. The Eleventh Circuit thus reviewed Barber's claim de novo and without AEDPA deference. *Id.* at 15a–18a.

The Eleventh Circuit's de novo assessment was brief. As for mitigation, the court of appeals recognized that much of the testimony "introduced at Barber's Rule 32 hearing was new evidence that the jury never heard," such as evidence that "Barber had a family history of mental health issues (including his own battles with depression and suicidal gestures or attempts), was exposed early to negative role models, and was subject to a detached parenting style." Pet. App. 17a. In a similar vein, the Eleventh Circuit also appreciated that "details and perspectives about Barber's drug use" developed after trial "undoubtedly have mitigating value." *Id.* at 16a. As for aggravation, nothing had changed since trial.

Despite these developments, the court of appeals held that there was no prejudice because "[t]he aggravating circumstances in this case are simply too great to permit us to find a probability of a different outcome had the jury heard what Barber presented at his Rule 32 hearing." *Id.* at 17a. The Eleventh Circuit did not mention in its analysis—much less try to reconcile its conclusion with—the fact that one juror had previously voted for life upon consideration of those same aggravating circumstances and without the benefit of all the new mitigating evidence presented at the Rule 32 hearing.

On September 8, 2021, the Eleventh Circuit denied Barber's petition for rehearing en banc. Pet. App. 228a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW FURTHERS ONGOING AND PERSISTENT CONFLICTS ABOUT THE PREJUDICE STANDARD APPLICABLE TO CAPITAL SENTENCING PROCEEDINGS

Throughout the federal courts of appeals and states where the death penalty is currently enforced, multiple and divergent standards control the penalty-phase prejudice inquiry under the Sixth Amendment.

1. The first split concerns how lower courts analyze "a reasonable probability that … *the result of the proceeding* would have been different." *Strickland*, 466 U.S. at 694 (emphasis added).

On one side, many courts of appeals require a close examination of the relevant state's capital sentencing regime and what, specifically, would have led to a dif-

ferent sentence and thus a different "result of the proceedings." If a death sentence must be handed down by unanimous juries, such a standard explicitly recognizes that only one juror would have needed to vote differently.

Decisions on this side of the split are legion. In the Tenth Circuit, for instance, there was prejudice when the defendant needed "only one juror to vote differently"—while "some jurors may have been disinclined to employ mercy, it is equally as likely that at least one juror would have empathized with [the defendant], given the additional" mitigation evidence. *Wilson* v. *Sirmons*, 536 F.3d 1064, 1095 (10th Cir. 2008); see also *United States* v. *Barrett*, 985 F.3d 1203, 1227, 1233 (10th. Cir. 2021) (applying same "at least one" juror standard). In the Third Circuit, too, there was prejudice when there was a reasonable probability that the new mitigation evidence "would have resulted in at least one juror according significantly greater weight to the catchall mitigating factor, thereby 'convinc[ing] one juror to find the mitigating factors to outweigh' the aggravating factors." *Abdul-Salaam* v. *Sec'y of Pa. DOC*, 895 F.3d 254, 272 (3d Cir. 2018).

The same standard applies in other circuits as well. In the Sixth Circuit, it was "reasonably probable that at least one juror hearing [the new] evidence would have been persuaded to impose a life, rather than a death, sentence." *Morales* v. *Mitchell*, 507 F.3d 916, 936 (6th Cir. 2007). Prejudice in the Eighth Circuit exists when the defendant would have "received a life sentence if only one juror had refused to vote for the death penalty." *Antwine* v. *Delo*, 54 F.3d 1357, 1368 (8th Cir. 1995). The same is true in the Seventh Circuit: "if just *one* juror had been sufficiently influenced by the character testimony, the death penalty could

not have been imposed." *Kubat* v. *Thieret*, 867 F.2d 351, 369 (7th Cir. 1989).

On the other side, by contrast, the decision below invokes a one-size-fits-all prejudice standard that ignores the particular "outcome" or "result" that needed to change. The court of appeals placed dispositive weight on the nature of the crime: that aggravation factor was "simply too great to permit . . . a probability of a different outcome had the jury heard what Barber presented at his Rule 32 hearing." Pet. App. 16a–18a. But the court's substantive analysis nowhere mentioned or addressed the fact that the jury's sentencing recommendation was *not unanimous*, and that one juror had already weighed the aggravating and mitigating factors and voted in favor of life when the aggravating circumstances remained identical. Diverging from numerous other courts of appeals, the Eleventh Circuit did *not* ask whether there was a reasonable probability that at least two other jurors would have voted against death with the *same* aggravation evidence and significant *new* mitigation evidence. *Id.*

2. The lower courts' prejudice standards are fractured in additional ways that extend beyond the need to account for (or disregard) the specific result from initial sentencing proceedings. One such fracture is that lower courts apply contradictory standards on how to "reweigh" the "totality of the available mitigation evidence" against the aggravating circumstances. *Williams* v. *Taylor*, 529 U.S. 362, 397–398 (2000).

Some courts of appeals engage in a comparison exercise in which the defendant's case is matched up against the facts of this Court's precedent. The Fifth Circuit's prejudice inquiry is representative. In *Canales* v. *Davis*, for example, there was no prejudice

because the defendant's "evidence [wa]s unlike the evidence presented" in *Williams* and *Wiggins*. 966 F.3d 409, 414–417 (5th Cir. 2020). The dissent called out the majority's standard for "fram[ing] the prejudice inquiry as a comparison of the facts here to the facts in *Wiggins* and *Williams*," and for "faulting [a defendant's] mitigating evidence for not neatly aligning with the evidence in those cases." *Id.* at 423–24. Similarly, in *Gray* v. *Epps*, there was no prejudice because the mitigation "pale[d] in comparison to the type of powerful mitigating evidence that the Supreme Court has opined would have a reasonable probability" of altering the sentence. 616 F.3d 436, 448–49 (5th Cir. 2010).

As it did here, the Eleventh Circuit deploys an analogous standard. In *Sealey* v. *Warden*, for instance, there was no prejudice when the defendant's mental health problems were not "nearly as compelling as [the] mitigating evidence in cases where the Supreme Court has held that habeas relief was warranted," and when his upbringing was not "nearly as extreme as the troubled childhoods of petitioners in other cases in which prejudice was found and relief was granted." 954 F.3d 1338, 1357–60, 1360 (11th Cir. 2020); see also *DeYoung* v. *Schofield*, 609 F.3d 1260, 1291 (11th Cir. 2010) (similar). The same thing happened in this case, where the district court found no prejudice because it viewed Barber's background as insufficiently "nightmarish" compared to this Court's precedent, Pet. App. 73a–75a, and the court of appeals held that prejudice could not possibly exist given the aggravated nature of the crime despite Barber's "new evidence that the jury never heard," Pet. App. 16a–18a.

Other courts of appeals, by contrast, do not confuse what may have been *sufficient* to find prejudice in prior cases as the legal standard for what is *necessary*

to establish prejudice in future cases. These circuit courts analyze often-gruesome aggravation evidence and independently weigh it against new mitigation evidence without asking how the evidence measures up to past decisions from this Court. As the Ninth Circuit explained in *Doe* v. *Ayers*, for example, the prejudice inquiry "requires close consideration of individual records, *rather than* oversimplified, ordinal comparisons between summaries of the suffering experienced by capital defendants." 782 F.3d 425, 461 (9th Cir. 2015) (emphasis added). "Such judgments," the court concluded, "are uniquely moral decisions in which bright line rules have a limited place." *Id.*

Numerous decisions employ such a no-comparison standard. In *Avena* v. *Chappell*, for instance, the Ninth Circuit labeled the aggravating circumstances as "certainly strong" but also recognized that "it would be difficult to find a capital case at the sentencing phase that does not have strong aggravating circumstances." 932 F.3d 1237, 1251–53 (9th Cir. 2019). That did not control and did not automatically surmount new mitigation evidence about the defendant's character, drug use, and family history of poverty, violence, and substance abuse. *Id.* at 1243–47. In a similar vein, in the Sixth Circuit, new mitigation evidence that includes "many specific details about [the defendant's] tumultuous life" is not sized up against the mitigation evidence from this Court's cases and is not treated as hopeless in the face of "brutal[]" aggravating circumstances like "scalp[ing]" a murder victim. *Morales*, 507 F.3d at 920–21, 935–36, 952.

3. The final division among the lower courts is the persistent split about whether the correct prejudice standard is a "reasonable probability" of a different outcome or is instead a "substantial likelihood" of one.

The Fourth and Tenth Circuits, for example, continue to apply a "reasonable probability" standard. The Fourth Circuit has asked whether, despite "extensive" aggravation evidence, there was a reasonable probability that, if the jury could have "placed [the defendant's] excruciating life history on the mitigating side of the scale, . . . at least one juror would have struck a different balance." *Stokes* v. *Stirling*, 10 F.4th 236, 256 (4th Cir. 2021). For its part, in *Hooks* v. *Workman*, the Tenth Circuit's legal standard for deciding whether trial counsel's "painfully brief case for mitigation" prejudiced the defendant was the following: adding newly presented evidence to "the mitigating side of the scale, [was] there . . . a reasonable probability that at least one juror would have struck a different balance." 689 F.3d 1148, 1207 (10th Cir. 2012).

The Fifth Circuit, by contrast, routinely applies a "substantial likelihood" standard that finds its roots in *Harrington* v. *Richter*, 562 U.S. 86, 112 (2011). According to the Fifth Circuit, *Richter* "clarified" the prejudice standard by "*establishing* the substantial likelihood standard." *Canales*, 966 F.3d at 413 (emphasis added). The Fifth Circuit regularly applies that "substantial likelihood" standard and describes it as particularly onerous—as "intentionally difficult," *Gates* v. *Davis*, 648 F. App'x 463, 471 (5th Cir. 2016), and a "heavy burden," *United States* v. *Wines*, 691 F.3d 599, 604 (5th Cir. 2012). Similarly, the Fifth Circuit recently framed the standard as not whether the sentence "*might* have been different" but whether it "likely *would* have been different." *Sanchez* v. *Davis*, 936 F.3d 300, 307 (5th Cir. 2019). The court found no prejudice because the petitioner could not establish that counsel's errors "necessarily resulted in a longer sentence than he would have received otherwise." *Id.*

Other courts of appeals have likewise adopted the position that *Richter* represented a change in the ineffective assistance of counsel prejudice inquiry. The Sixth Circuit, for instance, has elided *Strickland*'s "reasonable probability" standard and instead presented the prejudice test as solely a question of "substantial likelihood" under *Richter*. See, *e.g.*, *Meadows* v. *Doom*, 450 F. App'x 518, 522–23 (6th Cir. 2011).

Although the change in standards should be self-evident from their words alone, in other contexts, courts of appeals have made clear that a "substantial likelihood" is more stringent than a "reasonable probability." The Second Circuit, for example, states that "substantial likelihood means considerably more likely," *United States* v. *Thorn*, 317 F.3d 107, 117 (2d Cir. 2003), and the Fifth Circuit has "assume[d] that 'substantial likelihood' connotes a stronger showing than 'reasonable likelihood.'" *United States* v. *Brown*, 218 F.3d 415, 427 (5th Cir. 2000). The two standards are thus distinct and incongruous.

The decision below is of a piece with the courts of appeals of this side of the schism. By acknowledging that Barber presented "new evidence that the jury never heard" that "undoubtedly have mitigative value" but nevertheless holding that aggravating evidence rendered prejudice impossible, the decision below effectively elevated the prejudice standard into a requirement that Barber show a "substantial likelihood" of a different sentence, as other courts of appeals have.

* * *

All told, the lower courts have come up with a menu of choices from which they may choose a prejudice standard—be it outcome- and juror-specific (or not), a

"bad facts" comparison to past cases (or not), or a "reasonable probability" versus a "substantial likelihood." Such sharp divisions warrant certiorari.

II. THE DECISION BELOW AND THE LOWER COURTS' VARYING STANDARDS ARE WRONG AND CONTRARY TO THIS COURT'S PRECEDENT

Certiorari should also be granted because the decision below—and the lower courts' varied and conflicting standards for prejudice in capital sentencing proceedings—are wrong. Each of the divergent standards chronicled above implicates fundamental errors that need to be rectified.

1. This Court has repeatedly held that the only way to properly decide whether deficient performance would have undermined confidence in a death sentence is to ask precisely what led to that sentence initially. In *Wiggins*, the question was whether "at least *one juror* would have struck a different balance," because, under Maryland law, "as long as a single juror concludes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed." 539 U.S. at 537 (emphasis added). Likewise, in *Andrus* v. *Texas*, the Court held that the prejudice inquiry "requires only 'a reasonable probability that *at least one juror*'" was convinced to vote for life instead of death. 140 S. Ct. 1875, 1886 (2020) (emphasis added). And, in *Buck* v. *Davis*, the Court once again articulated the standard as asking whether there is "a reasonable probability that, [absent counsel's errors], at least one juror would have harbored a reasonable doubt about" the basis upon which they had sentenced him to death. 137 S. Ct. 759, 776 (2017).

The decision below is incompatible with these holdings. Under Alabama law, because one sentencing juror *already* voted for life, only two other jurors would have needed to find that the State's aggravating evidence did not outweigh Barber's new and original mitigating evidence to avoid a death sentence. Ala. Code § 13A-5-46(f) (requiring minimum vote of 10–2 in favor death). But the court of appeals did not ask—as this Court did in *Wiggins*, *Andrus*, and *Buck*—whether, given the life vote and weighing the new mitigation evidence against unchanged aggravation evidence, there was a reasonable probability that at least two additional jurors would have "struck a different balance." *Wiggins,* 539 U.S. at 537. The court of appeals needed to grapple with that specific question but ignored the jury's split verdict altogether.

2. The next set of decisions asks what it means to "reweigh[]" the "totality of the available mitigation evidence" from sentencing and postconviction proceedings against the aggravating circumstances of the crime. *Williams*, 529 U.S. 397–398. Here, too, this Court has foreclosed the "compare facts" prejudice standard that some lower courts apply.

The Court said as much in each of the last two Terms. In *Andrus*, the Court explicitly rejected such a standard, explaining it has "never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice" more generally and that the inquiry does not "turn[] principally on how the facts of this case compare to the facts in *Wiggins*." 140 S. Ct. at 1887 n.6. In *Shinn* v. *Kayer*, the Court again recognized more broadly that "the weighing of aggravating and mitigating evidence in a prior published decision is unlikely to provide clear guidance about how a state

court would weigh the evidence in a later case." 141 S. Ct. 517, 526 (2020).

These holdings make clear that there is simply no such thing as a "too aggravated" crime or a "not bad enough" mitigation story. On the contrary, this Court has found prejudice (1) when the nature of the crime is especially heinous, atrocious, or cruel and/or (2) when a defendant introduces mitigating evidence comparable to Barber's in post-conviction proceedings.

The decision below once more conflicts with these principles. Faced with severely aggravating circumstances,[3] this Court has not held, as the court of appeals did here, that those "aggravating circumstances … are simply too great" to overcome. Pet. App. 17a. By the same token, faced with new non-cumulative post-conviction mitigation evidence,[4] the Court has not held, as the court of appeals necessarily did here, that the mitigation evidence was insufficient to establish a "reasonable probability that the jury would not have recommended a sentence of death." Pet. App. 17a. Similarly-situated defendants have therefore seen their death sentences vacated while Barber's remains in place. The Court should not tolerate such a result.

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[3] Gruesome aggravating circumstances that did not foreclose a prejudice finding have included robbing and drowning a 77-year-old woman who was found missing her underwear and sprayed with pest killer, *Wiggins*, 539 U.S. at 534, and stabbing a victim multiple times, beating him with a blunt object, and setting his body on fire, *Rompilla* v. *Beard*, 545 U.S. 374, 377 (2005).

[4] New mitigation evidence in *Andrus*, for example, related to petitioner's upbringing in a rough neighborhood, by largely absent parents, in a family full of substance abusers and petty criminals. 140 S. Ct. at 1879–81.

3. The Court's precedent also forecloses a switch from a "reasonable probability" to a "substantial likelihood" standard.

According to *Strickland*, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The Court derived that standard from "the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . . and [] the test for materiality of testimony made unavailable to the defense by Government deportation of a witness." *Id*. The former asks whether "omitted evidence" is "*sufficient to create a reasonable doubt*." *United States* v. *Agurs*, 427 U.S. 97, 112–13 (1976) (emphasis added). The latter asks for "at least *some plausible showing* of how" the testimony of the deported witness "would have been both material and favorable to his defense." *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (emphasis added). Those standards align cleanly with *Strickland*'s explanation that a "reasonable probability" is a "probability sufficient to *undermine confidence* in the outcome." 466 U.S. at 693–94 (emphasis added).

A "substantial likelihood" test cannot be squared with these earlier-articulated standards. The "substantial likelihood" language traces back to the Court's 2011 decision in *Harrington* v. *Richter*, where the Court stated that "[t]he likelihood of a different result must be substantial, not just conceivable." 562 U.S. at 112. Although *Richter* did not concern sentencing, moreover, the "substantial likelihood" standard was later recited and applied in the sentencing context in *Shinn* v. *Kayer*, 141 S. Ct. at 523–525. But *Strickland*'s discussion of the appropriate prejudice standard never

once used the words "substantial likelihood." On the contrary, the Court *rejected* a "preponderance of the evidence" standard as too stringent. 466 U.S. at 694. More than that, the petitioner in *Strickland* urged the Court to adopt the equivalent of a "substantial likelihood" standard—requiring a deficiency "*substantial* enough to demonstrate a prejudice to the defendant to the extent that there is a *likelihood* that the deficient conduct affected the outcome of the court proceedings," *Knight* v. *State*, 394 So. 2d 997, 1001 (Fla. 1981) (emphases added)—*but the Court did not do so*.

The "substantial likelihood" standard should therefore have no place in the prejudice inquiry. It is more demanding than a "reasonable probability" inquiry, having been described as, for example, "rais[ing] the bar even further,"[5] and "ratchet[ing] up the prejudice prong."[6] And it is uniquely unsuited for the capital sentencing context that this case involves. In settling on a "reasonable probability" standard, this Court recognized, among other things, the "profound importance of finality in criminal proceedings." *Strickland*, 466 U.S. at 693–94. But such considerations are far less profound in capital *sentencing*: unlike the need for a whole new trial at the guilt phase, a successful penalty-phase ineffective assistance claim requires only that the State revisit the defendant's sentence. For the defendant, however, the consequences of ineffective penalty-phase assistance are final and absolute.

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[5] Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 Crim. Just. 24 (2011), https://heinonline.org/HOL/P?h=hein.journals/cjust26&i=86.

[6] Samantha Jaffe, *"It's Not You, It's Your Caseload": Using Cronic to Solve Indigent Defense Underfunding*, 116 Mich. L. Rev. 1465, 1471 (2018).

The Court should grant certiorari and offer much-needed guidance on what is and is not the proper prejudice standard for capital sentencing cases.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

The question presented concerns an issue that is far-reaching and exceptionally important.

The prejudice standard for capital sentencing cases comes up all the time in state and federal courts around the country. Indeed, *Strickland* is the sixth most-cited Supreme Court case of all time, and the single most-cited case on a topic of substantive law (as opposed to procedural or pleading standards).[7] That ubiquity confirms the need for clear and decisive guidance from this Court.

Beyond the sweeping impact of the question presented, there should be no serious question about its importance. The Court has often stated that "there is a significant constitutional difference between the death penalty and lesser punishments," *Beck* v. *Alabama*, 447 U.S. 625, 637 (1980), and that "death is different," *Ring* v. *Arizona*, 536 U.S. 584, 586–87 (2002). Penalty-phase Sixth Amendment claims often rise or fall on the prejudice prong, and the legal standard governing that prong therefore dictates the literal life-or-death stakes for capital defendants. The Court should grant certiorari to resolve the lower courts' erratic and incorrect prejudice standards on a matter of such grave importance.

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[7] *See* Adam Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 Vand. L. Rev. 333, 390 (2016).

CONCLUSION

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

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