CAPITAL CASE
No. 21-6822

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

The State's opposition does not seriously dispute or engage with most of Barber's petition. Most glaringly, the State does not meaningfully address the lower courts' fractured prejudice standards for ineffective assistance of counsel in penalty-phase capital cases—simply and summarily declaring those documented divisions to be nonexistent. The State likewise ignores the growing understanding among courts, practitioners, and scholars that similarly-situated defendants receive "wildly inconsistent" outcomes under these divergent legal standards. In addition, the State does not even bother to defend the various incorrect prejudice standards that the lower courts have created. And the State understandably does not and cannot sincerely dispute that the Sixth Amendment standards governing capital sentencing proceedings nationwide are exceptionally important.

Rather than squarely confronting Barber's arguments, the State principally rests its opposition on empty hyperbole and the assertion that Barber "misapprehends" the decision below. The State is wrong, and the petition's various bases for certiorari thus remain unanswered and unscathed. The Court should grant certiorari and provide a much-needed reset to the prejudice standard for analyzing deficient performance in capital sentencing.

I. REVIEW IS NEEDED TO RESOLVE THE CONFLICTS ABOUT THE PREJUDICE STANDARD APPLICABLE TO CAPITAL SENTENCING PROCEEDINGS.

Barber's petition explained how the prejudice standards that the lower courts apply in capital sentencing proceedings are divided in at least three distinct ways: (1) requiring consideration of the jury's vote and the

particular outcome that is needed to change the sentence, or ignoring such factors, Pet. 8–10, (2) conducting a rote comparison between the facts in this Court's past decisions and those in any given case, *id.* at 10–11, and (3) applying a "reasonable probability" or "substantial likelihood" standard, *id.* at 12–14.

The State's opposition focuses almost entirely on the first split. The State accuses Barber of seeking to "impose[] mandatory opinion-writing standards on state and federal courts" and cites *Rompilla* v. *Beard*, 545 U.S. 374 (2005), where the Court supposedly "made no mention of Pennsylvania law in holding under de novo review that the petitioner was prejudiced by his counsel's deficient performance at the penalty phase of his trial." Opp. 16–17. The State misconstrues Barber's point. Requiring courts to consider what, specifically, would have led to a different sentence does not require that those courts write their opinions in any particular way. Such a standard simply recognizes, as many courts of appeals do, that asking whether there is a probability "sufficient to undermine confidence" in the "result of the proceeding" requires consideration of the actual "result of the proceeding" and what would have led to a different "outcome." Pet. 2–3, 9–10 (citations omitted).

Rompilla is not to the contrary. In that case, the State did "not even contest the claim of prejudice," 545 U.S. at 390, and the Court relied extensively on *Wiggins*, *id.* at 390–93, which held that the relevant question is whether "there is a reasonable probability that *at least one juror* would have" voted differently. *Wiggins* v. *Smith*, 539 U.S. 510, 513 (2003) (emphasis added). In finding that there *was* prejudice, moreover, *Rompilla* did not ignore—as the Eleventh Circuit did below—a jury's *non-unanimous* sentencing recommendation or the fact that one juror had already weighed

the same aggravating circumstances and incomplete mitigating evidence and voted in favor of life. Pet. 10.

The State also calls Barber's interpretation of Alabama's capital sentencing statute "questionable," because two additional votes for life would have resulted in a mistrial. Opp. 16 & n.2. But Barber repeatedly argued that the proper standard asks what was required "to avoid a death sentence," Pet. 16, which a mistrial obviously would do. In other words, a mistrial is plainly a "different result" or "outcome" from being sentenced to die.

As for the second and third ways in which lower courts apply conflicting prejudice standards, the State has virtually nothing substantive to say. Instead, the State summarily declares—without any case support at all—that there are "no such circuit split[s]." Opp. 15–18. But the petition showed that there are, and the State cannot just wish away those divisions or the "wildly inconsistent" outcomes that they produce.

The State alternatively contends that, even if these splits exist, Barber's case would "not be an appropriate vehicle" to resolve them, because their resolution "would not affect the result in this case." Opp. 16–19. That is incorrect. The question presented and every one of the divisions are about the proper Sixth Amendment prejudice standard in capital sentencing cases like this one. The Court does not need to wait for a court of appeals decision that runs the table and announces an explicit position on all three splits to recognize that they all—together—show intractable divisions in the lower courts. Resolving the question presented and either reversing or vacating and remanding for application of the correct prejudice standard would thus undeniably "affect the result in this case" (and many others). *Id.*

Finally, the State invokes predictable certiorari opposition buzz words to contend that the petition is "factbound," implicates nothing, and seeks "error correction." Opp. 1, 16. The State's assertion is wrong for the reasons already discussed. But even taking the State at its word, the State's hypocrisy is striking, as it has no trouble asking this Court to summarily reverse death penalty decisions in which the State does not prevail. See, *e.g.*, Petition, *Comm'r, Alabama Dep't of Corr.* v. *Reeves*, No. 20-1084 (2021) (requesting summary reversal of unpublished decision granting habeas relief under fact-specific analysis of ineffective assistance of counsel claim); Emergency Application to Vacate Injunction of Execution at 26–28, *Comm'r, Alabama Dep't of Corr.* v. *Reeves*, 21A372 (2022) (seeking emergency vacatur of injunction under circumstances that Justice Sotomayor described as asking "the Court . . . to reweigh the evidence offered below." On Application to Vacate Injunction at 3, *Comm'r, Alabama Dep't of Corr.* v. *Reeves*, No. 21A372 (2022)).

Although the Court should consider the question presented after full merits briefing and argument, it can also of course summarily reverse.

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

The petition next showed how the decision below is wrong and how each of the divided legal standards implicates fundamental errors of law that warrant this Court's attention. Pet. 15–20. First, decisions like *Wiggins*, *Andrus*, and *Buck* demonstrate that the proper prejudice standard asks how, precisely, the defendant might have avoided a death sentence. *Id.* at 15–16. Second, decisions like *Andrus* and *Shinn* foreclose a fact-comparison exercise that some lower courts con-

tinue to undertake. *Id.* at 16–17. Third, the increasingly-popular "substantial likelihood" test cannot be squared with *Strickland* or its "reasonable probability" standard. *Id.* at 18–19. Remarkably, the State offers no substantive response *to any of this* and does not defend any of the lower courts' incorrect prejudice standards.

The State instead devotes the bulk of its opposition to the related assertions that the Eleventh Circuit "faithfully applied" *Strickland* and that Barber "profound[ly] misunderstand[s]" the decision. The State is again mistaken. *Id.* at 4, 7.

First, the State returns to the same factual arguments that it made in the lower courts to contend that the mitigation evidence offered at Barber's Rule 32 hearing was "essentially cumulative" of the original trial evidence. Opp. 8–15. But that sidesteps the critical problem: the court of appeals *expressly* recognized that much of the testimony "introduced at Barber's Rule 32 hearing was *new* evidence that the jury never heard," including 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 (emphasis added). Nor does the State's recitation confront Barber's showing that this Court has found prejudice (1) despite even more egregious aggravating circumstances and/or (2) with new mitigation evidence comparable to Barber's. Pet. 17 & n.3–4 (citing cases).

More fundamentally, the State's "essentially cumulative" argument fails to establish that the court of appeals "faithfully" applied the correct prejudice standard. Opp. 7–8. The State does not argue, contrary to *Wiggins*, *Andrus*, and *Buck*, that the court of appeals

was correct to ignore the jury's split verdict entirely or that the court of appeals was correct in declining to ask whether, given the life vote and weighing the "new" mitigation evidence against unchanged aggravation evidence, there was a reasonable probability that at least two jurors would have voted differently. Pet. 15–16. In fact, the State's opposition does not mention *Wiggins*, *Andrus*, or *Buck* at all. The decision below is incompatible with those cases, and the State does not argue otherwise.

Second, the State's lead argument for why the Court should deny certiorari accuses Barber of misunderstanding the decision below. Opp. 1, 4–6. The only misunderstanding, however, is the State's inability or unwillingness to address Barber's actual arguments.

Barber repeatedly recognized that the court of appeals needed to reweigh everything—that is, indisputably new and noncumulative mitigation evidence about serious mental health problems and suicide attempts against unchanged aggravation evidence and the existing life vote from trial. See, *e.g.*, Pet. 10 ("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*.") (quoting Pet. App. 17a) (emphasis added); *Id.* at 16 (arguing that the court of appeals needed to, but did not, account for "the life vote and weighing the new mitigation evidence against unchanged aggravation evidence"). But Barber also repeatedly explained that the court of appeals did not do that. Rather, when the court breezily held that Barber did not suffer 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," Pet. App. 17a, the Eleventh Circuit elided the proper prejudice standard and applied an incorrect one.

Barber therefore understood exactly what the court of appeals did, and Barber showed how that holding contributes to the lower courts' widespread use of erroneous prejudice standards. Pet. 15–20. The Court's review and guidance is sorely needed.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Barber's petition concluded with the self-evident point that the question presented is exceptionally important and impacts countless capital cases with penalty-phase ineffective assistance of counsel claims. Pet. 19–20. The State has no substantive response—just a single clause in a single sentence summarily declaring that there is no "important question of federal law" at issue here. Opp. 4. That is absurd, and the broad implications of the question presented are unmistakable.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, this Court should grant certiorari and reverse.

Respectfully submitted,

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