No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

HEATHER LEAVELL-KEATON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

_____

On Petition for Writ of Certiorari
to the Alabama Court of Criminal Appeals

_____

PETITION FOR WRIT OF CERTIORARI

_____

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February 21, 2023

CAPITAL CASE

QUESTION PRESENTED

A person facing a death sentence has a constitutional right to present evidence of her "well-behaved and peaceful adjustment to life in prison" because that evidence is "by its nature relevant to the sentencing determination." *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986). Heather Leavell-Keaton was sentenced to death in 2015, but her sentence was vacated on direct appeal. She was sentenced to death again in 2021 after she was denied the opportunity to present any evidence of her good behavior in prison between 2015 and 2021.

The Alabama Court of Criminal Appeals affirmed her 2021 death sentence, citing a division among state and federal courts interpreting *Skipper*, and an "absence of guidance from the United States Supreme Court." *Keaton v. State*, No. CR-14-1570, 2021 WL 5984951, at *67 (Ala. Crim. App. Dec. 17, 2021). The question presented is:

> When a capital defendant's death sentence is vacated and the case is remanded for a new sentencing at which the death penalty is an available sentence, does the defendant have a constitutional right under *Skipper* to present evidence of her good behavior in prison?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Heather Leavell-Keaton respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals affirming her death sentence.

OPINIONS BELOW

The Order of the Supreme Court of Alabama denying Ms. Leavell-Keaton's petition for writ of certiorari to the Alabama Court of Criminal Appeals is attached as Appendix A. The Order of the Alabama Court of Criminal Appeals reversing Ms. Leavell-Keaton's sentences and remanding the case is attached as Appendix B. The decision of the Alabama Court of Criminal Appeals affirming Ms. Leavell-Keaton's conviction and death sentence is reported at *Keaton v. State*, No. CR-14-1570, 2021 WL 5984951 (Ala. Crim. App. Dec. 17, 2021), and is attached as Appendix C.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed Ms. Leavell-Keaton's capital murder conviction and death sentence on December 17, 2021. On October 21, 2022, the Supreme Court of Alabama denied Ms. Leavell-Keaton's petition for writ of certiorari to the Alabama Court of Criminal Appeals. On December 2, 2022, Justice Thomas extended the time to file this petition for writ of certiorari to and including February 21, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "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 law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

District Attorney: [I]it is irrelevant if she has been a good girl in prison from that point to this point . . . .

Defense Counsel: You know nothing of her last five years in prison, nothing . . . . [N]otwithstanding that, are you prepared to eliminate her from this world?

. . .

Judge: It is hereby ordered, adjudged, and decreed that Heather Leavell-Keaton is sentenced to death by lethal injection.

-- Capital sentencing, Jan. 7, 2021

Heather Leavell-Keaton is a blind woman on Alabama's death row. On her initial direct appeal, her sentence was vacated because she had been denied her right to allocute before being sentenced to death. The case was remanded for a sentencing hearing after which the judge, in his discretion, could sentence her to death or life without parole. At that hearing, as an un-sentenced person facing the death penalty, Ms. Leavell-Keaton proffered five years' worth of mitigating evidence reflecting her good conduct in prison between her initial death sentence and this subsequent sentencing hearing. The trial court prevented her from presenting this evidence, agreeing instead with the Mobile County District Attorney that "it is irrelevant if she has been a good girl in prison from that point to this point." (Supp. 7th R. 31.)[1] The Alabama appellate courts affirmed this death sentence.

[1] A 2016 report described that same prosecutor as among the nation's most "overzealous" in pursuing the death penalty, part of the reason Mobile County was one of the sixteen counties responsible for the most death sentences in the country from 2010-2015. *See* Fair Punishment Project, *Too Broken*

Approximately six years earlier, in 2015, Ms. Leavell-Keaton was acquitted of two counts of capital murder but convicted of a third count. Via a nonunanimous vote, the jury recommended that Ms. Leavell-Keaton be sentenced to death, and the judge, in his discretion, accepted that recommendation. Prior to sentencing her to death, however, the judge did not allow Ms. Leavell-Keaton to allocute, in violation of Alabama law.

On direct appeal, the Alabama Court of Criminal Appeals ("CCA") vacated Ms. Leavell-Keaton's death sentence, making her a not-sentenced person facing a discretionary death sentence, and remanded for a new sentencing. *See* App. B (Order, *Heather Leavell-Keaton v. State of Alabama*, No. CR-14-1570 (Ala. Crim. App. Oct. 6, 2020)). Prior to her new sentencing hearing, Ms. Leavell-Keaton spent five years on death row. During this time, she exhibited a peaceful adjustment to prison and consistent good conduct. At her new sentencing hearing, Ms. Leavell-Keaton proffered substantial mitigating evidence that accrued during those five years. This evidence included that Ms. Leavell-Keaton:

- Exhibited model behavior while incarcerated at Tutwiler Prison for Women;
- Presented no threat to anyone's safety while in prison;
- Adjusted well to prison life;
- Would not be a risk to anyone in the prison were she to receive a sentence of life without parole;

to Fix: Part 1, An In-depth Look at America's Outlier Death Penalty Counties, 2, 26-30 (Aug. 2016), https://files.deathpenaltyinfo.org/documents/FairPunishmentProject-TooBroken_2016-08.pdf.

- Availed herself of opportunities to better herself through education, developed hobbies, and was a productive resident of the prison who contributed to the well-being of both incarcerated people and officers;

- Made new relationships with people inside the prison who she cares about, who care about her, who value her life, and whose lives have improved because of her;

- Maintained relationships with family during her incarceration, including with her mother, grandmother, stepfather, aunt, brother, and sister;

- Developed a mutually positive relationship with her adolescent daughter;

- Maintained significant relationships with friends during her imprisonment, including her Mobile-based pastor, Ms. Willsea; and

- Adapted to prison, according to a former prison warden, in a way that is uniquely exemplary, such that any purported deterrent, safety, or incapacitation argument in favor of a death sentence would be unfounded.

(Supp. 7th R. 74-77.)

Despite being faced with the decision of whether to sentence Ms. Leavell-Keaton to death or life without parole, the trial court refused to consider any of Ms. Leavell-Keaton's proffered mitigating evidence about her "well-behaved and peaceful adjustment to life in prison." *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986). Instead, the court accepted the District Attorney's argument that "it is irrelevant if she has been a good girl in prison from that point to this point." (Supp. 7th R. 31.) As a result, more than five years of substantial mitigation that was "by its nature relevant to the sentencing determination" was excluded from the court's capital sentencing decision. *Skipper*, 476 U.S. at 7.

The trial court believed that it did not need to hear the proffered mitigation and instead was constitutionally required *only* to hear Ms. Leavell-Keaton's allocution and to allow argument specifically related to that allocution. (*See* Supp. 7th R. 79 (court instructing defense counsel, "restrain and confine your comments to what [Ms. Leavell-Keaton] said in allocution.").) Yet the District Attorney then argued why a death sentence would be appropriate, an argument that went beyond the scope of the allocution and could have been rebutted by the proffered mitigation:

> District Attorney: This case has to do with Natalie and Chase DeBlase. This has to do with the immortal suffering and torture that they suffered. This has to do with antifreeze, broomsticks, duct tape, suitcases, darkness, and death.
>
> Defense Counsel: And that had nothing to do with the allocution, so I guess I now have the opportunity to respond?

(Supp. 7th R. 82-84.) The court denied defense counsel the opportunity to present mitigation and sentenced Ms. Leavell-Keaton to death. (Supp. 7th R. 83.)

Ms. Leavell-Keaton argued on appeal that the trial court's decision to exclude the mitigating evidence violated *Skipper v. South Carolina*, which held that evidence of good behavior while incarcerated is an inherently relevant mitigating factor and therefore cannot be excluded from the capital sentencing determination. *See* 476 U.S. at 7. The CCA rejected this argument, stating the following:

> Keaton relies on *Skipper*, *supra*, in support of her claim that she was entitled to present evidence of her good behavior while incarcerated during the approximately five-year period between the original sentencing hearing and the resentencing hearing. As we have already noted, the United States Supreme Court held in *Skipper* that evidence of a defendant's "good behavior during the [time] he spent in

> jail *awaiting trial*" is "relevant evidence in mitigation of punishment" and therefore cannot be excluded from the defendant's sentencing hearing in a capital trial. However, *Skipper* did not expressly address, nor has the Court since addressed, whether a defendant is entitled to present evidence of his or her good behavior in jail *during the time between the original sentencing hearing and a resentencing hearing* that occurs after an appellate court remands the case to correct an error in the original sentencing hearing. In the absence of guidance from the United States Supreme Court, other courts have been unable to reach a consensus as to whether *Skipper* implicitly answers that question.

Keaton v. State, No. CR-14-1570, 2021 WL 5984951, at *67 (Ala. Crim. App. Dec. 17, 2021) (internal citations omitted) (emphasis in original). The CCA then relied on a split among federal circuits and state courts of last resort as to *Skipper*'s application, and it decided that even though Ms. Leavell-Keaton's sentence had been vacated, *Skipper*'s constitutional protections did not apply at her capital sentencing. The Supreme Court of Alabama denied certiorari.

Ms. Leavell-Keaton now requests that this Court grant certiorari to address this significant constitutional question about a capital defendant's rights.

REASONS FOR GRANTING THE WRIT

This Court has held repeatedly that the Eighth and Fourteenth Amendments to the United States Constitution require that a sentencer "'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.'" *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)); *see also Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) (per curiam) (Scalia, J.) (stating "in capital cases, 'the

sentencer' may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence").

In *Skipper v. South Carolina*, this Court established that good conduct in jail is one of those mitigating factors that "is *by its nature relevant to the sentencing determination*." 476 U.S. at 7 (emphasis added). The CCA below, however, citing to a minority of state courts of last resort, misinterpreted this mandate as not applying to Ms. Leavell-Keaton's new sentencing hearing. *See Keaton*, 2021 WL 5984951, at *70 ("Like the Ohio Supreme Court and the South Dakota Supreme Court, we conclude that Keaton's reliance on *Skipper* and *Davis* is questionable.").

This interpretation of *Skipper* was wrong, as federal courts of appeals have held. *See Davis v. Coyle*, 475 F.3d 761, 774 (6th Cir. 2007) ("[T]he holding in *Skipper* that a defendant be 'permitted to present any and all relevant mitigating evidence that is available,' requires that, at resentencing, a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing.") (internal citations omitted); *Creech v. Arave*, 947 F.2d 873, 881-82 (9th Cir. 1991), *rev'd on other grounds* ("[W]e see no rational basis for distinguishing the evidence of a defendant's good conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence which is vacated on appeal."); *see also Sivak v. State*, 731 P.2d 192, 198 (Idaho 1986) (rejecting distinction between pretrial jail conduct and prison conduct pending a new sentencing, noting that "actual conduct in the penitentiary is certainly better evidence of [Mr. Sivak's] probable future conduct there").

At the heart of *Skipper*'s holding is that good conduct while incarcerated matters to the sentencing determination in capital cases. This constitutional right stands irrespective of whether the sentencing determination is being made in the first instance, or on remand following vacatur of a prior sentence. Prior to a judge making a discretionary decision about whether to sentence a person to death, a death-eligible person must be afforded the right to present her relevant mitigating evidence regardless of whether that decision is being made at a first sentencing or a later sentencing.[2] To hold otherwise is to operate in a pre-*Lockett-Eddings-Skipper-Hitchcock* world and to contravene this Court's clear Eighth Amendment case law.

Thus, this Court should address the confusion that the CCA and other state courts of last resort have sewn and ensure capital defendants get the opportunity to present relevant mitigating evidence in accordance with this Court's holding in *Skipper*. This case provides the perfect vehicle to address this issue because Ms. Leavell-Keaton was prevented from introducing five years' worth of good behavior in prison after her original death sentence was vacated and prior to her new sentencing hearing. The issue was squarely addressed below, and the exclusion of the mitigating evidence mattered to Ms. Leavell-Keaton, who was sentenced to death after a non-unanimous jury recommendation.

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[2] Indeed, even Respondent South Carolina conceded at Mr. Skipper's oral argument that every time a decisionmaker has sentencing discretion, it has the responsibility to consider one's future conduct: "We believe that it is inescapable, and it is inescapable because this Court has said so in *Jurek v. Texas*, [428 U.S. 262 (1976),] that every time a sentencing authority has jurisdiction, every time that it has discretion, it has to make some sort of inherent prediction concerning future conduct." *See* Oral Argument at 46:01, *Skipper v. South Carolina*, 476 U.S. 1 (1986), (No. 84-6859), https://www.oyez.org/cases/1985/84-6859. Here, Ms. Leavell-Keaton's five years of good jail and prison behavior were integral to that assessment.

I. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS WHAT THE ALABAMA COURT OF CRIMINAL APPEALS CHARACTERIZED AS A SPLIT AMONG THE FEDERAL CIRCUIT COURTS AND SOME STATE COURTS OF LAST RESORT AS TO THE MEANING OF *SKIPPER V. SOUTH CAROLINA*.

In *Skipper v. South Carolina*, this Court held that evidence of good behavior in jail is an inherently relevant mitigating factor that cannot be excluded from a sentencer's life-or-death determination. *See* 476 U.S. at 7. There, Ronald Skipper sought to introduce testimony of two jailers and a jail visitor to demonstrate that he "'made a good adjustment' during his time spent in jail." *Skipper*, 476 U.S. at 3. The trial court precluded the evidence. *See id.* Mr. Skipper argued that the testimony of the jailers and visitor constituted relevant mitigating evidence and its exclusion violated both *Lockett* and *Eddings*. *Id.* This Court agreed, stating "[i]t can hardly be disputed" that the exclusion of seven months' worth of Mr. Skipper's good behavior in jail from the sentencing determination "deprived [him] of his right to place before the sentencer relevant evidence in mitigation of punishment." *Skipper*, 476 U.S. at 4. Even more concerning than the mitigating evidence that accrued during the seven months of jail conduct excluded in *Skipper* is the *five years* of mitigating prison conduct excluded in Ms. Leavell-Keaton's case.[3]

In arriving at its decision below, the CCA agreed with a minority of state courts that have misunderstood *Skipper* by finding that it does not apply to new sentencing hearings under certain circumstances, such as where the error causing the remand was not allowing the defendant to allocute or where the prosecution did

[3] "The evidence of [a defendant's] actual conduct in the penitentiary is certainly better evidence of his probable future conduct there." *Sivak*, 731 P.2d at 198.

not present evidence in favor of death at the new sentencing hearing. In affirming, the CCA relied on an unresolved split among the federal circuits and state courts of last resort as to what *Skipper* held: "[i]n the absence of guidance from the United States Supreme Court, other courts have been unable to reach a consensus as to whether *Skipper* implicitly answers that question." *Keaton*, 2021 WL 5984951, at *67.

This Court should address this issue in the way its precedent dictates. In *Lockett v. Ohio*, this Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604 (emphasis in original); *see also Eddings*, 455 U.S. at 112 ("the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency"). Then, in *Hitchcock v. Dugger*, a unanimous Supreme Court, in an opinion written by Justice Scalia, held that "in capital cases, 'the sentencer' *may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence*." 481 U.S. at 394 (emphasis added). Meanwhile, *Skipper* held that a person facing a death sentence has a constitutional right to present evidence of her "well-behaved and peaceful adjustment to life in prison," because it is "by its nature relevant to the sentencing determination." 476 U.S. at 7.

Thus, the *Lockett-Eddings-Skipper-Hitchcock* line of cases clearly established the importance of all relevant mitigating evidence to the sentencing determination in death penalty cases. To now allow a manufactured distinction between pre-trial incarceration conduct and conduct while awaiting a new capital sentencing—a distinction unsupported by this Court's precedent—denounces decades of this Court's established law and the demands of the Eighth and Fourteenth Amendments.

In misapplying *Skipper*, the CCA discounted those federal circuit courts that have properly interpreted *Skipper* to allow capital defendants the opportunity to present mitigating evidence of good prison behavior where a death sentence was vacated, and the case was remanded for sentencing. In *Davis v. Coyle*, the Sixth Circuit recognized that "the holding in *Skipper* that a defendant be 'permitted to present any and all relevant mitigating evidence that is available,' requires that, at resentencing, a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing." 475 F.3d at 774 (internal citations omitted). Like Ms. Leavell-Keaton, the *Davis* petitioner had been denied the opportunity to present evidence of good behavior in prison during the five years he spent on death row between the first and second sentencing hearings. *See id.* at 764. The Sixth Circuit recognized that whether it is one's initial sentencing or second sentencing hearing, a capital defendant must be afforded the opportunity to "put forth evidence of the likelihood of future good conduct at sentencing[,]" and a

court's decision to disallow this evidence is directly contrary to this Court's decision in *Skipper*. *Id.* at 772-73. The Sixth Circuit is not alone among its sister circuits.

The Ninth Circuit has held that *Lockett*, *Eddings*, and *Skipper* demand that mitigating evidence of a capital defendant's good behavior and adjustment to incarceration be considered at a resentencing hearing. *See Creech*, 947 F.2d at 881-82. In *Creech*, the original death sentence was vacated because the trial judge pronounced the sentence without Mr. Creech's presence, in violation of state law. *Id.* at 881. On remand, the trial court read the sentence of death to Mr. Creech but did not allow him to introduce mitigating testimony related to the fourteen months between his sentencing and resentencing hearings. *Id.* On review, the Ninth Circuit found "no rational basis for distinguishing the evidence of a defendant's good conduct while awaiting trial and sentencing, and evidence of a defendant's good conduct pending review of a death sentence which is vacated on appeal." *Creech*, 947 F.2d at 881-82.

Other federal circuit courts have not had to address this issue because they are already applying *Skipper* correctly. For instance, the Eleventh Circuit routinely hears cases evaluating whether defense counsel was ineffective for failure to investigate and present new mitigating evidence at resentencing. *See, e.g.*, *Robinson v. Moore,* 300 F.3d 1320, 1345-48 (11th Cir. 2002) (acknowledging that defense counsel must present newly available evidence at resentencing, although failure to do so here was not prejudicial); *see also Alderman v. Zant,* 22 F.3d 1541, 1556-57 (11th Cir. 1994) (recognizing that at resentencing hearing, trial court must

consider reliable evidence of relevant developments occurring after defendant's initial death sentence, although evidence lacked trustworthiness in this case); *Spaziano v. Singletary,* 36 F.3d 1028, 1032-35 (11th Cir. 1994) (demonstrating that *Lockett* requires trial court to consider any new evidence that the parties may present at a resentencing hearing). The Tenth Circuit has heard similar cases. *See, e.g.*, *Hanson v. Sherrod*, 797 F.3d 810, 832-33 (10th Cir. 2015) (evaluating whether counsel provided ineffective assistance by failing to investigate and present mitigating evidence at resentencing).

Moreover, the Third Circuit has recognized that defense counsel can be ineffective for failure to obtain a capital defendant's record of prison conduct between two sentencing hearings. *See Wharton v. Vaughn*, 722 F. App'x 268, 282-84 (3d Cir. 2018). These federal courts of appeal recognize that defense counsel have a constitutional obligation to investigate and present new mitigation at resentencing because capital defendants are constitutionally entitled to present such evidence at resentencing.

Nevertheless, the Alabama courts below misunderstood *Skipper*'s demand and relied on the Supreme Court of Ohio and the South Dakota Supreme Court, which have distinguished between *Skipper* evidence at one's original sentencing hearing and one's second sentencing hearing on remand. In *State v. Goff*, the Supreme Court of Ohio refused to apply *Davis v. Coyle*, 475 F. 3d 761 (6th Cir. 2007), and precluded the defendant from introducing new mitigation evidence at a new sentencing hearing following an allocution error. *See* 113 N.E.3d 490 (Ohio

2018). There, the court held that because the underlying error—the court's failure to provide Mr. Goff an opportunity to allocute at his initial sentencing hearing—occurred after Mr. Goff presented his mitigating evidence at the initial hearing, the trial court should proceed on remand from the "point at which the error occurred." *Id.* at 494-95. In other words, regardless of Mr. Goff's death sentence being vacated and regardless of the new mitigating evidence of his positive adjustment to prison life, Mr. Goff was not permitted to introduce that evidence simply because of the time at which the error requiring remand occurred. *See id.*; *see also State v. Roberts*, 998 N.E.2d 1100 (Ohio 2013) (refusing to apply *Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007)); *State v. Chinn*, 709 N.E.2d 1166 (Ohio 1999) (precluding *Skipper* evidence at resentencing where remand was required due to the defendant's absence during the original sentencing hearing).

Similarly, South Dakota's court of last resort has declined to apply *Skipper* to new mitigating evidence developed after a vacated death sentence where the defendant "had a full and unrestricted opportunity to present mitigation evidence at the initial sentencing." *See, e.g.*, *State v. Berget*, 853 N.W.2d 45, 63 (S.D. 2014). In *Berget*, the South Dakota Supreme Court cited a split in authority and expressed a need for guidance from this Court:

> The Supreme Court has not determined, in *Skipper* or otherwise, that a capital defendant has a categorical constitutional right to introduce new mitigation evidence discovered after a sentencing hearing in which the defendant was given the opportunity to present all mitigation evidence he desired. It has also not determined whether a remand for a *limited* resentencing in a capital case that effectively excludes such newly discovered mitigation evidence is constitutionally invalid. On both issues, lower courts have attempted to fill that void.

853 N.W.2d at 58 (emphasis in original). This Court should grant certiorari because the CCA relied on these state court opinions to arrive at an erroneous interpretation of *Skipper* to affirm Ms. Leavell-Keaton's death sentence. These state court decisions overlook the core principle established by *Skipper*: evidence of good behavior is an intrinsic mitigating factor and it unquestionably matters to the sentencing determination, regardless of whether the court is dealing with a capital defendant's first or second sentencing hearing.

Here, Ms. Leavell-Keaton's death sentence was *vacated*, and she became a not-sentenced person pending imposition of a discretionary sentence of death or life without parole. Between her original death sentence and her second capital sentencing hearing, she accumulated years of good behavior in prison, evidence that was relevant and necessary to the trial court's decision of whether to sentence her to death. *Skipper* unequivocally afforded her the opportunity to present this evidence. The distinction between one's original sentencing hearing and a second sentencing hearing following a vacated death sentence has no meaningful difference where, as here, the discretionary decision of whether to sentence someone to death is being made. Accordingly, this Court should grant certiorari and reverse.

II. THIS CASE PROVIDES AN IDEAL VEHICLE THROUGH WHICH TO ADDRESS THIS IMPORTANT CONSTITUTIONAL ISSUE.

This case is an ideal vehicle for the Court to address the question presented. First, the issue is preserved. The CCA addressed the question squarely on the merits, holding that *Skipper* did not entitle Ms. Leavell-Keaton to present evidence

of her good behavior in prison. *See Keaton*, 2021 WL 5984951, at *71. Citing an "absence of guidance from" this Court, the CCA came to this decision because it found the aforementioned state court opinions interpreting *Skipper* "more applicable" than the aforementioned federal court authority. *Id.* at *67, 70.

Second, as the CCA recognized, resolving this question now, on direct appeal, furthers judicial economy. "[G]iven that [Ms. Leavell-]Keaton's death sentence will be subjected to many levels of intense judicial scrutiny in the coming years, we think it prudent to address now, in this initial stage of judicial review, whether [she] was entitled to present mitigating evidence at the resentencing hearing." *Keaton*, 2021 WL 5984951, at *66.

Third, this issue matters. This was a close case—both at the guilt phase and the penalty phase. The jury acquitted Ms. Leavell-Keaton of two of the three counts of capital murder, rejecting the State's arguments in favor of a lesser finding of guilt. *See id.* at *6. At the penalty phase, the jury was not unanimous in support of the death penalty. *Id.* Thus, "[t]here is reason to think" preclusion of compelling mitigation could have mattered. *See McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017) (recognizing in an Alabama death penalty case on federal habeas review that denial of access to potentially mitigating information could have prejudiced the defendant at his judicial sentencing, despite a jury recommendation of death).

Fourth, allowing the CCA's incorrect interpretation of *Skipper* to stand exacerbates unfairness and inequality in capital sentencing procedure. In Alabama, judges have historically enjoyed vast discretion in capital sentencing. Alabama

courts have always allowed prosecutors to introduce new evidence at judicial sentencing hearings. Judges frequently cited such evidence to justify imposing a death sentence despite a jury recommendation of life without parole. As Justice Sotomayor explained in *Woodward*, Alabama judges were frequently overriding life verdicts in favor of death based on the hearing of "additional evidence." *See Woodward v. Alabama*, 571 U.S. 1045 (2013) (Sotomayor, J., dissenting from denial of certiorari). For instance, the *Woodward* sentencing court heard audio recordings and transcripts of telephone calls that Mr. Woodward made from jail to support the override. *See Woodward v. State*, 123 So. 3d 989, 1035 (Ala. Crim. App. 2011); *see also McMillan v. State*, 139 So. 3d 184, 207, 219 (Ala. Ct. Crim. App. 2010) (upholding judicial decision to override jury's recommendation and impose death where judge properly considered evidence of bad jail conduct prior to sentencing that had not been before the jury).

In this case, had harmful evidence accrued during the five years Ms. Leavell-Keaton spent in prison prior to her subsequent sentencing hearing, surely the State would have offered it in asking the judge to impose, at his discretion, a new death sentence. One need look no further than *Skipper* itself to reach this conclusion. Mr. Skipper conceded at oral argument that if he were allowed to introduce evidence of good jail behavior, the state conversely would be allowed to introduce evidence of bad jail behavior. *See* Oral Argument at 20:06, *Skipper v. South Carolina*, 476 U.S. 1 (1986), (No. 84-6859), https://www.oyez.org/cases/1985/84-6859.[4] Yet here, the

[4] Following this Court's decision to reverse Mr. Skipper's death sentence, the trial court resentenced him to life after holding a full evidentiary hearing where Mr. Skipper presented mitigating evidence

Alabama courts went out of their way to exclude Ms. Leavell-Keaton's mitigating evidence—in violation of *Skipper*—based on the idea that the procedural posture was not appropriate for *her* to present such evidence. Preventing Ms. Leavell-Keaton from presenting mitigating evidence about her time in prison, in furtherance of her argument that the judge, *at his discretion*, should impose a sentence of life without parole, underscores the significance of the error in this case.

CONCLUSION

This Court should grant certiorari and reverse the judgment of the Alabama Court of Criminal Appeals.

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and the state introduced new aggravating evidence of his negative conduct in prison that occurred *after* his first sentencing hearing. *See generally Ronald De'Ray Skipper v. State of South Carolina*, *Johnson* Pet. for Writ of Cert. and Pet. to be Relieved as Counsel, at 3 (S.C. Sup. Ct. Jan. 13, 1997).

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on February 21, 2023, I served a copy of the foregoing via first class mail, postage prepaid, and via email, upon counsel for the Respondent.

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