

No. 22-6895

IN THE
Supreme Court of the United States

HEATHER LEAVELL-KEATON,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ALABAMA COURT OF CRIMINAL APPEALS

**Brief of Former Corrections Officials as *Amici*
Curiae in Support of Petitioner**

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INTERESTS OF THE *AMICI*¹

Amici are former corrections officials, each with decades of experience working in corrections facilities across the country. Many of the *amici* have also worked with death-sentenced inmates and have testified at sentencing and resentencing hearings regarding inmates' behavior while incarcerated. *Amici* also consult with States on how to improve prison administration to make prisons safer for both inmates and corrections staff.

Based on their experience in corrections, *amici* believe that corrections officers' testimony about a defendant's behavior while incarcerated is highly reliable evidence of the defendant's character that goes directly to whether he should be sentenced to death. Permitting such testimony at sentencing and resentencing hearings therefore not only vindicates a capital defendant's constitutional right to put forward all available mitigating evidence but also furthers this Court's goal of ensuring that capital sentencing is reliable, accurate, and nonarbitrary.

As experts in prison administration, *amici* also have an interest in ensuring that prisons are well-run and safe. *Amici* believe that *Skipper* makes prisons safer by giving inmates reason to care about their futures and believe that their actions matter. In *amici*'s experience, taking hope and belief away from inmates—as prisons can do all too easily—makes inmates more likely to break rules and makes new inmates less likely to make well-behaved and peaceful adjustments to life in prison. *Amici* are accordingly concerned that

¹ Pursuant to Rule 37, counsel for *amici* affirm that all parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

artificially limiting the scope of *Skipper's* rule, as the court below did, will expose inmates and prison staff to a higher risk of violence and harm.

Amici are:

Scott Frakes is the former Director of the Nebraska Department of Correctional Services and was appointed to the position by former Governor Pete Ricketts. He has over 40 years of corrections experience, during which he held line and supervisory positions in Washington State. He also oversaw executions in both States and personally carried out an execution in Nebraska. He is currently an expert corrections consultant.

Stephen Huffman is a former assistant director, regional director, and warden in the Ohio Department of Rehabilitation and Correction. He was appointed by former Governor John Kasich to serve as assistant director after over 30 years of serving in correctional facilities in both Ohio and Texas. Mr. Huffman also oversaw many executions in Ohio. He currently serves as a corrections expert and testifies regularly as an expert witness in state and federal court.

Patrick Hurley is a former prison warden in Ohio. He has over 35 years of experience in adult and juvenile corrections, during which he held line and supervisory positions in the Ohio corrections system. Since leaving the Ohio Department of Rehabilitation and Corrections, Mr. Hurley has served as an expert corrections consultant and testifies regularly in state and federal court.

Steve J. Martin, J.D., is the former General Counsel of the Texas Department of Corrections and has worked as a correctional officer on death row. During his fifty year career in correctional administration he has served gubernatorial appointments in Texas on

both a sentencing commission and a council for mentally impaired offenders. He has served various appointments as a federal court monitor for jails, prisons, and juvenile facilities. He also served as an expert for the civil rights divisions of both the U.S. Departments of Justice and Homeland Security. He coauthored the book, *Texas Prisons: The Walls Came Tumbling Down* (Texas Monthly Press, 1987) and has written numerous articles on criminal justice issues. He has been on the visiting faculties of seven universities, including the University of Texas School of Law and Queens University, Belfast.

Dan Pacholke is the former Secretary of the Washington State Department of Corrections. He has over 30 years of corrections experience, during which he held line and supervisory positions at all levels in the Washington State corrections system. He now serves as an expert consultant on prison conditions and practices, including on death row placement and housing policies.

Emmitt Sparkman is the former Deputy Commissioner for Institutions for the Mississippi Department of Corrections. He has over 40 years of corrections experience, during which he held line and supervisory positions in Texas, Kentucky, and Mississippi. Mr. Sparkman also served as the superintendent of the Mississippi State Penitentiary, which includes a supermax facility that houses death row and highest-risk offenders. Mr. Sparkman now serves as an expert consultant and is regularly retained to testify in resentencing hearings and cases regarding prison conditions.

Eldon Vail is the former Secretary of the Washington State Department of Corrections. He has 35 years of experience serving at all levels in the Washington State corrections system, including as superintendent

of three adult institutions, including two facilities with maximum-security inmates. For the last ten years, Mr. Vail has served as an expert witness and correctional consultant and has been retained over 60 times in 24 States.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an important question about what evidence a capital defendant can introduce at her own sentencing hearing. After her initial capital sentence was invalidated, Ms. Leavell-Keaton sought to offer at her resentencing hearing over five years' worth of testimony about her good behavior while incarcerated. This Court's decision in *Skipper v. South Carolina*, 476 U.S. 1 (1986), plainly would have entitled Ms. Leavell-Keaton to offer evidence of such good behavior at her initial sentencing hearing. *Id.* at 4-5; see also *Hitchcock v. Dugger*, 481 U.S. 393, 395 (1987). The resentencing judge, however, excluded the testimony and sentenced Ms. Leavell-Keaton to death without any evidence about her character and comportment during the five years leading up to the hearing. Pet. 5-7. Because there is no constitutional distinction between a sentencing hearing and a resentencing hearing that warrants excluding evidence that is "by its nature relevant to the sentencing determination," *Skipper*, 476 U.S. at 7, this Court should grant certiorari and hold that Ms. Leavell-Keaton is entitled to offer evidence of her own conduct while incarcerated at her own resentencing hearing.

The Alabama Court of Criminal Appeals' misunderstanding of an important Eighth Amendment principle in a capital case is important enough on its own to warrant this Court's review. *Amici* submit this brief to stress two additional points: (1) *Skipper* evidence is important because it provides a sentencer with highly relevant and highly reliable evidence of the individual defendant's character; and (2) artificially limiting *Skipper*'s reach makes prisons less safe by stripping hope from prisoners and decreasing the likelihood that they will adjust well to prison life.

First, *Skipper* evidence is important because it ensures that capital sentencing is both individualized and reliable. This Court has long held that capital sentencing proceedings must focus on the individual defendant's "particularized characteristics." *Gregg v. Georgia*, 428 U.S. 153, 206 (1976). And because human life is at stake, the Constitution requires "a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality). *Skipper* evidence, typically provided by current or former corrections officials, furthers both objectives by providing highly reliable evidence of individual defendants' character. Corrections staff have no incentive to misrepresent an inmate's behavior, can closely observe inmates' behavior while they are incarcerated, and can draw upon their experience working with other inmates to offer sentencers informed and reliable testimony about whether a particular inmate is a danger to others.

Second, *Skipper* helps make prisons safer by giving prisoners reason to believe that their behavior matters. In *amici's* experience, depriving inmates of hope for the future makes them more likely to break rules and makes new inmates less likely to make well-behaved and peaceful adjustments to life in prison. Prison conditions and administration practices in many States, including Alabama, also exacerbate inmates' feelings of hopelessness by keeping death row inmates in isolation in tiny cells for over 20 hours a day for years on end. By offering inmates reason to care about themselves and their futures, *Skipper* may help inmates adjust to prison life and the challenges associated with it. Artificially limiting the scope of *Skipper's* rule, as the court below did, exposes inmates and corrections staff alike to a higher risk of violence and harm.

ARGUMENT**I. *Skipper* evidence helps ensure that death sentences are reliable, accurate, and nonarbitrary.**

For nearly half a century, this Court has consistently held that capital sentencing must focus on “the particularized characteristics of the individual defendant.” *Gregg v. Georgia*, 428 U.S. 153, 206 (1976). To that end, a capital defendant has a constitutional right to introduce relevant mitigating evidence at his sentencing hearing—that is, evidence of “any aspect of [his] 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) (plurality)). Consistent with this principle, this Court held in *Skipper v. South Carolina*, 476 U.S. 1 (1986), that a capital defendant has a constitutional right to present evidence of his “well-behaved and peaceful adjustment to life in prison” to prove that “he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars.” *Id.* at 7.

At the same time, this Court has stressed that “above all, capital sentencing must be reliable, accurate, and nonarbitrary.” *Saffle v. Parks*, 494 U.S. 484, 493 (1990). *Skipper*’s rule improves the accuracy and fairness of capital sentencing because evidence of a defendant’s behavior while incarcerated, typically offered through the testimony of corrections staff, is highly reliable. Admitting *Skipper* evidence therefore helps ensure that capital sentencing is reliable, accurate, and nonarbitrary.

A. *Skipper* evidence is highly relevant.

“It can hardly be disputed” that evidence of a capital defendant’s good behavior while incarcerated is relevant evidence of a capital defendant’s character. *Skipper*, 476 U.S. at 4. If a defendant offers testimony that he behaved as a model inmate while incarcerated, the sentencer can draw “favorable inferences from this testimony regarding [the defendant’s] character and his probable future conduct if sentenced to life in prison.” *Id.*. Capital sentencers frequently consider whether the defendant is likely to be a danger to others in the future before deciding what sentence to impose. See, e.g., *Jurek v. Texas*, 428 U.S. 262, 272, 274-276 (1976) (upholding Texas law asking capital sentencing juries to determine “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society”). Just as evidence of whether a defendant has acted violently towards other inmates and corrections staff is plainly relevant to determining whether a defendant would be a danger to others and therefore relevant to determining whether he deserves to be sentenced to death, so too evidence of a capital defendant’s exemplary adjustment to incarceration is plainly relevant to determining whether a defendant should be spared from execution.

Jurors accord evidence of defendants’ behavior while incarcerated significant weight. One study that surveyed 153 jurors who served on death-qualified sentencing juries found that 26% of jurors said they would be less likely to impose the death penalty if the defendant proved that he “would be a well-behaved inmate.” Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559 table 4 (1998). To be sure, the jurors did not give *Skipper* evidence dispositive weight: other

factors, such as a defendant's history of violent behavior or mental illness, were more likely to change a juror's vote. *Ibid.* Nevertheless, the fact remains that a defendant's good behavior and nonviolence while incarcerated can sway jurors to vote for a sentence less than death, making *Skipper* evidence an important part of a capital defendant's sentencing case.

B. *Skipper* evidence is highly reliable.

Skipper's rule also makes capital sentencing more accurate and reliable. Many defendants who introduce *Skipper* evidence do so through the testimony of corrections staff who monitored and evaluated them while they were incarcerated. See, e.g., *Skipper*, 476 U.S. at 3 ("Petitioner . . . sought to introduce testimony of two jailers . . ."). Such testimony is uniquely objective evidence of a defendant's character because corrections staff, unlike many other character witnesses who testify at sentencing hearings, have "no particular reason to be favorably predisposed toward one of their charges." *Id.* at 8. Corrections staff can therefore be trusted to give impartial testimony that accurately reflects their observations and opinions about a particular defendant's character.

Corrections officials also have significant expertise in observing and evaluating inmates' behavior. Many prisons around the country employ classification systems that assign inmates to a certain level of custody depending on the risk they pose. These classification systems depend in part on fixed criteria, such as an inmate's criminal history prior to incarceration. But much of the evaluation depends on staff assessments and observations of inmates while they are incarcerated, including their compliance with prison rules, relationships with other inmates and prison personnel, progress towards obtaining a GED, religious observance, job performance, participation in therapy or

counseling, and more. To implement inmate classification systems, staff receive extensive training on how to observe, document, and assess inmate behavior while incarcerated. Officers, mental health experts, prison administrators, and other prison staff all work together closely to evaluate all available information and make a final determination as to an inmate's classification and degree of risk to others. By collaborating with a wide array of experts, corrections staff develop interdisciplinary, holistic approaches for evaluating inmates that accurately capture an inmate's character. In sum, corrections staff are experts at monitoring inmates and determining whether they are likely to be dangerous to others.

Trained corrections officers and staff can then apply their training and expertise to provide sentencers with invaluable insight into a capital defendant's character and risk to others. Corrections officers and staff closely monitor capital inmates for months, if not years prior to sentencing or resentencing. During that time, officers and staff accumulate extensive knowledge of a capital defendant's behavior and are constantly evaluating the risk that particular inmate poses to others. Prison personnel also can compare their observations of a capital inmate against their past experiences with other inmates to make informed predictions about how a capital inmate is likely to behave in the future after sentencing. In sum, prison staff have ample training and opportunity to develop reliable and insightful opinions about whether an inmate is dangerous and likely to harm others in the prison in the future.

Finally, both proper training and the adversarial system reduce the risk that a sentencer might be hoodwinked into showing mercy based on a defendant's good behavior in prison. Corrections staff are trained to evaluate all aspects of an inmate's behavior and are

unlikely to trust inmates naïvely. Moreover, *Skipper*'s rule is a two-way street: While defendants can offer evidence of their good behavior, prosecutors can also offer evidence of defendants' bad behavior. See Pet. 17-19 ("Alabama courts have always allowed prosecutors to introduce new evidence at judicial sentencing hearings."). Indeed, in *Skipper* itself, the prosecutor argued that the fact that the defendant had kicked the bars of his cell following his arrest proved that he was likely to commit violent crimes in prison if allowed to live. *Skipper*, 476 U.S. at 9-10 (Powell, J., concurring in the judgment). This Court has long recognized that this kind of adversarial testing, where both parties offer relevant evidence for a decisionmaker to weigh, can be trusted to "sort out the reliable from the unreliable evidence . . . , particularly when the convicted felon has the opportunity to present his own side of the case." *Barefoot v. Estelle*, 463 U.S. 880, 901 (1983), *superseded by statute on other grounds*. *Skipper* does exactly that: it permits both sides to present complete cases and enables the sentencer to make a final, reasoned judgment in full view of the relevant evidence. In so doing, *Skipper* makes capital sentencing decisions more reliable, both because *Skipper* evidence offered through corrections officers is itself highly credible and because it facilitates the adversarial process that this Court has long trusted to "advance the public interest in truth and fairness," *Polk Cnty. v. Dodson*, 454 U.S. 312, 318 (1981), and distinguish between reality and pretense. Cf. *Barefoot*, 463 U.S. at 899.

C. *Skipper* evidence remains important, relevant, and reliable at resentencing hearings.

Skipper evidence remains relevant and reliable at capital resentencing hearings where sentencers decide anew whether to impose a death sentence. Indeed,

courts routinely permit similar evidence of defendants' behavior while incarcerated at noncapital resentencing hearings. Since *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), courts throughout the country have held resentencing hearings for individuals who were sentenced to life without parole for crimes they committed as juveniles to determine whether those individuals are incorrigible. See *Montgomery*, 577 U.S. at 190; see also *id.* at 206 (holding that “*Miller* announced a substantive rule that is retroactive in cases on collateral review”). In one appeal from such a resentencing recently before this Court, the petitioner offered testimony from a corrections officer regarding petitioner's behavior during his decade-long incarceration, including his religious observance, disciplinary record, relationships with other inmates and prison staff, and commitment to self-improvement through pursuing and obtaining a GED. Pet. Br. at 5-6, *Jones v. Mississippi*, 141 S. Ct. 1307 (2021) (No. 18-1259). If the resentencing record had been cut off at the initial sentencing hearing, as it was here, then the sentencer would have had no sense of the petitioner's current character and whether he demonstrated improvement while incarcerated. It would have been impossible for the sentencer to determine whether the petitioner was incorrigible. Evidence of a capital defendant's behavior while incarcerated fills an identical gap in the evidentiary record at capital resentencing hearings.

The facts of this case underscore the continued importance of *Skipper's* rule at resentencing hearings. First, the testimony at issue is extremely probative of Ms. Leavell-Keaton's character given the length of her incarceration. At the time of her resentencing in 2021, Ms. Leavell-Keaton was 33 and had been incarcerated for over five years, or over one-third of her adult life.

While incarcerated, she has been a model inmate, presented no threats to anyone's safety, fostered meaningful relationships with other inmates and family members, and pursued opportunities for self-improvement. Pet. 4-5. A sentencer could have easily "drawn favorable inferences from this testimony regarding [Ms. Leavell-Keaton's] character and [her] probable future conduct if sentenced to life in prison," *Skipper*, 476 U.S. at 4, and the sentencing judge's assessment of her character is woefully incomplete without at least considering Ms. Leavell-Keaton's proffered testimony. Had the opposite been true—that is, had Ms. Leavell-Keaton exhibited violent or antisocial behavior during this same period of incarceration—there is little doubt that such evidence would have been admissible to support a claim by the State that she presented a continuing danger if not executed. That being so, it must necessarily also be the case that evidence of Ms. Leavell-Keaton's exemplary behavior during that period is admissible to establish the opposite.

Second, the testimony at issue is especially credible. Officers and staff monitored Ms. Leavell-Keaton for five years, accumulating extensive evidence and documentation of her behavior that is plainly sufficient to support well-informed opinions regarding her character. Permitting the testimony at issue at Ms. Leavell-Keaton's resentencing would therefore achieve two vitally important goals: it would vindicate her right to present all the relevant mitigating evidence available to her *and* help ensure that the sentencing decision in her case is reliable, accurate, and nonarbitrary.

II. *Skipper's* rule makes prisons safer for inmates and staff.

Throughout their careers as corrections officers, prison administrators, and expert consultants, *amici* have worked to make prisons safer for both inmates

and prison staff. “Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources.” *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Keeping a prison safe is all the more difficult because of staffing shortages in prisons throughout the nation. For example, the Alabama Department of Corrections acknowledged as recently as 2019 that it needed to hire over 2,000 correctional officers and 125 supervisors to adequately staff its men’s prisons. U.S. Dep’t of Justice, *Investigation of Alabama’s State Prisons for Men* at 9 (Apr. 2, 2019), <https://www.justice.gov/crt/case-document/file/1149971/download>. Simply put, corrections officers have hard jobs—and need whatever help they can get.

Skipper helps corrections officers perform their duties in two critical ways. First, it encourages inmates to transition to prison life peacefully by giving inmates reason to hold on to hope and believe that their actions matter. Second, it improves inmate morale by treating inmates as human beings.

1. Keeping everybody in a prison safe requires a significant degree of voluntary compliance with prison rules on the part of inmates. It is therefore essential to prison safety that inmates make peaceful, well-behaved transitions to life in prison and, to the extent possible, are motivated by something other than officers’ actions to comply with prison rules.

In *amici*’s experience, however, inmates are far less likely to transition peacefully to prison life and behave well when they have no reason to believe that their actions or behavior matter—that is, when they have no hope for the future. *Amici* found while working in prisons that inmates without reason to care about the rest of their lives—typically, those serving mandatory sentences with no possibility of parole—are more likely to join gangs in prison and commit serious rule violations

than inmates who continue to believe in the importance of self-improvement are. Holding onto hope, however, is hard for many capital inmates because life on death row can be extraordinarily difficult and traumatizing. Most capital inmates, including those in Alabama, are held in solitary confinement in tiny cells no larger than a parking spot for over 20 hours a day for years on end. Ala. Code § 15-18-81; see *Davis v. Ayala*, 576 U.S. 257, 286-290 (2015) (Kennedy, J., concurring); Gabriella Robles, *Condemned to Death – And Solitary Confinement*, The Marshall Project (July 23, 2017), <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement>.

Skipper makes prisoners more likely to transition peacefully to prison life. By giving inmates the opportunity to introduce evidence of their good behavior while incarcerated, *Skipper* gives inmates reason to believe that their behavior and actions matter and encourages them to make a peaceful transition to life in prison and behave well. To be clear, *amici* are not suggesting that the possibility of a reduced sentence based on good behavior in prison can transform incorrigible defendants into model inmates. Rather, *amici* believe that capital defendants who are capable of peacefully adjusting to prison life and behaving well would be less likely to do so without any reason to care about their futures. Limiting *Skipper*'s reach, as the court below did here, makes it harder for inmates to care about themselves and harder for corrections officers to do their jobs.

2. *Skipper* also makes prisons safer by treating inmates as individual human beings. This Court has long recognized that the “fundamental respect for humanity” that underlies the Eighth Amendment requires sentencers to consider the “character and record of the individual offender and the circumstances of the

particular offense.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Consistent with the Eighth Amendment’s underlying principles, *Skipper’s* rule respects capital defendants’ humanity by admitting reliable and important evidence of defendants’ character and individual traits before a sentencer inflicts the most severe punishment that our society permits.

Respecting capital defendants’ humanity is not only consistent with constitutional principles but also good prison policy. Based on their decades of experience working in and running prisons, *amici* strongly believe that prisons are safer and easier to run when inmates are treated with dignity and recognized as human beings. For example, after an explosion of inmate violence in a Mississippi super-maximum prison facility under his watch, then-Deputy Commissioner Emmitt Sparkman moved to the area and spent months walking among the inmates and getting to know their personal stories before moving them out of solitary confinement and back into the general prison population. Terry A. Kupers & Emmitt Sparkman et al., *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 *Crim. Just. & Behavior* 1037, 1040 (2009). Within months of his and others’ work overhauling the prison’s solitary confinement practices and peer counseling programs, inmate violence fell by 70% and the rate of inmate incidents requiring officers’ use of force plummeted as well. *Id.* at 1041-46. Other jurisdictions that have taken similar steps to treat inmates, including death row inmates, with respect and dignity have observed similar results. In 1991, Missouri integrated death row inmates with the general prison population and saw immediate benefits, including cost savings, im-

proved inmate morale, and fewer disciplinary incidents. George Lombardi, Richard D. Sluder & Donald Wallace, *Mainstreaming Death-Sentenced Inmates: The Missouri Experience and Its Legal Significance*, 61 Fed. Probation 3, 5-7 (1997).

These results confirm that prisons are safer when they treat death row inmates as human beings rather than as objects to be locked away until their execution dates. Barring defendants from presenting reliable and important evidence of their own character and individual traits at their resentencing hearings has exactly the opposite effect: it denies inmates their basic human right to defend themselves and be treated as individual human beings by a court of law. Arbitrarily limiting *Skipper's* rule therefore makes it harder for prison officials to do their jobs and makes prisons less safe for inmates, officers, and staff. This Court should grant certiorari, restore the proper scope of *Skipper*, and ensure that capital sentencings and resentencings continue to respect inmates' basic humanity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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