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 Court of Criminal Appeals of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

Cameron G. Ball
Assistant Attorney General

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

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CAPITAL CASE

QUESTION PRESENTED
(Restated)

Heather Leavell-Keaton was convicted of capital murder and sentenced to death. Her sentencing proceeding involved two phases. First was an evidentiary phase at which Leavell-Keaton had a full opportunity to present mitigating evidence; second was a non-evidentiary phase, at which she was entitled under state law to address the judge before the judge decided on a sentence. Leavell-Keaton appealed her sentence, arguing that she was not afforded that state-law right of allocution. The Alabama Court of Criminal Appeals agreed and granted a limited remand to allow for allocution. At resentencing, in addition to allocution, Leavell-Keaton requested but was denied the opportunity to present new mitigating evidence, including evidence of her behavior in prison in the time between sentencing and resentencing. The question presented is:

> When there has been no error in the evidentiary phase of a capital defendant's sentencing, but her case is remanded for some other reason, does the Constitution require a trial court to reopen evidence to allow the capital defendant to introduce new mitigating evidence?

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INTRODUCTION

Heather Leavell-Keaton assisted her boyfriend in torturing and killing his two young children, and she was convicted of capital murder for one of these killings. Her sentencing then proceeded in two phases. First was an evidentiary phase during which she had a full and fair opportunity to present mitigating evidence. Second was a non-evidentiary phase during which, under state law, she was supposed to be afforded the "opportunity to make a statement in … her own behalf." ALA. R. CRIM. P. 26.9(b)(1). Because she was not given that chance, the Alabama Court of Criminal Appeals (CCA) ordered a limited remand for Leavell-Keaton to be afforded an opportunity to allocute, and for the trial court to then resentence her "after taking into consideration any statement that she chose to make." *Keaton v. State*, CR-14-1570, 2021 WL 5984951, at *7 (Ala. Crim. App. Dec. 17, 2021).

At her trial, Leavell-Keaton had presented substantial mitigation evidence, including testimony from a psychologist, friends and family, a fellow inmate, and even correctional officers. Even so, on remand, she moved to present additional mitigation evidence along with her allocution, including evidence of her behavior in prison since her initial sentencing—evidence that could not have been introduced at trial. The trial court refused, found Leavell-Keaton's allocution unpersuasive, and resentenced her to death.

Because the trial court's resentencing order did not contain the specific written findings regarding the existence or absence of certain aggravating and mitigating factors, the CCA "again remanded the case to the trial court with instructions for that

court to issue a new sentencing order that complies with [Ala. Code] § 13A-5-47," and the trial court did so on June 23, 2021. *Id.* at *7. Leavell-Keaton argued that on this limited remand too the trial court should reopen the evidentiary phase of sentencing and accept new mitigation evidence. 9th Supp. C. 23–24.

When the case returned to the CCA, the court held that Leavell-Keaton was not entitled to present mitigating evidence at the resentencing. *Keaton*, 2021 WL 5984951, at *70. The court noted that the only error at the original sentencing was the denial of allocution, and that limited error was resolved by the limited remand. *Id.* As the CCA explained, "Because such error [i.e., lack of allocution] occurs *after* the close of evidence, the defendant is not entitled to 'update' his or her mitigating evidence at the resentencing hearing when his or her future dangerousness is not at issue." *Id.* at *71.

Leavell-Keaton now seeks certiorari, arguing that she had a constitutional right under *Skipper v. South Carolina*, 476 U.S. 1 (1986), to present additional evidence at resentencing and that this Court's guidance is required to resolve a circuit split on the applicability of *Skipper* to resentencing proceedings. Certiorari is unwarranted. *Skipper* does not apply to this case, nor should it be extended here, where Leavell-Keaton had a full and fair opportunity to present mitigation evidence at her sentencing. The unrelated state-law error that occurred after the close of evidence and led to a limited remand to correct that limited error did not require the reopening of the error-free evidentiary phase of her sentencing. That result comports with this Court's recognition that appellate courts can adequately correct sentencing

errors without ordering a new penalty-phase hearing and that appellate courts have the power to order limited remands when appropriate. Allowing Leavell-Keaton allocution afforded her more than the Constitution requires, and her petition is not worthy of certiorari.

STATEMENT OF THE CASE

A. The Proceedings Below.

Heather-Leavell Keaton did not want to be a stepmother. Despite the fact that she had taken up with a married father, John DeBlase, and was carrying his child, she tortured DeBlase's two preschool-aged children, beating them, burning them, starving them, and eventually feeding them antifreeze—all with DeBlase's knowledge, consent, and participation. Natalie, aged four, died in March 2010 after a period of soiling herself and vomiting black fluid. For a time, Leavell-Keaton and DeBlase stopped poisoning Natalie's three-year-old brother, Chase, but then the boy made the mistake of asking "where his sissy was" in public, and the poisoning resumed to remove the liability. When Chase began to soil himself, his father and Leavell-Keaton taped him to a broomstick and placed him in the corner, over a tarp, then taped his mouth closed so he could not cry. Chase died in June 2010.

That December, the children's skeletal remains were recovered in the woods in Alabama and Mississippi, though only some of their bones remained; sixty-eight bones and three teeth for Natalie, and twenty-one bones and two teeth for Chase. What was left of their bodies showed signs of malnutrition or poisoning. Leavell-Keaton's fellow inmates at the Mobile Jail testified that she told them details of the

murders and that she showed no remorse: "It's like she didn't care. She was not human." *Keaton*, 2021 WL 5984951, at 1–6.

Leavell-Keaton was indicted for three counts of capital murder: two counts for killing a child less than fourteen years old, ALA. CODE § 13A-5-40(a)(15), and one count for killing two or more persons "by one act or pursuant to one scheme or course of conduct," *id*. § 13A-5-40(a)(10). *See Keaton*, 2021 WL 5984951, at *1. Her trial began on May 7, 2015, and guilt-phase deliberations began on May 26. The next day, the jury found Leavell-Keaton guilty of capital murder for her role in Chase's death and guilty of manslaughter for her role in Natalie's death. *Id.* at *6.

The penalty phase began on May 28. The State adopted the evidence from the guilt phase and presented additional evidence to prove the aggravating circumstance that the murder of Chase was especially heinous, atrocious, or cruel compared to other offenses. *See* ALA. CODE § 13A-5-49(8). Leavell-Keaton presented evidence in mitigation, including that she was legally blind, suffered sexual abuse as a child, suffered physical and emotional abuse at the hands of DeBlase, suffered from bipolar disorder and post-traumatic stress disorder, and had adjusted well to incarceration in the time from her arrest to her trial. R. 5014–308. The jury unanimously found the existence of the aggravating circumstance and recommended by a vote of 11–1 that Leavell-Keaton be sentenced to death. *Keaton*, 2021 WL 5984951, at *6.

At the judicial sentencing hearing on August 20, the trial court heard argument from the prosecutor and defense counsel, R. 5671–77, and then read to

Leavell-Keaton its sentencing order. C. 40–63; R. 5679–722. In the order, the trial court stated the following concerning the existence of the aggravating circumstance:

> It is not possible to adequately describe the level of depravity of one who intentionally poisons young children. Death from antifreeze poisoning is neither spontaneous nor painless. Dr. Stacy Turner described the effects on the human body of ingesting antifreeze. In the first stage antifreeze causes nausea, vomiting, dizziness, confusion, and loss of kidney and bow[e]l functions. Later the heart accelerates, breathing becomes panting, and blood pressure increases. In the final stages the kidneys and heart fail, and death results. Chase suffered these effects from antifreeze poisoning before he died. Depending on the quantity of antifreeze ingested, the process of dying can last up to seventy two hours.
>
> Keaton made no effort to comfort or aid him. Rather, he was gagged with a sock to silence his screaming. Tape was bound around his face, except for his eyes, and his body was taped rigid to a broom handle. He was placed standing in a corner on a tarp until he died. If his death finally resulted from asphyxia, rather than the effects of antifreeze, his death is no less horrific.
>
> The physical pain and psychological torture Chase endured during his prolonged death is difficult to comprehend. His body was transported to a rural location, deposited unceremoniously without burial, and desecrated by wild animals. The Court has never encountered facts depicting a more callous disregard for the sanctity of a human life. This crime is set apart from other capital offenses because the crime is completely conscienceless, pitiless, and unnecessarily torturous to the victim.
>
> The Court finds the State has proven beyond a reasonable doubt this crime is especially heinous, atrocious, or cruel when compared to other capital offenses. This aggravating circumstance is found to exist and it weighs heavily in favor of a sentence of death.

C. 54–55. The court sentenced Leavell-Keaton to twenty years' imprisonment for her manslaughter conviction and to death for her capital murder conviction. Before the pronouncement of sentence, however, the court did not ask Leavell-Keaton if she wished to address the court.

B. Direct Appeal and Allocution Remand.

On direct appeal, Leavell-Keaton raised multiple claims of error, none of which the CCA ultimately deemed meritorious except for her claim that she had not been permitted to allocute. The court issued a limited remand in October 2020 to correct the error:

> [W]e reverse Keaton's sentences and **REMAND** the case **WITH INSTRUCTIONS** for the trial court to hold a hearing at which it resentences Keaton after affording her an opportunity to allocute in accordance with Rule 26.9(b), Ala. R. Crim. P. To be clear, the trial court is not to hold a full capital-conviction sentencing hearing, which has already occurred. Rather, the trial court is only (1) to afford Keaton an opportunity to allocute; (2) to take into consideration any statements Keaton may choose to make during said allocution; and, following allocution, (3) to sentence Keaton to either death or life imprisonment without the possibility of parole for her capital-murder conviction and to sentence Keaton in accordance with § 13A-5-6(a)(2), Ala. Code 1975, for her reckless-manslaughter conviction. The trial court shall take all steps necessary to ensure that the circuit clerk makes due return to this Court within 49 days of the date of this order. The trial court shall also ensure that the record on return to remand includes a transcript of the resentencing hearing and the trial court's sentencing order.

App'x B at 2.

The trial court set the matter for a status hearing, and Leavell-Keaton filed a barrage of motions, including a motion requesting to present evidence at resentencing concerning her good conduct in prison in the time since original sentencing.[1] 8th Supp. C. 41–44.

At the status hearing, the State argued that reopening evidence would be outside the scope of the CCA's limited remand order. Defense counsel argued, in part,

> You know, the [CCA] in its order, they say you shouldn't do a new capital sentencing hearing. We're not asking for a new capital sentence hearing.

[1] Judge Rick Stout presided over all original and remand proceedings.

> We're asking for a sentence that is imposed consistent with the Constitution, and *Skipper* and its progeny says that in order to sentence someone to death, you gotta consider their behavior in prison.
>
> […]
>
> [W]e've had a hearing consistent with the Constitution to determine her sentence. We're not repeating a capital sentence again. We're not calling in a jury. We're not repeating a capital sentencing hearing. We're not re-presenting any information that was already presented to this Court. What we are doing is we are presenting new information the Court has never before heard that is relevant to this sentence.
>
> As the Court noted, it found jail records mitigating. There are now five-and-a-half years worth of mitigating information out there that this Court won't be considering in support of a death sentence. And, like I said, a federal court is going to have to look at that one day.

7th Supp. R. 22, 25–26. The trial court denied the motion "as being beyond the scope of the remand order, not on the merits."[2] *Id.* at R. 46. The State conceded, however, that it could not limit Leavell-Keaton's allocution.[3]

The resentencing hearing was held on January 7, 2021, at which time the trial court allowed defense counsel to proffer the evidence they would have presented had the court reopened evidence.[4] Counsel submitted an affidavit from Emmitt Sparkman, a corrections expert, stating that if he were provided the necessary

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[2] Leavell-Keaton repeatedly suggests that the trial court ruled that the evidence was "irrelevant." Pet. 3, 5. However, the trial court did not pass on the relevance of any evidence or on Leavell-Keaton's vague proffers because it determined that reopening evidence was not within the scope of the CCA's remand order.

[3] The prosecutor stated, "Your Honor, I'd like to make one more point just to clarify. If Ms. Keaton chose to speak about her conduct while in prison during her allocution, … it's not our position that we can limit what she says during allocution. This is just about the records, the physical records being introduced." 7th Supp. R. 27. "[S]he is free to say what she wants during her allocution…." *Id.* at R. 28–29.

[4] Before allowing defense counsel to make proffers, the trial court stated, "Ms. Keaton … will be given the opportunity to allocute, to say whatever she wants to say whatever the time reference is, and I'll give her that opportunity, but I'm not going to open the record. I'm not going to rehash or recreate a new sentencing hearing." 7th Supp. R. 73.

policies and records, he would have been willing to testify regarding Leavell-Keaton's behavior in prison. 7th Supp. C. 3–7; 7th Supp. R. 75. Counsel also submitted a declaration by Dr. Lasana Harris, who would have testified "about the ways in which proceeding with a death penalty case in the middle of a global pandemic is unconstitutional." 7th Supp. C. 8–14; 7th Supp. R. 75–76. Finally, counsel proffered that two chaplains, Jacobs and Miller, "would have offered what an asset Ms. Leavell-Keaton could be to the prison were she permitted to serve life without parole," and that two unnamed inmates "would discuss the inspiration Ms. Leavell Keaton has been to them in how she has handled her time in prison."[5] 7th Supp. R. 76. Leavell-Keaton then gave the following brief allocution:

> Your Honor, I devote my time to going to church and Bible study and I believe I am a good friend and family member to the many people who love me. I have proven that I am not a danger to anyone, but instead, have a lot to offer those around me. Growing up blind was a challenge, and I have battled other health issues all of my life, but, with the love that my family and friends give me, I continue to make progress to overcome those challenges. Thank you.

Id. at 77–78. The trial court entertained further argument by defense counsel,[6] after

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[5] Leavell-Keaton's petition (at 4–5) presents a bulleted list that she represents as her counsel's proffer to the trial court, but the portion of the record she cites does not support that such a detailed proffer was made.

[6] Leavell-Keaton asserts that the trial court limited defense counsel to arguing about her allocution while allowing the State to "argue[] 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[.]" Pet. 6. Leavell-Keaton omits important context for the portion of the quotation she excerpts: moments before the prosecutor made the quoted statement, defense counsel was permitted wide latitude in his arguments, which included an argument that John DeBlase is "a white man," and "[the prosecutor] told me that no one deserves the death penalty more than Heather Leavell-Keaton. Well, the jury disagreed with her. What's the difference? She's a woman. She's a Native American. She's black." 7th Supp. R. 81. Defense counsel (also counsel of record here) further argued, "There were Confederate flags flying inside of our nation's capital yesterday. I don't think you have the right to sentence her to death." *Id.* It was after these comments that the trial court appropriately asked defense counsel to conclude, after which the prosecutor responded, "This case has nothing to do with what's going on in our country or world. This case has to do with Natalie and Chase DeBlase." *Id.* at R. 82–83.

which it sentenced Leavell-Keaton to death for her capital murder conviction and to twenty-years' imprisonment for her manslaughter conviction. *Id.* at 83.

The record on return to remand was submitted to the CCA, and the parties filed supplemental briefs. The CCA again entered an order remanding the case for the trial court to enter a new sentencing order that complied with Section 13A-5-47 of the Code of Alabama, to include findings of fact regarding aggravating and mitigating circumstances and the court's weighing thereof. The CCA stated, "To be clear, the trial court may adopt the findings it made in its original sentencing order, but it must memorialize those findings in a new sentencing order that also includes a finding as to whether the court found Keaton's allocution to be mitigating." Order at 3, *Keaton v. State*, CR-14-1570 (Ala. Crim. App. May 28, 2021). The trial court entered a new order in which it adopted its earlier findings and additionally found that Leavell-Keaton's allocution was not mitigating under Section 13A-5-52 of the Code of Alabama. 9th Supp. C. 62.

C. The CCA affirms.

Though the CCA recognized that had the trial court reopened evidence at Leavell-Keaton's resentencing hearing, it "would have exceeded the express scope" of the remand order and, therefore, would have "exceeded the scope of its jurisdiction on remand," the CCA thought it "prudent" to address the question of "whether Keaton was entitled to present mitigating evidence at the resentencing hearing." *Keaton*, 2021 WL 5984951, at *66.

First, the court acknowledged that *Skipper v. South Carolina*, 476 U.S. 1 (1986), "did not expressly address … 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." *Keaton*, 2021 WL 5984951, at *67.

Next, the CCA turned to cases in which other courts had considered whether *Skipper* "implicitly answers that question." *Id.* The court first examined *Davis v. Coyle*, 475 F.3d 761, 772 (6th Cir. 2007), in which the Sixth Circuit held that *Skipper* mandated that the defendant be allowed to present evidence of his good behavior in prison between original sentencing and resentencing, noting that the prosecutor had argued at resentencing that the defendant was "too dangerous for anything other than a death sentence." Because the trial court had prohibited the introduction of additional evidence at resentencing, in rebuttal, "Davis was then forced to rely solely upon the evidence presented at his first sentencing hearing." *Id.* at 773.[7] "[T]he Sixth Circuit was careful to note that 'there could conceivably be some question about the relevance of' evidence of a defendant's good behavior while incarcerated between sentencing hearings in cases where the State does not argue that 'future dangerousness should keep [the defendant] on death row.'" *Keaton*, 2021 WL 5984951, at *67 (quoting *Davis*, 475 F.3d at 773).

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[7] "Davis was prevented, however, from presenting the testimony of three employees of the Department of Corrections who could have offered relevant information about Davis's more recent behavior and adjustment to prison life since his incarceration after his trial in 1984." *Id.*

The CCA then examined *State v. Roberts*, 998 N.E.2d 1100 (Ohio 2013), *State v. Goff*, 113 N.E.3d 490 (Ohio 2018), and *State v. Berget*, 853 N.W.2d 45 (S.D. 2014), all of which involved sentencing errors that occurred after a full and unrestricted penalty-phase hearing had concluded. *See Roberts*, 998 N.E.2d at 1104 (trial judge improperly allowed prosecutor to participate in drafting sentencing opinion); *Goff*, 113 N.E.3d at 493 (lack of allocution); *Berget*, 853 N.W.2d at 58–59 (sentencing authority may have considered improper aggravating factors in its sentence). Like those courts, the CCA found that "Keaton's reliance on *Skipper* and *Davis* [was] questionable." *Keaton*, 2021 WL 5984951, at *70. The court concluded,

> Unlike the defendants in those cases, Keaton was not attempting to defend herself at the resentencing hearing against an allegation that she represented a future danger to others. In fact, the State provided no arguments at the resentencing hearing regarding the appropriate sentence.[25] Rather, we find *Roberts* and *Goff* more applicable to the specific circumstances of this case.
>
> As we conclude in this opinion, there were no errors in the evidentiary part of the penalty phase of Keaton's trial, and Keaton's opportunity to present mitigating evidence at that time was unrestricted. The only error that occurred in the penalty phase was the trial court's failure to afford Keaton an opportunity to allocute, but that error occurred *after* Keaton's full and unfettered opportunity to present mitigating evidence.[26] Thus, to afford Keaton an opportunity to present new mitigating evidence at her resentencing hearing would be to afford her the right to "update" her mitigating evidence following an error-free evidentiary part of the original sentencing proceedings. We agree with the conclusion of the Ohio Supreme Court and the South Dakota Supreme Court that "such a right has no clear basis in *Lockett* or its progeny," which includes *Skipper*. *Roberts*, 998 N.E.2d at 1108.
>
> [FN25: We also note that the State did not argue at the original sentencing hearing that Keaton's future dangerousness warranted a death sentence. (R. 5670–71.)]
>
> [FN26: Although allocution provides a defendant with an opportunity to

> attempt to mitigate his or her sentence, *Newton v. State*, 673 So. 2d 799, 801 (Ala. Crim. App. 1995), it is not an avenue by which a defendant presents mitigating evidence. *See State v. Curtis*, 126 Wash. App. 459, 108 P.3d 1233, 1236 (2005) ("[A]llocution is a plea for mercy; it is not intended to advance or dispute facts." (citation omitted); and *State v. Cohen*, 272 Conn. 106, 864 A.2d 666, 789 (2004) (noting that most jurisdictions "limit the right of allocution to pleas for mercy or leniency and expressions of future hope").]

Keaton, 2021 WL 5984951, at *70. The court further acknowledged that allowing Leavell-Keaton to update her mitigation case with new evidence at resentencing would result in the "arbitrary distinctions between similarly situated capital defendants," noting that DeBlase would not have a similar opportunity because he, unlike Leavell-Keaton, had been afforded an opportunity to allocute at his sentencing hearing. *Id.* (quoting *Roberts*, 998 N.E.2d at 1108). Such an inconsistency, the CCA found, would "strike[] at the heart of *Lockett*'s holding that the death penalty should be imposed 'in a more consistent and rational manner.'" *Id.* (quoting *Berget*, 853 N.W.2d at 62, in turn quoting *Lockett v. Ohio*, 438 U.S. 586, 601 (1978)).

Accordingly, the CCA held that when resentencing is required "in a capital trial for the limited purpose of affording the defendant an opportunity to allocute, the trial court is 'to proceed on remand from the point at which the error occurred,' i.e., the point at which the defendant should have been afforded an opportunity to allocute." *Id.* at *71 (quoting *Goff*, 113 N.E.3d at 494). Thus, in Leavell-Keaton's case, because the CCA had ordered remand "solely for the trial court to afford Keaton an opportunity to allocute and because Keaton's future dangerousness was not at issue at the resentencing hearing, the trial court did not err by prohibiting Keaton from presenting new mitigating evidence at the resentencing hearing." *Id.* The CCA noted

that "[n]othing in *Skipper* requires a different conclusion," and that its holding was "consistent with the principle that "'States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'"'" *Id.* (quoting *Oregon v. Guzek*, 546 U.S. 517, 526 (2006), in turn quoting *Boyde v. California*, 494 U.S. 370, 377 (1990), in turn quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988)).

The CCA thus affirmed Leavell-Keaton's convictions and death sentence. *Id.* at *75. Leavell-Keaton sought certiorari, arguing in relevant part that the CCA had misread *Skipper* and its progeny, Petition for Writ of Certiorari at 12–22, *Ex parte Keaton*, SC-2022-0559 (Ala. July 8, 2022), but the Alabama Supreme Court denied certiorari. App'x A.

REASONS THE PETITION SHOULD BE DENIED

This Court should deny certiorari for at least three reasons. First, the petition does not present an important constitutional question. The *Lockett–Skipper* line of cases holds that capital defendants must be allowed to introduce mitigation evidence. The CCA held, and Leavell-Keaton conceded, that she was afforded a full and unrestricted opportunity to present mitigating evidence at the evidentiary phase of her sentencing hearing before the jury. Thus, the Constitution was satisfied by Leavell-Keaton's sentencing hearing. Any interest she had on remand was solely allocution under Alabama law, which she was afforded, and which the trial court found not to be mitigating. Leavell-Keaton's petition thus does not concern the *Skipper* line of cases, but rather the authority of an appellate court to correct a state-

law sentencing error that occurred after an error-free penalty-phase hearing. Additionally, Leavell-Keaton fails to show a circuit split concerning *Skipper*'s reach. She cites no case that requires reopening evidence for correction of allocution error. She cites a single case for the proposition that *Skipper* demands reopening evidence after an error-free penalty phase, but this Court has consistently denied petitions presenting the same question. Her remaining cases are factually distinguishable or inapposite.

Second, the issue in this case is unlikely to recur. Alabama is unique in that cases are automatically remanded if lack of allocution is raised on direct appeal. Some jurisdictions require prejudice for allocution error, while others outright do not afford capital defendants the right of allocution. Thus, the number of cases that will be remanded for allocution error is likely to be small.

Third, the decision below is correct. Leavell-Keaton's proposed rule would require States to reopen sentencing hearings, receive new mitigation evidence, and perhaps even re-empanel juries to hear evidence both old and new—all because of errors of state law that did not affect the defendant's ability to mount a mitigation case. Neither *Skipper* nor the Constitution demands that result. The petition should be denied.

I. This Case Provides a Poor Vehicle to Consider *Skipper*'s Applicability to Resentencing Because the Evidentiary Phase of Leavell-Keaton's Initial Sentencing Was Error Free.

Before reaching the question of whether *Skipper v. South Carolina*, 476 U.S. 1 (1986), is applicable to resentencing—that is, whether a trial court at a resentencing

may prevent a defendant from presenting evidence of her good behavior in prison that was not available at original sentencing—the Court would have to address the question of whether the CCA properly exercised its superintendence over the trial court in ordering a remand for the limited purpose of allowing Leavell-Keaton the opportunity to allocute. *See* ALA. CONST. art. VI, § 141(d); ALA. CODE § 13A-5-53; *see also* 28 U.S.C. § 2106. That question, in turn, depends on Alabama's interpretation of the nature of the right to allocution and the extent to which that implicates this Court's capital sentencing jurisprudence (it doesn't). This is a poor case to address the *Skipper* question, which pertains to the relevance of mitigating evidence, because the trial court was not obligated to reopen evidence at resentencing in the first place, where the only error Leavell-Keaton asked to be corrected was to allow her the opportunity to allocute in accordance with state law.

First, the only error in this case was one of state law, which occurred after a full and unrestricted penalty-phase hearing before the jury and was corrected on remand. *See Barclay v. Florida*, 463 U.S. 939, 957–58 (1983) ("[M]ere errors of state law are not the concern of this Court, *Gryger v. Burke*, 334 U.S. 728, 731 … (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution."). Under Alabama law, a defendant must be given the opportunity to make a statement on her own behalf to the trial court before it imposes sentence.[8] ALA. R. CRIM. P. 26.9(b)(1). If the issue is raised on direct appeal,

[8] As the CCA explained,

even where it was not raised in the trial court, the CCA automatically remands the case without consideration of prejudice to allow the defendant the opportunity to allocute. *See, e.g.*, *McMahan v. State*, 109 So. 553, 553 (Ala. Ct. App. 1926) ("The error in this respect is as to the sentence only, and, if no reversible error appears, the Case would be remanded for resentence only, the object being to place the case before the trial judge for correct action beginning at the point of his erroneous departure."); *Oliver v. State*, 140 So. 180, 181 (Ala. Ct. App. 1932) (noting that "to constitute a valid judgment[, the fact that the defendant was asked if he had anything to say why the sentence of law should not be pronounced upon him] must appear in the minute entry of the judgment"); *Banks v. State*, 51 So. 3d 386, 392 (Ala. Crim. App. 2010) ("[T]he requirement that the defendant be afforded the opportunity to speak on his or her behalf at the sentencing hearing [is an] exception[] to the general preservation rule and [is] required to afford a defendant the minimal due process."). This Court has recognized that the lack of allocution is not a constitutional error. *Hill v. United States*, 368 U.S. 424, 428 (1962) ("The failure of a trial court to ask a defendant … whether he has anything to say before sentence is imposed is … an error which is neither jurisdictional nor constitutional.").

Leavell-Keaton's case is not one in which the defendant was prohibited from

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> Although allocution provides a defendant with an opportunity to attempt to mitigate his or her sentence, *Newton v. State*, 673 So. 2d 799, 801 (Ala. Crim. App. 1995), it is not an avenue by which a defendant presents mitigating *evidence*. *See State v. Curtis*, 126 Wash. App. 459, 108 P.3d 1233, 1236 (2005) ("[A]llocution is a plea for mercy; it is not intended to advance or dispute facts." (citation omitted); and *State v. Colon*, 272 Conn. 106, 864 A.2d 666, 789 (2004) (noting that most jurisdictions "limit the right of allocution to pleas for mercy or leniency and expressions of future hope").

Keaton, 2021 WL 5984951, at *70 n.26.

presenting evidence in mitigation—indeed, she had a full and constitutionally proper penalty-phase hearing, which she conceded.[9] *See Keaton*, 2021 WL 5984951, at *70 ("[T]here were no errors in the evidentiary part of the penalty phase of Keaton's trial, and Keaton's opportunity to present mitigating evidence at that time was unrestricted."). The infirmity in her case occurred *after* the presentation of mitigation evidence, between the time of the jury's advisory verdict[10] and the trial court's imposition of sentence. In her initial brief on direct appeal, Leavell-Keaton simply asked for an opportunity to allocute, not for evidence to be reopened or for a new penalty-phase hearing. The CCA granted her request to correct the state-law error. Not until she returned to the trial court did Leavell-Keaton ask to present new mitigating evidence of her adjustment to prison in the time between sentencing and resentencing, which would never have been available at the time of trial.[11]

Second, *Skipper* is inapposite, and there is nothing unconstitutional about prohibiting the introduction of additional mitigating evidence at a resentencing for allocution where there was no error in the penalty-phase evidentiary hearing. *See Clemons v. Mississippi*, 494 U.S. 738, 750 (1990) ("Consequently there is no sound

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[9] "[W]e've had a hearing consistent with the Constitution to determine her sentence. We're not repeating the capital sentence again. We're not calling in a jury. We're not repeating a capital sentencing hearing." 7th Supp. R. 25–26.

[10] At the time of Leavell-Keaton's trial, the jury's penalty-phase verdict was advisory, and the trial court could adopt it or override it at the sentencing hearing. *See* Ala. Laws Act 2017-131 (removing jury override). Allocution does not take place before the jury.

[11] Leavell-Keaton proffered (1) that a corrections expert, *if given relevant materials*, would have testified regarding Leavell-Keaton's good behavior in prison, (2) that a psychological expert would have testified as to why proceeding with a capital case during the COVID-19 pandemic was unconstitutional, (3) that two chaplains, Jacobs and Miller, "would have offered what an asset Ms. Leavell-Keaton could be to the prison were she permitted to serve life without parole," and (4) that two unnamed inmates would have discussed "the inspiration Ms. Leavell Keaton has been to them in how she has handled her time in prison." 7th Supp. R. 75–76.

basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.") (quoting *Wainwright v. Goode*, 464 U.S. 78, 86–87 (1983) (per curiam)). Indeed, the remand in this case afforded Leavell-Keaton more than the Constitution requires, and she cites to no case that holds evidence must be reopened for correction of allocution error.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), a plurality of this Court announced the rule that "the sentencer" in a capital case must "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." *See also Eddings v. Oklahoma*, 455 U.S. 104, 113–15 (1982); *Saffle v. Parks*, 494 U.S. 484, 490 (1990) ("There is no dispute as to the precise holding in [*Lockett* and *Eddings*]: that the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial."). In *Skipper*, the Court held that prohibiting a defendant from presenting evidence of his good behavior in the time "spent in jail awaiting trial" is a deprivation of the "right to place before the sentencer relevant evidence in mitigation of punishment." 476 U.S. at 4. *Lockett*, *Eddings*, and *Skipper* all involved the exclusion of relevant mitigating evidence from a capital defendant's original sentencing proceeding, and this Court has never held "that a capital defendant has a categorical constitutional right to introduce new mitigation evidence that is discovered after a sentencing hearing in which the defendant was given an opportunity to present all the mitigation evidence he desired." *State v. Jackson*, 73 N.E.3d 414, 427 (Ohio 2016).

Stated similarly, the *Lockett–Skipper* cases concern the question of *what* mitigating evidence the sentencer must be permitted to consider but not *when* the sentencer must consider that evidence. While the principle that capital defendants have a right to present mitigating evidence would apply to a resentencing where evidence has been reopened, nothing in the *Skipper* line of cases dictates that a constitutionally adequate and concluded penalty phase must nevertheless be reopened.

Leavell-Keaton's case thus does not concern *Skipper* or the Constitution. Rather, her case concerns only the authority of an appellate court to determine the appropriate remedy for a sentencing error.[12] Whether the CCA selected the appropriate remedy for correcting a state-law sentencing error that occurred after an error-free penalty phase is not an important question, much less a constitutional one. *See Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring) (quoting S. SHAPIRO ET AL., SUPREME COURT PRACTICE § 5.12(c)(3) (10th ed. 2013), "[E]rror correction … is outside the mainstream of the Court's functions and…not among the 'compelling reasons' … that govern the grant of certiorari"). This Court has recognized the ability of appellate courts to adequately correct sentencing errors without ordering a new penalty-phase hearing, *see, e.g.*, *Clemons*, 494 U.S. at 754 (remanding for appellate court to either reweigh without invalid aggravating factor or to order new penalty phase); *McKinney v. Arizona*, 140 S. Ct. 702, 707 (2020) ("In deciding

[12] "If the court determines that an error adversely affecting the rights of the defendant was made in the sentence proceedings … it shall remand the case for new proceedings *to the extent necessary to correct the error or errors*." ALA. CODE § 13A-5-53(a) (emphasis added). "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court … and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106.

whether a particular defendant warrants a death sentence in light of the mix of aggravating and mitigating circumstances, there is no meaningful difference for purposes of appellate reweighing between subtracting an aggravator from one side of the scale and adding a mitigator to the other side."), and it has recognized that appellate courts have the authority to issue limited remand orders when appropriate. *See Pepper v. United States*, 562 U.S. 476, 505 n.17 (2011) ("Nor do we mean to preclude courts of appeals from issuing limited remand orders, in appropriate cases, that may render evidence of postsentencing rehabilitation irrelevant in light of the narrow purposes of the remand proceeding."); *see also Cone v. Bell*, 556 U.S. 449, 473 (2009) ("We granted certiorari and affirmed, rejecting Brady's contention that the state court's limited remand violated his constitutional rights."). In arguing that any additional action ordered on resentencing is what entitles a defendant to the reopening of evidence carte blanche, Leavell-Keaton ignores that the *reason* for remand is crucially important to determine the scope of the appropriate remedy.

Third, the "circuit split" to which Leavell-Keaton alludes does not exist. The only case she cites that addresses whether new mitigation evidence must be admitted at resentencing *after* the defendant was given the opportunity to present all mitigation at his original sentencing is *Creech v. Arave*, 947 F.2d 873 (9th Cir. 1991), *overruled on other grounds*, 507 U.S. 463 (1993).[13] This Court has denied at least five

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[13] This Court limited certiorari to the vagueness question in *Arave v. Creech* and did not consider Idaho's argument that the Ninth Circuit's remand for full resentencing was error. 507 U.S. at 465 ("The sole question we must decide is whether the 'utter disregard' circumstance, as interpreted by the Idaho Supreme Court, adequately channels sentencing discretion as required by the Eighth and Fourteenth Amendments."); Brief for Respondent at 4 n.2, *Arave v. Creech*, 507 U.S. 463 (1993) (No. 91-1160).

petitions that presented the same question. *State v. Davis*, 584 N.E.2d 1192 (Ohio 1992), *cert. denied*, 506 U.S. 858 (1992); *State v. Roberts*, 998 N.E.2d 1100 (Ohio 2013), *cert. denied,* 572 U.S. 1022 (2014); *State v. Berget*, 853 N.W.2d 45 (S.D. 2014), *cert. denied,* 574 U.S. 1197 (2015); *State v. Jackson*, 73 N.E.3d 414 (Ohio 2016), *cert. denied*, 137 S. Ct. 1586 (2017); *State v. Goff*, 113 N.E.3d 490 (Ohio 2018), *cert. denied*, 139 S. Ct. 2715 (2019).

Leavell-Keaton also relies on *Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007), for her supposed split, but *Davis* is readily distinguishable. Davis was granted relief because he was prevented from introducing new mitigating evidence at resentencing, but the Sixth Circuit emphasized that at resentencing, the state "argue[d] that Davis's status as a repeat offender rendered him too dangerous for anything other than a death sentence." *Id.* at 772. Indeed, this was "the single aggravating factor relied upon by the state—that future dangerousness should keep Davis on death row." *Id.* at 773. Davis sought to respond with evidence of his post-conviction good behavior in prison, evidence the Sixth Circuit found to be "in this case … without doubt … highly relevant." *Id.* But as the CCA noted in Leavell-Keaton's case, "the Sixth Circuit was careful to note that 'there could conceivably be some question about the relevance of' evidence of a defendant's good behavior while incarcerated between sentencing hearings in cases where the State does not argue that 'future dangerousness should keep [the defendant] on death row.'" *Keaton*, 2021 WL 5984951, at *67 (quoting *Davis*, 475 F.3d at 773). In Leavell-Keaton's case, the prosecutor did not at either sentencing or resentencing make a future dangerousness

argument when arguing that Leavell-Keaton should receive a death sentence. *Keaton*, 2021 WL 5984951, at *70.

The remaining cases Leavell-Keaton cites in support of her conflict are inapposite, as they concern new penalty-phase hearings. Pet. 13–14. *See Robinson v. Moore*, 300 F.3d 1320, 1323 (11th Cir. 2002) ("A jury again recommended death, by a vote of eight to four."); *Alderman v. Zant*, 22 F.3d 1541, 1550 (11th Cir. 1994) (addressing claims from "Alderman's 1984 resentencing trial"); *Spaziano v. Singletary*, 36 F.3d 1028, 1035 (11th Cir. 1994) (discussing case on *Gardner* remand, noting that "the order itself indicates that the purpose of the resentence hearing was to afford Spaziano an opportunity to present evidence in response to the PSI, and other evidence as well"); *Hanson v. Sherrod*, 797 F.3d 810 (10th Cir. 2015) ("At the end of the resentencing hearing, the jury recommended a death sentence for Hanson…."); *Wharton v. Vaugn*, 722 F. App'x 268, 271–72 (3d Cir. 2018) ("[A] new penalty hearing was held. As before, the jury returned a verdict of death.").

The Court should deny certiorari because the petition fails to present an important federal question or a circuit split. Framing the question as whether *Skipper* applies to resentencing in capital cases is imprecise and overbroad. Instead, Leavell-Keaton's case concerns the authority of a state appellate court to fashion an appropriate remedy short of reopening evidence to correct a state-law sentencing error that occurred after a full and unrestricted penalty phase hearing.

II. The Issue Is Unlikely to Recur.

The Court should also deny certiorari because there are few cases like this one, in which an allocution error requires a capital defendant to be resentenced and the defendant then seeks to reopen evidence while her case is before the trial court on limited remand. Some jurisdictions require the appellant to allege on appeal what he would have stated in allocution to allow the appellate court to determine whether the error was prejudicial.[14] *See, e.g., State v. Anderson*, 111 P.3d 369, 392 (Ariz. 2005); *State v. Brill*, No. 14-22-20, 2023 WL 1957524, at *6 (Ohio Ct. App. Feb. 13, 2023). Other jurisdictions have done away with allocution, finding the right has been displaced by their capital sentencing schemes.[15] *See, e.g.*, *People v. Tully*, 282 P.3d 173, 263 (Cal. 2012); *State v. Colon*, 864 A.2d 666, 789 (Conn. 2004); *People v. Jackson*, 793 N.E.2d 1, 20 (Ill. 2001); *State v. Green*, 443 S.E.2d 14, 43 (N.C. 1994); *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 857–58 (Pa. 1989). This Court should not devote further time to this narrow issue that is unlikely to arise again.

III. The Decision Below Was Correct.

Finally, the Court should deny certiorari because the CCA's decision was clearly correct. This Court has never extended *Skipper*'s rationale to include

[14] Though harmless-error analysis in this case would have been more efficient and just as appropriate constitutionally speaking, the trial court's finding that Leavell-Keaton's allocution was not mitigating and resentencing her to death is a de facto finding that the allocution error was harmless.

[15] The State in Leavell-Keaton's case originally argued that the right to allocution had been abrogated in capital cases, but "the State abandoned that argument during oral arguments and conceded that a remand was required for resentencing." App'x B at 1. Regardless of whether the CCA would have addressed that argument had the State not conceded the issue, the 2017 amendment of ALA. CODE § 13A-5-47, which abolished Alabama's jury override function, renders allocution after a jury's death verdict purely cathartic.

mandating a reopening of evidence at a new sentencing. And for good reason. There is no basis in the Eighth or Fourteenth Amendments for mandating that a defendant who had a full opportunity to present her penalty-phase case to a jury should have a right to do so again based on an unrelated error of state law.

This case demonstrates some of the absurdities that would arise from that rule. As the CCA noted, both Leavell-Keaton and her husband DeBlase had error-free evidentiary hearings at their respective penalty phases after being convicted of torturing and killing DeBlase's two young children. *Keaton*, 2021 WL 5984951, at *70. Under Leavell-Keaton's rule, she would have the "opportunity for her to 'update' her mitigating evidence because she was not afforded an opportunity to allocute at her original sentencing hearing, while DeBlase could *not* receive such opportunity because he *was* afforded an opportunity to allocute at his sentencing hearing." *Id.* To the extent the Constitution demands "that the death penalty … be imposed in a more consistent and rational manner," *Lockett*, 438 U.S. at 601 (plurality op.), Leavell-Keaton's proposed rule comes up short.

The scope of the proposed rule is unclear too. Perhaps it applies only to allocution errors, though Leavell-Keaton's pleadings in this case suggest she would apply it any time a case ends up before a trial court an additional time. Indeed, after the trial court granted her the right of allocution, but entered an order that failed to comply with a state law that requires the order to explicitly address certain aggravating and mitigating circumstances, the CCA again remanded so a new order could be entered. *See Keaton*, 2021 WL 5984951, at *7 (citing ALA. CODE § 13A-5-47).

Leavell-Keaton argued that she was entitled on this limited remand to present new mitigation evidence before the trial court corrected its order. 9th Supp. C. 23–24. There is no reason to grant some defendants a right to reopen evidence based on the happenstance of non-constitutional state-law errors.[16]

Moreover, Leavell-Keaton is hazy on the question of what sort of hearing would be required. In this case, the jury heard all the aggravating and mitigating evidence during a full and fair evidentiary hearing. Yet when Leavell-Keaton sought to introduce more evidence, she did not seek to assemble a new jury or reassemble the old one. She adamantly was "not asking for a new capital sentence hearing" or for "calling in a jury." 7th Supp. R. 22, 26. Yet it appears that the logic of her approach would be to require assembling a new jury, and thus reconducting the entire penalty phase again, with evidence old and new, to allow the jury to weigh new evidence against what evidence came before (to the extent it is still available). The risk of faded memories and lost evidence would undermine "reliability in the determination that death is the appropriate punishment in a specific case." *Oregon v. Guzek*, 546 U.S. 517, 525 (2006). It follows then that "the Eighth Amendment," which "does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit," *id.*, also does not deprive the State of its authority to set reasonable limits on *when* a defendant can submit that evidence. Here, Leavell-Keaton was given, in her own lawyer's words, "a hearing consistent with the

[16] Indeed, why not have appellate courts appoint special masters to consider new mitigating evidence of good conduct that has become available while the defendant's claims have been pending on appeal.

Constitution to determine her sentence." 7th Supp. R. 25–26. The Eighth Amendment does not require the State to allow her to reopen the record years later.

Finally, to the extent *Skipper* or related decisions could be read to require what Leavell-Keaton demands, the Constitution does not. Leavell-Keaton tortured and killed two children. "[D]eath is not a cruel and unusual punishment for the offense of which [she was] convicted." *Woodson v. North Carolina*, 428 U.S. 280, 324 (1976) (Rehnquist, J., dissenting); *see also Furman v. Georgia*, 408 U.S. 238, 381 (1972) (Burger, C.J., dissenting) ("[T]hese words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted."). Relatedly, nothing in original meaning of the Constitution bars States from "exclud[ing] evidence of a defendant's good behavior in jail following his arrest, as long as the evidence is not offered to rebut testimony or argument such as that tendered by the prosecution" in *Skipper*. *Skipper*, 476 U.S. at 11 (Powell, J., concurring in the judgment). But this case is not like the facts of *Skipper*, and the Eighth Amendment holding of *Skipper* lacks any basis in the Constitution. For that reason too, the state court's decision should not be disturbed.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

Cameron G. Ball
Assistant Attorney General

OFFICE OF ALA. ATT'Y GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund LaCour@AlabamaAG.gov