No. 22-6895

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

REPLY BRIEF FOR PETITIONER

MARK LOUDON-BROWN
Counsel of Record
SAMRIN ALI
SOUTHERN CENTER FOR
HUMAN RIGHTS
60 Walton Street NW
Atlanta, GA 30303
Phone: (404) 688-1202
Fax: (404) 688-9440
mloudonbrown@schr.org

Counsel for Heather Leavell-Keaton

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For decades, an administrable, bright-line rule has answered the question presented here: "in capital cases, 'the sentencer' may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence." *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) (per curiam). The purpose and logic underlying that rule apply with no less force when previously unavailable "relevant mitigating evidence," *id.*, is proffered at a resentencing hearing where the sentencer has discretion to impose life or death.

Neither the decision below nor Respondent's Brief in Opposition offer any persuasive reason to preclude consideration at resentencing of what all concede is relevant and reliable mitigating evidence of a capital defendant's positive conduct in prison. Deeply rooted American values underlying the proscription of cruel and unusual punishment demand that death sentences be imposed only after reasoned, individualized scrutiny of the character of the accused. Where, as here, significant new mitigation is available at a sentencing hearing at which the sentencer is called upon to impose death, the Constitution requires that the defendant have the opportunity to present that new evidence to the sentencer.

Respondent does not, because it cannot, advance any sound justification for the decision below. It instead makes feeble efforts to insulate this particular case from the rule of *Skipper v. South Carolina*, 476 U.S. 1 (1986). Specifically, Respondent tries to reframe this case as a question of state law error, even though the appellate court below squarely addressed the constitutional issue presented here. Respondent then attempts to explain away a split in authority that the lower

appellate court explicitly acknowledged and called upon this Court to resolve. Underscoring the weakness of its arguments for not applying *Skipper*, Respondent concludes by urging the Court to overrule *Skipper*, and presumably with it a host of this Court's other decisions requiring individualized sentencing in capital cases. The Court should reject Respondent's arguments, grant certiorari, and reverse the judgment below.

I. *SKIPPER* APPLIED TO MS. LEAVELL-KEATON'S RESENTENCING.

The straightforward question in this case is whether Ms. Leavell-Keaton was deprived of her Eighth Amendment "right to place before the sentencer relevant evidence in mitigation of punishment." *Skipper*, 476 U.S. at 4. There is no serious question that she was.

On appeal, the state court vacated her death sentence and she became an un-sentenced person. *See Keaton v. State*, No. CR-14-1570, 2021 WL 5984951, at *7 (Ala. Crim. App. Dec. 17, 2021). Her case was remanded to the trial court for a new sentencing hearing to determine, as if for the first time, whether she would be sentenced to death or life imprisonment without parole. On remand, she did not attempt to reopen all the evidence or to admit evidence that had been available at her original sentencing hearing. She simply asked for an opportunity to "place before the sentencer relevant evidence in mitigation of punishment" in the form of five years of good prison behavior that she could not possibly have made use of at the original hearing, and which was not in the record, because it simply did not exist then. *Skipper*, 476 U.S. at 4. But that evidence *did* exist at the time of the

second sentencing hearing, yet the sentencer was "precluded from considering" this "aspect of [Ms. Leavell-Keaton's] character" before sentencing her to death. *Id.* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)). That is exactly what *Skipper* and a host of other cases prohibit.

Neither Respondent's brief nor the lower court's opinion provides any plausible reason for carving Ms. Leavell-Keaton's case out from the rule of individualized sentencing in capital cases. The principal rationale advanced by the Alabama court and Respondent is that the remand in this case followed what was assumed to be an "unrestricted" and "error-free" evidentiary presentation at the original sentencing. *Keaton*, 2021 WL 5984951, at *70. Thus, Ms. Leavell-Keaton, in the lower court's words, had no "right to 'update' her mitigating evidence." *Id.* But that reasoning fails. The original evidentiary presentation may have been "unrestricted" with respect to the original sentencing; but when the sentencer was called upon to issue a new sentence five years later—either death or life without parole—the sentencing *was* restricted. It excluded important, newly available mitigating evidence. Like any un-sentenced person facing a death sentence, Ms. Leavell-Keaton was entitled to present the previously unavailable mitigating evidence to the sentencer. That approach is dictated by *Skipper* and virtually every other individualized sentencing decision this Court has issued. *See, e.g.*, *Parker v. Dugger*, 498 U.S. 308, 321 (1991); *Sumner v. Shuman*, 483 U.S. 66, 74-76 (1987); *Hitchcock*, 481 U.S. at 394; *Eddings*, 455 U.S. at 110; *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Neither the state court nor Respondent offers a coherent reason to

depart from the constitutional requirement of individualized sentencing in capital cases.

Respondent, like the state court, suggests that the main problem with allowing Ms. Leavell-Keaton to present new evidence at a resentencing is that it would undermine the Eighth Amendment's requirement of "consistent and rational" death sentencing by allowing Ms. Leavell-Keaton, but not her separately tried codefendant, John DeBlase, to "'update' her mitigating evidence." BIO 24; *see also Keaton*, 2021 WL 5984951, at *70. This argument is untenable for multiple reasons. Leaving aside that there is no evidence that Mr. DeBlase's prison record was mitigating to begin with, Respondent's and the lower court's position promotes the kind of "false consistency" that this Court's cases condemn. *See, e.g.*, *Eddings*, 455 U.S. at 112. At the time she was resentenced to death, Ms. Leavell-Keaton had the right to have all of her "individual differences," *id.*, taken into account. Artificially cutting off some aspects of her "character and record" for the sake of some misguided principle of codefendant parity disregards the "fundamental respect for humanity underlying" the requirement that each person facing the death penalty be considered as a unique individual. *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality op.)).

Moreover, Respondent and the state court completely undermine their parity rationale by in turn conceding that a different rule would apply if a prosecutor had "ma[d]e a future dangerousness argument when arguing that [Ms.] Leavell-Keaton should receive a death sentence." BIO 21-22; *Keaton*, 2021 WL 5984951, at *71

("[T]he defendant is not entitled to 'update' his or her mitigating evidence at the resentencing hearing when future dangerousness is not at issue."). If a prosecutor's choice of argument at resentencing can open the door for new, positive evidence about an accused's current adjustment to incarceration—which Respondent and the state court concede—there is no principled reason to treat an accused's ability to offer that same mitigating evidence as an affront to consistent and rational sentencing. In either case, the accused must be provided an opportunity to be considered by the sentencer as an individual contemporaneously with capital sentencing, not as the person she was one, two, five, or ten years ago. This is what *Skipper* requires.

Respondent's other arguments against reviewing this case are similarly baseless. Respondent concedes that Ms. Leavell-Keaton would have been entitled to present evidence of her positive adjustment to prison if "evidence ha[d] been reopened," BIO 19, but suggests that allowing additional evidence at the hearing in this case would have inevitably meant "a full opportunity to present her penalty phase case to a jury." BIO 24. That is false, and Respondent's lawyers know it. Although Alabama law provides for a penalty-phase evidentiary presentation to a jury, sentencing is ultimately performed[1] by the trial judge at a hearing after the

[1] After Ms. Leavell-Keaton's trial, Alabama changed its sentencing law to make the jury's sentencing determination binding on the trial court in future cases. Ms. Leavell-Keaton, however, was sentenced under a regime in which the jury provided a recommendation and the judge, at a subsequent sentencing hearing at which evidence could be offered, determined the sentence. This case concerns the latter sentencing hearing at which the judge, in an exercise of discretion, imposes either a death sentence or life without parole.

conclusion of the penalty phase. Alabama law directs trial courts conducting that final sentencing hearing to consider "[a]ny evidence which has probative value and is relevant to sentenc[ing]." *Woodward v. State*, 123 So. 3d 989, 1034-35 (Ala. Crim. App. 2011) (quoting Ala. Code § 13A-5-45(d)). Thus, the second sentencing hearing in this case provided a forum for presenting evidence to the sentencer without empaneling a jury or otherwise expanding the hearing beyond what Alabama law contemplates at every judicial sentencing in every capital case.

In addition, Respondent incorrectly suggests that Ms. Leavell-Keaton's argument is unclear with respect to the sort of hearing *Skipper* requires. *See* BIO 24. But Ms. Leavell-Keaton's argument is simple. Consistent with *Skipper*'s demands, anytime a sentencing authority has discretion to impose life or death, the sentencer *must* consider any mitigating evidence that is relevant to the sentencing determination, and evidence of good carceral conduct "by its nature" falls in that category. *Skipper*, 476 U.S. at 7. All this requires is a meaningful opportunity to present the new mitigation to the sentencer, not necessarily a jury, and not any and all evidence the defendant wants.[2] Ms. Leavell-Keaton was denied that opportunity despite facing and receiving what Respondent concedes is a new sentence of death. Indeed, Respondent elsewhere has insisted that new statutorily imposed

[2] Respondent alludes to a parade of horribles that could ensue if Ms. Leavell-Keaton were entitled to present mitigating evidence before she was sentenced to death below. *See* BIO 23-25. In support of this misguided hysteria, Respondent notes that on a second remand for the trial court to correct its sentencing order, Ms. Leavell-Keaton again raised the issue. She did so to ensure that the issue remained preserved and to give the trial court the opportunity to cure its error. It in no way clouds the clarity of the rule she seeks from this Court.

restrictions will apply in state post-conviction precisely *because* Ms. Leavell-Keaton "was sentenced to death after August 2017."[3] Respondent thus concedes that legal consequences flow from Ms. Leavell-Keaton's new death sentence when the consequences *disadvantage* her. All Ms. Leavell-Keaton seeks is evenhanded recognition by this Court that one of the consequences of facing a new discretionary death sentence is that she was entitled to present material, newly available mitigating evidence to the designated sentencer.

II. THIS CASE PROVIDES AN IDEAL VEHICLE.

This case presents an ideal vehicle through which the Court can address the critical constitutional question presented. Respondent claims that this case presents no Eighth Amendment issue because it concerns "only" a state appellate court's authority "to determine the appropriate remedy for a sentencing error." BIO 19; see also *id.* at 15-17. But even the court below recognized that its remand order "raise[d] the question whether [the court] had violated Keaton's constitutional rights" by "restricting the trial court from receiving mitigating evidence at the resentencing hearing." *Keaton*, 2021 WL 5984951, at *66; *see id.* ("[W]e think it prudent to address now, in this initial stage of judicial review, whether Keaton was entitled to present mitigating evidence at the resentencing hearing.").

Furthermore, the court below explicitly stated that the constitutional question in this case had been left unresolved by this Court. Thus, Respondent's

[3] State's Answer and Motion to Dismiss ¶ 13, *State v. Leavell-Keaton*, No. 02-CC-2012-3096.60 (Mobile Cty. Cir. Ct. Sept. 9, 2022).

repeated suggestion that the circuit split Ms. Leavell-Keaton referenced in support of certiorari is a fiction is both incorrect and disingenuous. *See* BIO at 20 (split "does not exist"); 21 ("her supposed split"); 22 ("her conflict"). It was the Alabama Court of Criminal Appeals that identified the conflicting decisions on this issue: "In the absence of guidance from the United States Supreme Court, other courts have been unable to reach a consensus as to whether *Skipper*" would apply here. *Keaton*, 2021 WL 5984951, at *67. Accordingly, this Court is not being called upon for mere "error correction." BIO 19. To the contrary, this case illustrates the urgent need for this Court to intervene and clarify that *Skipper* applies when a person is facing a resentencing at which death is an option, in order to prevent lower courts from further eroding the constitutional right to individualized sentencing.

III. MS. LEAVELL-KEATON'S *SKIPPER* EVIDENCE MATTERED.

It is telling that Respondent not once disputes the materiality or inherent mitigating value of Ms. Leavell-Keaton's good prison conduct to the discretionary sentencing determination. This is a case where the jury was divided as to sentencing and where the jury declined to convict Ms. Leavell-Keaton of capital murder as to one of the children. Thus, the prison adjustment evidence could have made a difference to the imposition of life or death.

Respondent claims the State did not argue future dangerousness at Ms. Leavell-Keaton's first or second sentencing hearing. *See* BIO 21-22. That assertion is inaccurate. In her penalty phase closing argument to the jury, the district attorney called Ms. Leavell-Keaton "a very dangerous woman" who "manipulates

[people] even now in jail." T.R. 5629. Likewise, at the first judicial sentencing, the district attorney insisted that the death penalty was needed because Ms. Leavell-Keaton was "domineering, manipulative, deceitful, and morally unhinged," T.R. 5671—characterizations wholly at odds with Ms. Leavell-Keaton's prison record. The district attorney also attempted to portray Ms. Leavell-Keaton as a troublemaker in jail through the testimony of a fellow jail detainee who did not like her and phone calls alluding to minor altercations. *See, e.g.*, T.R. 5521-22, 5525-28. In both sentencing orders,[4] the trial judge sided with the district attorney, characterizing Ms. Leavell-Keaton as "aggressive toward other [incarcerated people] on several occasions" and giving Ms. Leavell-Keaton's evidence of good conduct in jail "slight weight." T.C. 62; 9th Supp. T.C. 87.

Thus, at the point at which the trial court excised more than five years of mitigating evidence from Ms. Leavell-Keaton's sentencing determination, it had heard the worst about her and got a sense of her conduct in jail from the prosecution witnesses, evidence that could have supported a conclusion that death was warranted in light of anticipated future conduct in prison. That evidence, relied on by the judge in imposing death for the second time, misrepresented Ms. Leavell-Keaton's carceral conduct. Ms. Leavell-Keaton's right to respond with five years' worth of mitigating evidence therefore is protected not only by *Skipper* and its progeny, but even under Respondent's *Skipper*-plus-dangerousness requirement.

[4] During remand proceedings, the trial judge noted that he had "reviewed the transcript" of the first sentencing and "considered" it during the resentencing. 7th Supp. T.R. 72.

Moreover, the evidence Ms. Leavell-Keaton sought to admit was highly reliable evidence of her individual character. As a group of former wardens wrote as *amici*, "*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." Brief of Former Corrections Officials as *Amici Curiae* in Support of Petitioner at 7. "Corrections staff can therefore be trusted to give impartial testimony that accurately reflects their observations and opinions about a particular defendant's character." *Id.* at 9.

IV. IT IS CRITICALLY IMPORTANT TO PRESERVE INDIVIDUALIZED SENTENCING IN CAPITAL CASES.

Respondent attempts to diminish the importance of this case by suggesting that this issue is unlikely to recur, and by minimizing the harm to come absent guidance from this Court. *See* BIO 14. Respondent is wrong for several reasons.

First, the importance of *Skipper* and its progeny cannot be cabined to allocution-related errors, and this issue will continue to arise in different contexts without guidance from this Court. For example, if a defendant is improperly prevented from presenting an expert diagnosing her with severe mental illness at the sentencing trial, and the state appellate court remands for only the admission of that evidence, does that then mean that the state court can ban the defendant from introducing *Skipper* evidence at that hearing? Should, as Respondent suggests, the error causing the remand be dispositive of its scope and prevail over the Constitution to dictate whether evidence deemed inherently relevant to the determination of life or death is presented and considered? The only sound

conclusion here is that the error causing the remand in a case such as this cannot be the deciding factor. Rather, two things matter: (1) whether the sentencing authority has discretion to impose life or death, and (2) whether there is new mitigation evidence that is relevant to the sentencing determination—indeed, that is the very heart of *Skipper* and its progeny. Here, both are present. The judge had discretion to sentence Ms. Leavell-Keaton to life or death because she had become an un-sentenced person once her sentence was vacated, and she had five years of new mitigating evidence of good carceral conduct, which is "by its nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 7. The singular question for this Court, therefore, is whether the central holding of *Skipper*—that evidence of good carceral conduct is "natur[ally]" relevant to the sentencing determination—ceases to exist for a person rendered un-sentenced, who must once again face the discretionary decision of life or death. *Skipper*'s reasoning undeniably answers this question in the negative.

Second, Respondent's suggestion that this is an Alabama-only issue is plainly inconsistent with the number of jurisdictions that recognize the right to allocution, particularly in capital cases.[5] This vital right to appear, defend oneself, plea for

[5] The right to allocution is recognized in many states and by the federal government. *See People v. Borrego*, 774 P.2d 854 (Colo. 1989)); *Hill v. State*, 962 S.W.2d 762 (Ark. 1998); *Shelton v. State,* 744 A.2d 465 (Del. Supr. 2000); *Harris v. State*, 509 A.2d 120 (Md. Ct. App. 1986); *Homick v. State*, 825 P.2d 600 (Nev. 1992); *State v. Zola*, 548 A.2d 1022 (N.J. 1988); *State v. Tomlinson*, 647 P.2d 415 (N.M. 1982); *State v Green*, 738 N.E.2d 1208 (Ohio 2000); *DeAngelo v. Schiedler*, 757 P.2d 1355 (Or. 1988) (en banc); *Robalewski v. Superior* Court, 197 A.2d 751, 753 (R.I.1964); *Commonwealth v. Bassett*, 284 S.E.2d 844 (Va. 1981); *State v. Maestas*,

mercy, and equip the sentencing authority with the relevant mitigation evidence it needs to properly decide between life and death is by no means unique to Alabama. As this Court has guided, "trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing." *Green v. United States*, 365 U.S. 301, 305 (1961) (plurality opinion).

This Court should not overrule *Skipper*, nor should it allow states to erode *Skipper* in the context of resentencing. In its rush to eliminate Ms. Leavell-Keaton from the human community, the State overlooks the right our country affords its inhabitants to life. It overlooks that grounded in this nation's history is the fundamental belief that the government may not deprive a person of life without due process of law. It overlooks that in our country, before condemning a person to death, we believe we ought to know any and all factors relevant to that determination, particularly those that are "by [their] nature relevant" mitigation. *Skipper*, 476 U.S. at 7. "Consistent with the Eighth Amendment's underlying principles, *Skipper*'s rule respects capital defendants' humanity by admitting reliable and important evidence of a defendants' character and individual traits before a sentencer inflicts the most severe punishment that our society permits." Amicus at 16.

63 P.3d 621 (Utah 2002); *State v. Young*, 853 P.2d 327 (Utah 1993); *State v. Lord*, 822 P.2d 177 (Wash. 1991); Fed. R. Crim. P. 32.

CONCLUSION

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

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with Supreme Court Rule 29, on April 25, 2023, I served a copy of the foregoing via first class mail, postage prepaid, and via email, upon counsel for the Respondent.

Edmund G. LaCour Jr.
Solicitor General
Cameron G. Ball
Assistant Attorney General
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
Edmund.LaCour@AlabamaAG.gov
Cameron.Ball@AlabamaAG.gov

/s/ *Mark Loudon-Brown*
Mark Loudon-Brown