No. _____

In the Supreme Court of the United States

BILL COOL, WARDEN,

Petitioner,

v.

NATHANIEL JACKSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE

QUESTION PRESENTED

This Court's precedent in *Lockett*, *Eddings*, and *Skipper* require that state courts admit and consider all relevant mitigating evidence that a death-eligible convict wants to present. And when the state courts fail to do so, this Court has remanded for them to fix the error. The question is:

Has this Court clearly required state courts to reopen the mitigation evidence in every death-penalty remand, even if the error did not affect the defendant's opportunity to submit mitigation evidence?

LIST OF PARTIES

The caption lists all parties to the proceeding.

LIST OF DIRECTLY RELATED PROCEEDINGS

Direct Review:

1. *State v. Jackson*, No. 01-CR-794, 2002 WL 34254514 (Ohio Com.Pl. Dec. 09, 2002) (Findings of Facts and Conclusion of Law).
2. *State v. Jackson*, 107 Ohio St. 3d 300 (2006) (affirming death sentence).
3. *State v. Jackson*, 108 Ohio St. 3d 1408 (2006) (granting stay of execution).
4. State v. Jackson, 111 Ohio St. 3d 1406 (2006) (denying application to reopen).
5. *Jackson v. Ohio*, 547 U.S. 1182 (2006) (denying certiorari).

First Postconviction Petition:

6. *State v. Jackson*, 2006-Ohio-2651 (11th Dist.) (affirming dismissal of postconviction petition)
7. *State v. Jackson*, 110 Ohio St. 3d 1407 (2006) (dismissing motion to stay).
8. *State v. Jackson*, 111 Ohio St. 3d 1469 (2006) (declining to review).

Motion for Relief from Judgment:

9. *In re Disqualification of Stuard*, 113 Ohio St.3d 1236 (2006) (denying disqualification motion).
10. *State v. Jackson*, 2010-Ohio-1270 (11th Dist.) (affirming trial court's denial of motion for relief from judgment).
11. *State v. Jackson*, 135 Ohio St. 3d 1470 (2013) (declining to review).

Second Sentencing:

12. *State v. Jackson*, 120 Ohio St.3d 1450 (2008) (dismissing appeal from denial of new trial motion).
13. *State v. Jackson*, 2010-Ohio-5054 (11th Dist.) (reversing denial of new trial and/or sentencing motion, remanding for resentencing).
14. *State ex rel. Jackson v. Stuard*, 2012-Ohio-4209 (11th Dist.) (dismissing petition for writ of prohibition).
15. *State v. Jackson*, 135 Ohio St. 3d 1455 (2013) (vacating and remanding on jurisdictional issue).
16. *State v. Jackson*, 2015-Ohio-6 (11th Dist.) (affirming denial of second new trial motion).
17. *State v. Jackson*, 148 Ohio St. 3d 1409 (2017) (declining to review denial of second new trial motion).
18. *Jackson v. Ohio*, 583 U.S. 844 (2017) (denying certiorari to Court of Appeals).
19. *State v. Jackson*, 149 Ohio St. 3d 55 (2016) (affirming second death sentence).
20. *State v. Jackson*, 147 Ohio St. 3d 1439 (2016) (denying reconsideration).
21. *Jackson v. Ohio*, 581 U.S. 921 (2017) (denying certiorari to Ohio Supreme Court).
22. *State v. Jackson*, 151 Ohio St. 3d 1422 (2017) (denying application to reopen).

Second Postconviction Petition:

23. *State v. Jackson*, 2015-Ohio-7 (11th Dist.) (affirming dismissal of postconviction petition).
24. *State v. Jackson*, 148 Ohio St. 3d 1409 (2017) (declining to review).

Motion for New Trial:

25. *State v. Jackson*, 2018-Ohio-2146 (11th Dist.) (affirming denial of Jackson's motion for leave to file a motion for a new mitigation trial).
26. *State v. Jackson*, 153 Ohio St. 3d 1495 (2018) (declining to review).
27. *Jackson v. Ohio*, 139 S. Ct. 1334 (2019) (denying certiorari).

Federal Habeas:

28. *Jackson v. Houk*, No. 4:07-CV-00880, 2021 WL 698590 (N.D. Ohio Feb. 23, 2021) (granting habeas).
29. *Jackson v. Cool*, 111 F.4th 689 (6th Cir. 2024) (affirming in part, reversing in part, and remanding).
30. *Jackson v. Cool*, No. 21-3207/3280, 2024 WL 4195143 (6th Cir. Sept. 5, 2024) (denying en banc review).

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INTRODUCTION

State courts go to great lengths to provide defendants with every right the Constitution and laws afford. Their efforts are wasted when the federal courts wrongly issue writs of habeas corpus. For that and many other reasons, Congress acted almost thirty years ago to tamp down on federal habeas review of state-court criminal judgments. And this Court has honored Congress's boundaries.

The court below did not. Contrary to this Court's instructions, it extended Supreme Court precedent to require States to shoulder burdens beyond what constitutional law, as clearly established by this Court, requires of the States. The Sixth Circuit held that a state court must afford capital defendants a new chance to submit mitigating evidence when their cases are remanded for penalty-phase error, even if their prior mitigation hearings were flawless, and even if the error prompting the remand did not affect the presentation of evidence at all.

The Sixth Circuit's holding is the subject of a split, which is itself good evidence that its reading of the law is not actually clearly established. And because the Sixth Circuit and Ohio are on opposite sides, the split is particularly disruptive. This case provides a good vehicle—and a pressing reason—to take up the question presented and clarify the procedures required of state courts in capital remands under this Court's precedents in *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1 (1986).

OPINIONS BELOW

The District Court granted Jackson's habeas petition on February 23, 2021. *Jackson v. Houk*, No. 4:07-

CV-00880, 2021 WL 698590 (N.D. Ohio Feb. 23, 2021). The Sixth Circuit affirmed in part, reversed in part, and remanded on August 6, 2024. Its opinion is published at *Jackson v. Cool*, 111 F.4th 689 (6th Cir. 2024). The circuit court denied en banc review on September 5, 2024. *Jackson v. Cool*, No. 21-3207/3280, 2024 WL 4195143 (6th Cir. Sept. 5, 2024).

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case under 28 U.S.C. §1331. The Sixth Circuit had jurisdiction under 28 U.S.C. §1291. The Sixth Circuit issued its opinion and judgment on August 6, 2024. The circuit court denied en banc review on September 5, 2024. This petition timely invokes this Court's jurisdiction under 28 U.S.C. §§1254(1), 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution says:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

Nathaniel Jackson plotted a murder on a recorded prison phone line. *State v. Jackson*, 149 Ohio St. 3d 55, 56 (2016). He also wrote about his plans in letters to his accomplice and lover, Donna Roberts. *Id.* Together, the pair planned to kill Roberts's ex-husband, Robert Fingerhut, with whom she lived. *Id.* They would then be able to live together and enjoy the over half-million dollars in the ex-husband's life-insurance proceeds. *Id.*

The plan went awry. Roberts did her part to supply Jackson with gloves, a mask, and access to the house. *Id.* at 57. And Jackson followed through by shooting Fingerhut to death. *Id.* But Fingerhut apparently scuffled with Jackson and injured the assailant's finger, so Jackson left blood in Fingerhut's car, which he had stolen to flee the crime scene. *Id.* at 57–58. Jackson later admitted that he shot Fingerhut but maintained that he had done it in self-defense. *Id.* at 57.

Jackson was convicted and sentenced to death. *Id.* at 58. But eventually he found out that his sentencing judge had involved the prosecutor in drafting the sentencing opinion—an ethical infraction and violation of state law. *Id.* at 58–60. So his case went back for a second sentencing. *Id.* at 60–61. While on remand, Jackson sought to introduce new mitigating evidence. *Id.* at 61. The trial court did not allow it. *Id.* The court sentenced Jackson to death again. *Id.* Jackson lost the subsequent appeals and state postconviction proceedings.

Jackson next filed a petition for habeas corpus. Pet. App.8a. Relevant here, he argued that his sentencing judge had been biased, that he was entitled to introduce new evidence when his case was remanded, and that his mitigation counsel had been constitutionally ineffective. *Id.* The District Court agreed that he had the right to introduce new mitigation evidence on remand, but it denied relief on the other claims. *Id.*

The Sixth Circuit agreed that Jackson was entitled to introduce new mitigation evidence on remand. Pet. App.18a–27a. It read this Court's precedents as requiring a reopening of mitigation evidence any time a death-penalty case is remanded, even if there was no

error in the first mitigation evidentiary hearing. Pet. App.19a–23a. It also found, though, that the sentencing judge had been unconstitutionally biased. Pet. App.10a–18a. On the ineffective-assistance claim, Jackson admitted that he had failed to develop a cognizable claim in the District Court, so he asked the Sixth Circuit to remit the decision on that claim. Pet. App.27a–28a. The court obliged. *Id.*

The Warden sought en banc review. He pointed out that the panel's opinion had expanded on Supreme Court precedent in a way that the Antiterrorism and Effective Death Penalty Act (AEDPA) does not allow. The court denied en banc review. Pet. App.85a.

REASONS FOR GRANTING THE WRIT

The circuits and state high courts are split on what this Court requires in death penalty remands. Some take this Court's precedents to clearly establish that State courts must provide a new mitigation hearing if the first hearing was tainted by error. Others understand this Court to clearly mandate a redo of the mitigation hearing for any error during the penalty phase, even during events after the close of mitigation evidence. In circuits with the latter rule, State courts are functionally prohibited from conducting limited remands in death penalty cases. Even remanding to cure a state-law error in the method of announcing the sentence can trigger an all-new mitigation hearing.

The discrepancy causes significant disruption for States in an area that already taxes considerable resources. The disorder is maximized when a circuit is split with one of its constituent States. In that situation—which is reality for Ohio and a latent conflict for many other States—criminal proceedings can lock in a vortex in which the circuit demands a procedure that

the State's high court holds is inappropriate. Only clarity from this Court can resolve the conflict and provide a clear pathway forward.

I. The circuits and state high courts are split on what this Court requires on remand in a death-penalty case.

Three circuits and two state high courts have weighed in on whether this Court requires a reopening of the mitigation evidentiary hearing every time a capital case is remanded for error in the penalty phase. Ohio and South Dakota do not require a redo of the mitigation hearing unless the error infected the original hearing. Idaho, the Sixth Circuit, and the Ninth Circuit, however, require States to reopen the mitigation evidence phase any time a death-penalty case is remanded.

A. Ohio and South Dakota hold that state courts are required only to cure error on remand, not restart the mitigation evidentiary hearing.

For Ohio and South Dakota, the guiding principle is that the scope of the error determines the scope of the remand. All agree that the original sentencing requires an evidentiary hearing where "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce." *State v. Berget*, 2014 S.D. 61, ¶23 (quotation omitted). But remands are different from the original proceedings; they occur only to fix an error in the prior proceeding. So for these two States, whether the original mitigation evidentiary hearing suffered from an error determines whether a defendant should be permitted to reopen the hearing.

Start with the background principles applicable to remands. Normally, courts use remands to remedy errors by redoing the proceedings tainted by error. In simple terms, "the remedy should be appropriate to the violation." *Waller v. Georgia*, 467 U.S. 39, 50 (1984). Determining the scope of the violation, and its effect on the surrounding proceedings, is key for conducting an appropriate remand. *Goldberg v. United States*, 425 U.S. 94, 111 (1976); *Jackson v. Denno*, 378 U.S. 368, 394, (1964). After all, gratuitous relitigation of phases unaffected by the error "would be a windfall for the defendant, and not in the public interest." *Waller*, 467 U.S. at 50.

Against that backdrop, the Ohio and South Dakota high courts have seen no reason to order or allow reopening of mitigation evidentiary hearings on remand when all agree that those original hearings were untainted. In *Berget*, the defendant introduced all the mitigating evidence he wished at his original mitigation hearing, but the trial court included an improper aggravating circumstance when it weighed the evidence. 2014 S.D. 61, ¶3. Accordingly, the South Dakota Supreme Court remanded for the trial court to redo the weighing of the evidence "on the existing record," but not to reopen the mitigation evidence. *Id.* at ¶4.

The Ohio Supreme Court has held similarly. In one case, a defendant claimed a right to introduce new evidence during a remand to cure errors in the judge's "independent evaluation … and in his original sentencing opinion." *State v. Chinn*, 85 Ohio St. 3d 548, 562 (1999). The court explained that the defendant "was given a full opportunity to present such evidence at the initial sentencing hearing," and the "error for which we remanded … occurred after the mitigating

evidence had been presented." *Id.* at 563. That means the error had not affected the presentation of mitigation evidence, so the trial court was right to "proceed from the point at which the error occurred" rather than backing up and redoing the mitigation hearing. *Id.* The Ohio Supreme Court later reaffirmed its holding in another case. *State v. Goff*, 154 Ohio St. 3d 218, 222 (2018). The "underlying error" there (failing to heed the state-law right to allocute) happened after the defendant "had an opportunity to present mitigation evidence and the factfinder ha[d] made its sentencing recommendation." *Id.* Thus, the trial court "had to proceed from the point" of the error and "did not err in excluding … additional mitigation evidence." *Id.* at 223.

Both the South Dakota and Ohio Supreme Courts reached their conclusions in the light of this Court's precedents. The *Berget* court analyzed the differences between its case and *Skipper*, 476 U.S. at 4–5. It explained that the error in *Skipper* had been "excluding mitigation evidence" at the defendants first mitigation hearing, thus "tainting the subsequent sentencing hearing." 2014 S.D. 61, ¶30. That explains why this Court required the state court to redo the presentation of evidence. *Id.* But in *Berget*, the trial court "only improperly considered evidence … after the hearing was completed, during its deliberation," meaning that "[t]he sentencing hearing itself was not tainted." *Id.* at ¶31. Simply reconsidering the evidence without the improper aggravating factor was "sufficient to correct this error on remand." *Id.* In sum, the South Dakota Supreme Court concluded that this Court "has not determined, in *Skipper* or otherwise, that a capital defendant has a categorical constitutional right to introduce new mitigation evidence

discovered after a sentencing hearing in which the defendant was given the opportunity to present all mitigation evidence he desired." *Id.* at ¶32.

The Ohio Supreme Court likewise noted that "each of [this Court's] cases" about the right to present mitigation evidence "involved a situation where the capital sentencer was prohibited, in some form or another, from considering relevant mitigating evidence at trial." *Chinn*, 85 Ohio St. 3d at 564. In contrast, when "no relevant mitigating evidence" is unlawfully excluded in the original mitigation hearing, there is no analogous error to cure. *Id.* In short, if all the "errors requiring resentencing occurred after the close of the mitigation phase of the trial," the court concluded that *"Lockett*, *Skipper*, and *Hitchcock* [were] inapplicable" and the proper course was to "proceed on remand from the point at which the error occurred." *Id.* at 564–65.

* * *

For Ohio and South Dakota, the animating principle to draw from this Court's precedent is correcting error. Using that principle to apply this Court's precedent, those courts concluded that the Constitution does not require a new mitigation evidentiary hearing when no error infected the first hearing.

B. Idaho and the Sixth and Ninth Circuits hold that state courts are required to reopen the mitigation evidentiary hearing on remand for any reason.

Idaho and two circuits go the opposite way. For those courts, the animating principle is that a judge who is entering a sentence on remand is considering what sentence to enter, and anyone considering

whether to enter a sentence of death must have on the record all currently existing mitigation evidence the defendant wishes to present. As a result, the determining factor is whether a sentence will be entered during the remand proceedings. If it will—and if that sentence could be death—then these three courts hold that the Constitution requires reopening the mitigation evidence so that the court is updated before it enters the sentence.

The Idaho Supreme Court's precedent shows this principle in action. In the leading case, the trial judge had erred by sending findings of fact and conclusions of law to the defendant without holding a sentencing hearing in open court as required by state law. *Sivak v. State*, 112 Idaho 197, 199 (1986). But when the trial court went to fix that error on remand, the defendant attempted to add more mitigation evidence. *Id.* at 199–200. The trial court did not allow it. *Id.* The Idaho Supreme Court found that to be error. It noted "the critical importance of mitigation evidence to the imposition of the death sentence" and concluded that this Court's precedent required the updated mitigation evidence to be admitted. *Id.* at 200.

Two circuits have followed suit. The Ninth Circuit adopted the Idaho Supreme Court's holding because it found it "highly persuasive." *Creech v. Arave*, 947 F.2d 873, 881 (9th Cir. 1991), *as amended on denial of reh'g* (Oct. 16, 1991), *rev'd in part on other grounds*, 507 U.S. 463 (1993).

The Sixth Circuit has also joined this side of the split. Previously, the Sixth Circuit had partially endorsed this line of thought, but only when the defendant missed out on an opportunity to rebut a prosecutor's argument about future dangerousness. The

defendant had sought to introduce new evidence about his "exemplary behavior on death row" to rebut the prosecutor's arguments about future dangerousness at his second sentencing. *Davis v. Coyle*, 475 F.3d 761, 770, 772 (6th Cir. 2007). The court wrote that the "core" of *Skipper* was that "the right of a defendant to present evidence of good behavior in prison is particularly relevant when a prediction of future dangerousness figures centrally in a prosecutor's plea for imposition of the death penalty." *Id.* at 771. It found that the state court had violated that core right to rebuttal. *Id.* at 773. In this case, the Sixth Circuit extended that precedent even further, holding that a capital defendant always has a right to introduce new evidence on remand. Pet. App.18a. Like Idaho, the court reviewed this Court's precedents and distilled a principle requiring that a sentencer have all currently available mitigation evidence when entering a sentence of death. Pet. App.18a–23a.

Because of the nature of habeas review, the circuit courts that adopted this side of the split have an added layer. Federal courts reviewing state-court judgments may only grant the writ for legal error if the state court's judgment is "contrary to" or "an unreasonable application of" the "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). In other words, unless this Court has clearly said it, it does not bind the state courts. *Brown v. Davenport*, 596 U.S. 118, 136 (2022). That means that the Ninth and Sixth Circuits—both of which were reviewing state-court judgments on habeas—necessarily held that this Court *clearly established* a right to introduce new evidence on remand. They could not have issued the writ by simply holding

that they had the better argument for how to extend the precedents to a new situation.

II. This case merits review.

The question presented warrants this Court's attention. First, it implicates core issues of federalism and state sovereignty that this Court has deemed worthy of protection. Second, the split has now become a particularly disruptive conflict between a circuit and a State judiciary whose judgments it reviews. And this case presents a good vehicle for resolving the split.

A. The split implicates federalism and state sovereignty.

The question presented impacts the State's "core power to enforce criminal law." *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022). Because federal habeas review "intrudes on state sovereignty," this Court has repeatedly intervened to preserve the safeguards in AEDPA and this Court's precedents. *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see, e.g.*, *Shoop v. Twyford*, 596 U.S. 811 (2022); *Dunn v. Reeves*, 594 U.S. 731 (2021) (per curiam); *Alaska v. Wright*, 593 U.S. 152 (2021) (per curiam); *Mays v. Hines*, 592 U.S. 385 (2021) (per curiam); *Shinn v. Kayer*, 592 U.S. 111 (2020) (per curiam); *Shoop v. Hill*, 586 U.S. 45 (2019) (per curiam); *Sexton v. Beaudreaux*, 585 U.S. 961 (2018) (per curiam).

This case calls for such intervention. To begin, the disagreement among the courts suggests that this Court has not "clearly established" the right that Idaho and the Ninth and Sixth Circuits claimed exists. Instead, these circuits have held the state courts to their own estimation about how courts should

extend this Court's precedents to a previously undiscussed scenario. This Court has condemned that move and should put a stop to it again here. *White v. Woodall*, 572 U.S. 415, 426 (2014).

Even beyond that violation, this split implicates federalism and state powers because it needlessly increases the burden on States administering their criminal justice systems. Evidentiary hearings can be "sprawling," days-long ordeals. *Ramirez*, 596 U.S. at 388. States invest significant resources to ensure that each capital defendant enjoys a fulsome and fair mitigation evidentiary hearing. To hold that they must do so again on every remand, even though they conducted them without error beforehand, is burdensome and demoralizing. This Court has sought to ensure that state proceedings will not be reduced to a "tryout" because of inevitable and extensive future proceedings. *Id.* at 377 (quotation omitted). But if a second resentencing hearing is around the corner for any remand, the first sentencing hearing may become just that.

B. The split disrupts Ohio law.

While any split leaves geographic disuniformity, this split is far more disruptive because of the interplay between overlapping jurisdictions. Binding Ohio law dictates that a new mitigation hearing is not necessary when a case is remanded to fix an unrelated error. *Chinn*, 85 Ohio St. 3d at 564–65; *Goff*, 154 Ohio St. 3d at 222. And lower Ohio courts "may not extend or vary the mandate given" in a limited remand. *State ex rel. Mather v. Oda*, 174 Ohio St. 3d 526, 530 (2023) (quotation omitted). Meanwhile, the Sixth Circuit's precedent does not bind Ohio Courts. *Lockhart v. Fretwell*, 506 U.S. 364, 375–76 (1993) (Thomas, J.,

concurring); *State v. Burnett*, 93 Ohio St. 3d 419, 424, (2001). But it does bind future Sixth Circuit panels. 6th Cir. R. 32.1(b). This squeeze locks lower Ohio courts into a Morton's fork: follow the binding directives of the higher Ohio courts, or defy the Ohio courts and conduct the mitigation do-overs the federal courts will later require. The only solution is for this Court to resolve the conflict.

Indeed, courts across the country have long used limited remands to cure penalty-phase errors in capital cases without detecting any constitutional problem—including some States in circuits that now would prohibit the practice. *See, e.g.*, *State v. Bowen*, 352 Or. 109, 115–16 (2012); *Lambert v. State*, 2003 OK CR 11, ¶¶5–6; *Echols v. State*, 344 Ark. 513, 519 (2001); *Hoskins v. State*, 702 So. 2d 202, 211 (Fla. 1997) (per curiam); *State v. Schackart*, 175 Ariz. 494, 499 (1993); *People v. Brown*, 45 Cal. 3d 1247, 1251 (1988). The holdings of the Sixth and Ninth Circuits thus threaten these widespread practices even in States where an explicit split has yet to materialize.

C. This case is a good vehicle for answering the question.

This case provides a good vehicle for this Court to answer the question presented. Both factually and legally, nothing stands in the way of this Court's clear view of the question.

Factually, the parties do not dispute any of the facts that set up the question presented. All agree that Jackson had a full mitigation hearing in his first sentencing, that his case was remanded for an opinion-drafting error, and that he sought but was denied the chance to add more mitigation evidence on remand. Indeed, these facts are the model for how this

question has occurred in the past and will continue to arise.

Legally, the court below squarely addressed the question presented in a published opinion. Each party thoroughly briefed and argued the question, and the district court also ruled on the same question.

Although the mitigation-reopening holding was not the only ground for habeas relief, it was dispositive on the scope of the writ. Because the Sixth Circuit also found that the state court unreasonably adjudicated Jackson's judicial-bias claim, this case will still return to state court for a resentencing. If the Sixth Circuit's mitigation-reopening holding stands, the state court will also be required to hold a new evidentiary hearing to accept all of Jackson's updated mitigation evidence. But if this Court clarifies that the Sixth Circuit overstepped its authority in extending *Skipper*, then the State will only need to cure the judicial bias. And it could do so on the existing record. In other words, a favorable decision by this Court would dramatically alter the future proceedings in this case.

This case is a better vehicle than the case in which this Court denied certiorari on the same question. In *Keaton*, the Alabama intermediate court of appeals agreed with Ohio and South Dakota that reopening the mitigation evidence is not appropriate on a remand for unrelated errors. *Keaton v. State*, 375 So. 3d 44, 146–7 (Ala. Crim. App. 2021). This Court denied the defendant's petition for certiorari. *Leavell-Keaton v. Alabama*,143 S. Ct. 2585 (2023). Two reasons the State gave for doing so were that "the decision below [was] correct" and an estimation that the issue was "unlikely to recur." Brief in Opp., *Keaton v. Alabama*,

No. 22-6895, at 23 (U.S. April 11, 2023). Here, the first reason does not apply to the Sixth Circuit's error, and the second is proven untrue. More yet, at the time *Keaton* came to this Court, the Sixth Circuit and Ohio were not yet locked into their present irreconcilable disagreement.

III. The Sixth Circuit's decision was wrong.

The Sixth Circuit erred twice over in reaching its decision. First, although it was reviewing a state court judgment under AEDPA, it extended this Court's precedent to cover a scenario that it has never ruled on before. Second, its extension of precedent was wrong even as an initial matter.

AEDPA protects respect and finality for state court criminal judgments. It permits habeas intervention for legal error only when the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. §2254(d). This Court has explained—many times—that this standard does not permit federal appeals courts to establish the law that binds state courts, or to grant relief any time a federal court would have decided a case differently in the first instance. *See Johnson v. Williams*, 568 U.S. 289, 305 (2013); *Richter*, 562 U.S. at 103; *see also Woodall*, 572 U.S. at 426; *Lopez v Smith*, 574 U.S. 1, 7 (2014); *Davenport*, 596 U.S. at 144.

The Sixth Circuit ran afoul of that guardrail. It took this Court's holdings in *Lockett*, *Eddings*, and *Skipper*, which protect the right to a full and fair mitigation hearing, and then extended them to establish requirements for remands even after flawless mitigation hearings. But this Court has never commanded

that state courts must redo the mitigation phase when a case is remanded for an unrelated error.

Even apart from AEDPA, that holding would make little sense. The background principles of remands, discussed above at 6, would counsel the exact opposite. Indeed, the best reading of this Court's precedent in *Eddings* is at odds with the Sixth Circuit's holding. This Court remanded for the state courts to "consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances," explaining that this Court would "not weigh the evidence for them." *Eddings*, 455 U.S. at 117. By declining to "weigh the evidence for [the state court]," the Court implied that the "relevant mitigating evidence" was the evidence that was already admitted but not properly considered. *Id.*

Moreover, the *Skipper* line of cases already went beyond the original understanding of the Eighth Amendment, which prohibits "cruel and unusual punishment." U.S. Const. amend. VIII; *see Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and in judgment); *Bucklew v. Precythe*, 587 U.S. 119, 129–32 (2019). Instead of expanding *Skipper*, the Sixth Circuit should have "resolve[d] questions about the scope of … precedents in light of and in the direction of the constitutional text and constitutional history." *United States v. Rahimi*, 144 S. Ct. 1889, 1920 (2024) (Kavanaugh, J., concurring).

Finally, extending Supreme Court precedent to create a right to add mitigation evidence on remand could create an arbitrary distinction between otherwise similarly situated defendants. For example, Berget in the South Dakota case had a co-defendant whose case was not remanded. *Berget*, 2014 S.D. 61,

¶42. If Berget had received a second chance to present a mitigation case when his case was remanded for reweighing, he would have had a windfall not offered to his co-defendant. *Id.* Or to put it another way, one defendant would get one full and fair mitigation evidentiary hearing, and the other defendant would get two, even though the State afforded them both a flawless evidentiary hearing the first time.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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