No. 22-5891
CAPITAL CASE

IN THE
Supreme Court of the United States

KEVIN B. BURNS,
Petitioner,

v.

TONY MAYS, WARDEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR REHEARING

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Pursuant to Rule 44, Petitioner Kevin Burns respectfully requests rehearing and reconsideration of the Court's April 24, 2023 order denying the Petition for a Writ of Certiorari. This petition is submitted based on substantial intervening circumstances and substantial grounds not previously presented.

Specifically: (1) as of April 14, 2023, "the big man in glasses," as well as the other codefendant, have been paroled from their life sentences, leaving Mr. Burns as the only defendant in custody—let alone facing execution; and (2) his death sentence is uniquely disproportionate when compared to the life sentence given to the man who murdered Mr. Burns' young niece and two cousins in an intentional domestic violence arson. These two grounds do not change the legal calculus under which Mr. Burns easily prevails, rather they change the moral equation that determines whether this Court should exercise judicial discretion to grant extraordinary relief.

INTRODUCTION

Kevin Burns should not be on death row for a killing he did not commit. That our felony murder law permits such a sentence in general, and that this Court's aversion to error correction has permitted such a sentence specifically, does not make his capital sentence just. Respectfully, pursuant to Rule 44, Mr. Burns asks that this Court rehear and reconsider its discretionary decision not to correct the extreme errors in this case.

Previously, Mr. Burns relied upon the law when requesting relief—and his legal arguments were successful. Three justices found that under controlling Supreme Court precedents he was entitled to relief. Dissent at 5-7. The ruling of the

Sixth Circuit Court of Appeals was "indefensible" (and undefended by Respondent) with errors so obvious "they leap off the page." *Id.* However, Mr. Burns also lost, as the law is only the half of it. He also needed to convince this Court that relief was warranted as a matter of "judicial discretion" based on "compelling reasons." Sup. Ct. R. 10. He needed to overcome this Court's strong aversion to error correction.

Thus, Mr. Burns was originally denied relief, because a controlling plurality[1] of this Court did not exercise its judicial discretion to correct the Sixth Circuit's "indefensible" legal errors. This was not entirely surprising: this case did not involve a circuit split (all courts of appeal across the country, including other panels of the Sixth Circuit, would rule in Mr. Burns favor), and the issues of law were all clearly established by the well-recognized precedents of this Court. *See* Pet. at 16-24. Under these circumstances, at least four Justices found that there was not a compelling reason to correct such obvious errors.

The controlling plurality may have believed that Mr. Burns' claims are better addressed through executive clemency. *See e.g. Grzegorczyk v. United States*, 142 S. Ct. 2580, 2581 (2022) (Statement of Kavanaugh, J. with Roberts, C.J., Thomas, J., Alito, J. and Barrett, J). No doubt, under the Tennessee Constitutional system, Governor Bill Lee has the *power* to step in and remedy the obvious wrong. Tenn. Const. Art. III, § 6. Of course, like this Court, he also may decline to exercise his power—and his discretion is virtually unbridled. *Carroll v. Raney*, 953 S.W.2d 657,

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[1] Counsel understands that the informal rules of this Court require six votes for a *per curiam* summary reversal.

659 (Tenn. 1997); *State ex rel. Rowe v. Connors,* 61 S.W.2d 471, 472 (Tenn. 1933).

Thus, before turning to the Tennessee Governor, Mr. Burns must seek rehearing. And he will seek rehearing based on powerful grounds that justify a unique exercise of this Court's judicial discretion.

A. The Two Grounds for Rehearing Under Rule 44

Correction of the Sixth Circuit's indefensible legal errors is a proper exercise of judicial discretion, due to (1) an intervening circumstances of a substantial effect, and (2) another substantial ground not previously presented. Sup. Ct. R. 44. These grounds are not legal and will not alter the already favorable conclusion reached by Justices Sotomayor, Kagan, and Jackson. Rather, these grounds demonstrate that Mr. Burns' sentence of death is truly an "extreme malfunction" in our justice system, such that "justice require[s]" relief. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022).

The intervening circumstance is that Derrick Garrin—"the big man in glasses," at whose home the murder weapons were found—made parole on April 14, 2023, less than two weeks before certiorari was denied in this case. His reform and rehabilitation in prison was successful, and he can now return to society. However, with his parole, two of the three men convicted of murder in this matter are now free—with only Mr. Burns remaining behind bars. Most pertinently, the man identified as the actual killer of Damon Dawson has been found morally fit to return

to society—while Mr. Burns awaits execution for this same killing.[2]

The other substantial ground was not appropriate for Mr. Burns' certiorari petition, which focused on the law, but it is appropriate in this appeal to judicial discretion. In less than one year in the mid-1990s, the Burns family lost four members to crime. On September 23, 1995, Kevin Burns was sentenced to death. On June 22, 1996, Mr. Burns' niece Latoya (age 12), and cousins Ashley (age 4), and Kevin (8 months) were murdered by Andra Gaines. Mr. Gaines set the three children's apartment on fire in a failed effort to kill his estranged girlfriend. Despite having committed these horrific capital murders, Mr. Gaines was sentenced to life without parole—because the Burns family opposed the death penalty.

The Court should examine these uniquely compelling circumstances and exercise its independent discretion to intervene. The *per curiam* decision has already been written by Justice Sotomayor. Granting Kevin Burns the relief that he deserves will not burden the Court. Summary reversal would be just under these unique circumstances.

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[2] Eric Thomas was the only survivor inside the car. At Garrin's trial he testified unequivocally that he and Damon Dawson were shot over and over by the big man in glasses. Derrick Garrin is 6'4" and wears glasses. Burns is 5'7" and does not. The guns that fired all the shots into the car, including the gun that killed Damon Dawson, were found at Derrick Garrin's home. *See* Pet. at 4-10.

B. While this Court was deliberating Mr. Burns' case, the last remaining co-defendant, "the big man in glasses," identified by Eric Thomas as the killer of Damon Dawson, was released on parole.

On April 12, 2023, while this case was being conferenced, Derrick Garrin, the 6'4" tall "big man in glasses," made parole. Garrin Parole Sheet, Appx. at App. 001. In 2017, Carlito Adams, the man at the center of the dispute, made parole. Adams Parole Sheet, Appx. at App. 002. The man who organized the crime, Kevin Shaw, was never prosecuted. Pet. at 4.

Thus, today, the organizer, the motivator, and the man with both murder weapons *who was identified as the killer of Damon Dawson*, are all free.

Kevin Burns and Counsel are happy for all of them. That Mr. Adams and Mr. Garrin both successfully rehabilitated themselves in prison is a testament to the efficacy of reasonable sentencing practices. Justice worked in their cases.

However, in this Court's discretionary calculus the fact that Kevin Burns, alone, faces death due not to his moral culpability, but due to the ineptitude of his defense attorneys should matter. That two men with better lawyers are all free, and that one was not even prosecuted, reduces our justice system from a rational one to a medieval trial-by-combat farce.[3] It is impossible to explain to a person who relies on common sense why Kevin Burns, alone, despite his incredible reforms in prison is ineligible for parole. *See* Amicus Brief at 3-5 for discussion of prison behavior. That

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[3] In this trial-by-combat, Kevin Shaw was defended by Lancelot, Adams, and Garrin, by Tristram and Gawain, while Kevin Burns was appointed Sir Robin the-not-quite-so-brave.

Adams and Garrin could take classes, earn credits, and prove their worth in prison, so that now they are at liberty, while the less-culpable Kevin Burns awaits execution is morally inexplicable.

Derrick Garrin's parole is one of those truly unique "intervening circumstances" of "substantial effect" that warrants rehearing and relief. Sup. Ct. R. 44. The Court should exercise its judicial discretion, adopt the opinion already drafted by Justice Sotomayor, and grant summary reversal.

C. Kevin Burns has received the death penalty for a felony murder when he did not kill anyone. Yet, the man who wantonly murdered Mr. Burns' niece and two cousins in a planned arson is serving life without parole. This extreme sentencing disparity is morally absurd.

On June 22, 1996, a month after the issuance of an order of protection, Andra Gaines set fire to his girlfriend's apartment for a second time (the first attempt had failed to cause sufficient destruction). *Gaines v. State*, 8 S.W.3d 547, 550 (Ark. 2000), found at Appx. 003-012. His girlfriend escaped with her life, but three children who lived upstairs were killed. *Id.* The victims were Kevin Burns' niece, Latoya Nicole Burns Abston (age 12), and his cousins Ashley La-Cheryl Greene (3), and Kevin Jermol Simmons (8 months). Funeral Notice, Appx. at App. 013-016.

Mr. Gaines was found guilty by a jury of all three murders and sentenced by the court to life without parole. *Gaines*, 8 S.W.3d at 552. The State initially sought Mr. Gaines' execution; however, "[r]ight before trial, the Burns family asked the prosecutor not to seek the death penalty. The prosecutor did not seek death." Affid. of Gaines Attorney, Gerald Coleman, Appx. at App. 017.

Mr. Gaines' terrible premeditated arson took place 9 months after Kevin Burns was sentenced to death for (supposedly) killing Damon Dawson. Thus, in less than a year, the Burns family lost four members to murder.[4]

To the non-lawyer who relies on common sense it is utterly inexplicable how one man who intentionally burns down an apartment killing three children is granted life, while another is sentenced to death for a sudden and unplanned murder committed by his companions. The radical disparity between the mercy given to Andra Gaines and the "indefensible" sentence of death given to Kevin Burns is a "substantial ground" warranting this Court's discretionary intervention. Not only does the law favor relief, but so do the equities.

D. Justices of this Court have found that similar grounds justify summary reversal in the past, particularly when addressing a court of appeals that contumaciously refuses to follow this Court's precedents.

The Sixth Circuit's decision is legally indefensible. That a lower court's decision is "patently wrong" with "no basis in law" justifies summary reversal. *Allen v. Lawhorn*, 562 U.S. 1118 (2010) (Scalia, J. dissenting from denial of certiorari, joined by Thomas, J., and Alito, J.). Review is appropriate "if the lower court conspicuously failed to apply a governing rule." *Salazar-Limon v. City of Houston, Tex.*, 137 S. Ct. 1277, 1278 (2017) (Alito, J. concurring in denial of certiorari, joined by Thomas, J.). As set-forth in the dissent, and in Mr. Burns' petition, the Sixth

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[4] On October 20, 2010, Kevin Burns' younger brother Derrick Burns was shot and killed. No one has been punished for this murder, and the "reasons" for this killing are unknown to counsel.

Circuit failed to apply two governing rules established by this Court, while declining to engage in required AEDPA analysis, producing an opinion that is patently wrong with no basis in law.[5]

That the opinion comes from the Sixth Circuit should be significant. This is not an aberration—the Sixth Circuit has uniquely refused to abide by this Court's habeas jurisprudence. Eight years ago, Justice Scalia observed that the Sixth Circuit has "acquired a taste for disregarding AEDPA." *Rapelje v. Blackston*, 577 U.S. 1019 (2015) (Scalia, J., dissenting from denial of petition for writ of certiorari, joined by Thomas, J. and Alito, J.). As a result, this Court has reversed the Sixth Circuit no fewer than twenty-five times in the past twenty years, with no less than fourteen of those reversals being per curiam summary reversals on petitions for certiorari in capital cases. *Mays v. Hines*, 141 S. Ct. 1145 (2021) (per curiam); *Shoop v. Hill*, 139 S. Ct. 504, 505 (2019) (per curiam); *Jenkins v. Hutton*, 137 S. Ct. 1769, 1771-73 (2017) (per curiam); *Woods v. Etherton*, 136 S. Ct. 1149, 1151-52 (2016) (per curiam); *White v. Wheeler*, 136 S. Ct. 456, 458 (2015) (per curiam); *Woods v. Donald*, 575 U.S. 312, 313 (2015) (per curiam); *White v. Woodall*, 572 U.S. 415, 427, (2014); *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013); *Metrish v. Lancaster*, 569 U.S. 351, 365–68 (2013); *Parker*

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[5] Contrary to *Hinton v. Alabama*, 571 U.S. 263 (2014) (*per curiam*) and *Kimmelman v. Morrison*, 477 U.S. 365 (1986) the panel held that ineffective assistance claims cannot be based on errors under state law; contrary to *Guzek v. Oregon*, 546 U.S. 517 (2006) the panel failed to consider "*how*, not *whether*, [Burns] committed the crime;" and based on those two flagrant errors the panel failed to apply AEDPA analysis to Mr. Burns' claims. *See* Dissent at 4-7.

v. Matthews, 567 U.S. 37, 38 (2012) (per curiam); *Howes v. Fields*, 565 U.S. 499, 505–08 (2012); *Bobby v. Dixon*, 565 U.S. 23, 24 (2011) (per curiam); *Bobby v. Mitts*, 563 U.S. 395, 400 (2011) (per curiam); *Bobby v. Mitts*, 563 U.S. 395, 399–400, 131 S.Ct. 1762, 179 L.Ed.2d 819 (2011); *Berghuis v. Thompkins*, 560 U.S. 370, 380–91 (2010); *Renico v. Lett*, 559 U.S. 766, 776–79 (2010); *Berghuis v. Smith*, 559 U.S. 314, 332–33 (2010); *Smith v. Spisak*, 558 U.S. 139, 148–56 (2010); *Bobby v. Van Hook*, 558 U.S. 4, 4-5 (2009) (per curiam); *Bradshaw v. Richey*, 546 U.S. 74, 75, 79-80 (2005) (per curiam); *Bell v. Cone*, 543 U.S. 447, 447-48 (2005) (per curiam); *Holland v. Jackson*, 542 U.S. 649, 651-52 (2004) (per curiam); *Mitchell v. Esparza*, 540 U.S. 12, 13 (2003) (per curiam); *Price v. Vincent*, 538 U.S. 634, 638–43 (2003); *Bell v. Cone*, 535 U.S. 685, 693–702 (2002).

No doubt, those twenty-five reversals involved legally defective pro-inmate rulings that failed to apply controlling AEDPA standards and failed to give state courts proper deference. However, what must matter to this Court, which is scrupulously neutral, is not which side prevails, but whether the law is followed. The errors that required those twenty-five reversals are nearly identical in form and substance to the errors here. That, for once, the Sixth Circuit has chosen to disregard AEDPA and this Court's controlling precedents when they would require relief for a prison inmate is of little import—what matters is that, yet again, the Sixth Circuit has chosen to thumb its nose at this Court's authority.

This Court should exercise its judicial discretion to correct this 26th legally defective, "indefensible," and AEDPA-ignoring decision of the Sixth Circuit.

CONCLUSION

This is an extraordinary case where judicial discretion favors rehearing and summary reversal. That "the big man in glasses" was paroled days before this Court denied Kevin Burns relief is "an intervening circumstance of substantial effect." Sup. Ct. R. 44. While the disparate life sentence given to the triple murderer of Mr. Burns' niece and two cousins is a substantial ground not previously presented. *Id.* That the legally absurdist decision to deny Mr. Burns relief comes from the Sixth Circuit Court of Appeals is only a final factor that should support an exercise of this Court's discretion. Kevin Burns should not be on death row for a killing he did not commit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 44.2, undersigned counsel certifies that this Petition for Rehearing is submitted based on an intervening circumstance of substantial effect, and on a substantial ground not previously presented. Counsel further certifies that this Petition is presented in good faith and not for purposes of delay.

/s/ Richard Lewis Tennent
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