No.___
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 A WRIT OF CERTIORARI

RICHARD LEWIS TENNENT*
DAVID FLETCHER
Assistant Federal Public Defenders
KATHERYN P. THOMAS
Research & Writing Attorney
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
Richard_Tennent@fd.org

*Counsel of Record

QUESTIONS PRESENTED

Capital Case

1. Whether an ineffective assistance claim may be based on counsel's failure to exercise a state-law right to introduce residual doubt evidence at a capital sentencing?

2. Whether counsel provides ineffective assistance at capital sentencing if they fail to establish the defendant's lesser moral culpability by demonstrating that he did not kill a victim, even if the lesser culpability proof fails to negate all aggravating (eligibility) factors?

3. Whether it constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668, 688 (1984), if trial counsel postpones their preparations for sentencing until a brief post-guilt phase recess? And if deficient, can counsel's performance be excused, if omitted mitigation evidence fails to explain why the defendant committed the offense?

LIST OF RELATED PROCEEDINGS

- *Tennessee v. Kevin Burns*, Nos. 92-05131, 32, 33, 34, in the Criminal Court for Shelby County, Tennessee, judgment issued Sept. 23, 1995 (trial and sentencing).

- *State v. Burns*, No. 02C01-9605-CR-00170, 1997 WL 418492 (Tenn. Crim. App. July 25, 1997) (direct appeal, affirming).

- *State v. Burns*, 979 S.W.2d 276 (Tenn. 1998) (direct appeal, affirming).

- *Kevin Burns v. Tennessee*, No. P-21820, in the Criminal Court for Shelby County, Order Denying Post-Conviction Relief issued March 4, 2004 (post-conviction relief).

- *Burns v. State*, No. W200400914CCAR3PD, 2005 WL 3504990 (Tenn. Crim. App. Dec. 21, 2005) (post-conviction appeal, affirming).

- *Burns v. Bell*, No. 06-2311-SHM-DKV, Order issued Sept. 22, 2010 (denying federal habeas corpus relief on claims presented herein).

- *Burns v. Carpenter*, No. 06-2311-SHM-DKV, 2014 WL 12975682 (W.D. Tenn. Aug. 6, 2014) (denying federal habeas corpus relief on other claims).

- *Burns v. Mays*, 31 F.4th 497 (6th Cir. 2022) (affirming denial of federal habeas corpus).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF RELATED PROCEEDINGS ii

TABLE OF CONTENTS iii

INDEX OF APPENDICES v

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. The State attempts to prove that Burns killed Dawson. 5

B. Counsel prepares the mitigation case in the brief recess between the guilt phase and sentencing phase. 7

C. Evidence at the post-conviction hearing demonstrates that Burns did not kill Dawson. 8

D. Burns presents significant mitigating evidence at the post-conviction hearing. 10

E. The state courts deny relief. 11

F. Burns seeks habeas relief in federal court. 12

REASONS FOR GRANTING THE PETITION 14

I. Ineffective Assistance of Counsel Claims May Be Based on Errors Under State Law. 17

A. The decision below is contrary to the clearly established law of this Court and unnecessarily creates a circuit split. 18

B. Tennessee law allowed Burns to introduce residual doubt evidence at sentencing. 20

II. Counsel provides ineffective assistance if they fail to establish a defendant's lesser moral culpability by demonstrating that he did not kill a victim. 22

A. *Guzek* reaffirms the already clearly established law: defendants may present sentencing proof regarding the circumstances of their crime. 23

B. Under Tennessee law, a defendant can be guilty of felony murder without personally killing the victim. 24

C. The TCCA's holding that it did not matter whether Burns killed Dawson, as long as an aggravating factor was proven, was contrary to clearly established law. 25

III. Trial Counsel Provides Ineffective Representation When They Wait Until a Brief Post-Guilt Phase Recess to Begin Preparing for Sentencing. 29

A. The panel's decision is an extreme outlier, ignores this Court's explicit precedents, and unnecessarily creates a circuit split. 32

B. Nexus requirements are contrary to clearly established law. 35

CONCLUSION 36

INDEX OF APPENDICES

Appendix A	Opinion, United States Court of Appeals for the Sixth Circuit (April 13, 2022)	App.1
Appendix B	Opinion, United States District Court for the Western District of Tennessee (September 22, 2010)	App.30
Appendix C	Opinion, Court of Criminal Appeals of Tennessee at Jackson (December 21, 2005)	App.156
Appendix D	Order, Denying Petition for Post-Conviction Relief in the Criminal Court of Tennessee 30th Judicial District at Memphis (March 4, 2004)	App.209
Appendix E	Order, Denying Petition for Rehearing in United States Court of Appeals for the Sixth Circuit (May 24, 2022)	App.235

TABLE OF AUTHORITIES

CASES

Allen v. Stephen, 42 F.4th 223 (4th Cir. 2022) 36

Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007) 34

Andrus v. Texas, 140 S. Ct. 1875 (2020) 29, 32, 33

Andrus v. Texas, 142 S. Ct. 1866 (2022) 33

Barwick v. Sec'y, Fla. Dep't of Corr., 794 F.3d 1239 (11th Cir. 2015).....36

Bedford v. Collins, 567 F.3d 225 (6th Cir. 2009) 20

Brown v. Payton, 544 U.S. 133 (2005).....35

Buchanan v. Angelone, 522 U.S. 269 (1998) 25

Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984).....24

Crace v. Herzog, 798 F.3d 840 (9th Cir. 2015) 19

Cullen v. Pinholster, 563 U.S. 170 (2011) 16

Dretke v. Haley, 541 U.S. 386 (2004).....19

Eddings v. Oklahoma, 445 U.S. 104 (1982) 22, 23, 27

Enmund v. Florida, 458 U.S. 782 (1982) 23, 27, 28

Ford v. Norris, 364 F.3d 918 (8th Cir. 2004) 19

Foust v. Houk, 665 F.3d 524 (6th Cir. 2005).....34

Greer v. Mitchell, 264 F.3d 663 (6th Cir. 2001) 34

Goff v. Bagley, 601 F.3d 445 (6th Cir. 2010).....17, 19, 20

Harries v. Bell, 417 F.3d 631 (6th Cir. 2005).....34

Hinton v. Alabama, 571 U.S. 263 (2014) 18, 21

Holland v. Anderson, 583 F.3d 267 (5th Cir. 2009).....24

Jermyn v. Horn, 266 F.3d 257 (3rd Cir. 2001).....33

Jones v. Stotts, 59 F.3d 143 (10th Cir. 1995).....19

Jones v. United States, 527 U.S. 373 (1999) 26

Johnson v. Sec'y, DOC, 643 F.3d 907 (11th Cir. 2011).....34
Kimmelman v. Morrison, 477 U.S. 365 (1986) 19, 21
Knowles v. Mirsayance, 556 U.S. 111 (2009) 19
Lockett v. Ohio, 438 U.S. 586 (1978) 22, 23, 27
Lynch v. Dolce, 789 F.3d 303 (2nd Cir. 2015) 19
Manns v. Beckstrom, 695 F.App'x 883 (6th Cir. 2017) 20
Martinez v. Ryan, 566 U.S. 1 (2012) 1
Pavan v. Smith, 137 S. Ct. 2075 (2017) 16, 36
Pinkney v. Sec'y, DOC, 846 F.3d 1290 (11th Cir. 2017) 19
Porter v. McCollum, 558 U.S. 30 (2009).....19, 23
Poyson v. Ryan, 879 F.3d 875 (9th Cir. 2018).....36
Priester v. Vaughn, 382 F.3d 394 (3rd Cir. 2004) 19
Oregon v. Guzek, 546 U.S. 517 (2006).....13, 17, 22, 23, 24
Ries v. Quarterman, 522 F.3d 517 (5th Cir. 2008) 19
Richardson v. Branker, 688 F.3d 128 (4th Cir. 2012) 19
Roe v. Flores-Ortega, 528 U.S. 470 (2000) 18
Rompilla v. Beard, 545 U.S. 374 (2005).....23, 27, 28, 29
Sanders v. Davis, 23 F.4d 966 (9th Cir. 2022).....34
Schweiker v. Hansen, 450 U.S. 785 (1981) 16
Sears v. Upton, 561 U.S. 945 (2010).....33
Shaw v. Wilson, 721 F. 3d 908 (7th Cir. 2013) 17, 19
Shinn v. Kayer, 141 S. Ct. 517 (2020) 36
Shinn v. Ramirez, 142 S. Ct. 1718 (2022).....16
Shoop v. Cassano, 142 S. Ct. 2051 (2022).....16, 36
Skipper v. South Carolina, 476 U.S. 1 (1986).....35
Smith v. Singletary, 61 F.3d 815 (11th Cir. 1995).....24

Smith v. Texas, 543 U.S. 37 (2004) 35

State v. Banks, 271 S.W.3d 90 (Tenn. 2008).....26

State v. Burns, 979 S.W.2d 276 (Tenn. 1998) 8

State v. Dorantes, 331 S.W.3d 370 (Tenn. 2011) 24

State v. Hartman, 42 S.W.3d 44 (Tenn. 2001).....20

State v. Ivy, 188 S.W.3d 132 (Tenn. 2006) 17, 20

State v. McKinney, 74 S.W.3d 291 (Tenn. 2002.....20

State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992).....24

State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013) 24

State v. Teague, 897 S.W.2d 248 (1995).....21

Strickland v. Washington, 466 U.S. 668 (1984).....i, 14, 16, 18, 21, 23, 28, 31

Sumner v. Shuman, 483 U.S. 66 (1987).....23, 27

Tennard v. Dretke, 542 U.S. 274 (2004).....35

Tison v. Arizona, 481 U.S. 137 (1987).....27

United States v. Ruiz, 536 U.S. 622 (2002).....19

Walbey v. Quarterman, 309 F. App'x 795 (5th Cir. 2009) 33

Weatherford v. Bursey, 429 U.S. 545 (1977) 19

Wiggins v. Smith, 539 U.S. 510 (2003) 23, 28, 29, 35

Williams v. Taylor, 529 U.S. 362 (2000) 17, 18, 21, 23, 29, 33, 35

Woodson v. North Carolina, 428 U.S. 280 (1976).....23

Young v. Sirmons, 551 F.3d 942 (10th Cir. 2008) 34

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C § 2254(d) 2, 13, 14, 28, 35, 36

Tenn. Code Ann. § 39-11-402 24

Tenn. Code Ann. § 39-13-202 24

Tenn. Code Ann. § 39-13-204 12

PETITION FOR A WRIT OF CERTIORARI

Kevin B. Burns respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1–29, is reported at 31 F.4th 497 (6th Cir. 2022). The opinion of the district court, App. 30-155, is not reported.[1] The opinion of the Tennessee Court of Criminal Appeals ("TCCA"), App. 156–208, is unpublished but may be found at 2005 WL 3504990. The opinion of the state trial court that ruled on Burns' petition for post-conviction relief ("PCR Court"), App. 209–34, is not reported.

JURISDICTION

The Sixth Circuit entered the opinion and judgment denying habeas relief on April 13, 2022. App. 1. The court of appeals denied a timely petition for rehearing on May 14, 2022. App. 235. On August 15, 2022, Justice Kavanaugh extended the time within which to file a petition for writ of certiorari to and including October 21, 2022.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

---

[1] The district court issued two opinions. In 2010, the district court issued an opinion rejecting Burns' ineffective assistance of counsel at sentencing claims (among others) based on evidence fully developed in the State court record. The 2010 opinion is in the appendix at App. 1-29. In 2014, following a remand to address the significance of *Martinez v. Ryan*, 566 U.S. 1 (2012), the district court issued a second opinion dismissing a variety of other claims that were procedurally defaulted. None of the defaulted claims are raised in this petition, and the second opinion is not in the Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

Section 2254(d) of Title 28 of the United States Code ("Section 2254(d)") provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The decision below denying habeas relief for Burns' claims of ineffective assistance of counsel involves three independent errors. The first is an error of logic. The Sixth Circuit held that counsel cannot be ineffective for failing to introduce residual doubt evidence at sentencing because there is no federal right to argue residual doubt. But there is a right under Tennessee law to present residual doubt proof and argument at capital sentencing, and federal ineffective assistance claims may be based on rights created by state law.

The second error is procedural and substantive. The Sixth Circuit failed to apply required AEDPA analysis and failed to consider whether the decision by the Tennessee Court of Criminal Appeals ("TCCA") was contrary to clearly established law—as it plainly was. Petitioner had the right to present proof regarding the *manner* of the offense and of his lesser culpability at sentencing. Despite Burns' being found guilty of felony murder, and despite an aggravating (eligibility) factor being established, his jury was entitled to learn that it was his codefendant, "the large fellow in glasses" who had killed the victim—and not the short, clear-eyed petitioner.

The third error is one of disregard. The Sixth Circuit approved of trial counsels' extraordinary lack of preparation for sentencing: efforts that counsel conducted entirely in the brief period—one or two hours, at most—between the guilt and sentencing phases of this capital trial. No decision of this Court has held that similarly rushed and cursory preparation constitutes effective assistance of counsel, and, until this opinion, no court of appeals had ever made such a finding. However, the Sixth Circuit declined to apply AEDPA analysis and failed to address whether the TCCA's holding—which focused entirely on prejudice, and which imposed a nexus requirement—was contrary to clearly established law.

These three errors all involve previously uncontroversial and well-settled legal doctrines. Summary reversal is appropriate so that an unnecessary circuit split may be avoided, and so that the primacy of this Court's precedents may be affirmed. Alternatively, should there be room for fairminded disagreement regarding any of the court of appeals' holdings, then full certiorari review should be granted.

STATEMENT OF THE CASE

Petitioner's convictions for felony murder and his death sentence arise out of the deaths of Damon Dawson and Tracy Johnson. Dawson, Johnson, and their companions Tommy Blackman and Eric Thomas ("the four") were sitting in a car drinking gin and smoking marijuana when they were confronted by six men ("the six").

The six robbed the four of jewelry and cash, and three men opened fire with handguns, two firing into the car, one firing at Blackman as he fled. Dawson and Johnson were killed, Thomas was seriously injured, while Blackman escaped with a "graze" to his arm. App. 2-3; R. 139-5, PageID# 2566. Who of the six killed Dawson was a key issue at Burns' capital sentencing.

Setting the stage for the confrontation, two days earlier one of the six, Carlito Adams, argued with one of the four, Blackman, over a traveling call at a basketball game. R. 139-5, PageID# 2566-68. This argument frightened Adams, and upset his cousin, Kevin Shaw, who gathered the six together and provided at least two of the guns (albeit, he insisted, not the guns that fired the fatal shots). App. 83; R. 139-23, PageID# 4304-09.[2]

Bullets and shell casings recovered from the scene strongly suggest that two gunmen fired the lethal shots: one with a .32 semi-automatic pistol who killed

---

[2] Burns had no involvement in the basketball game. He was friends with Shaw, Adams, and the others, as they were all musicians who played together. The day of the murders was Burns' birthday, and he had been celebrating it with these friends.

Dawson and also hit surviving victim Eric Thomas, and one with a .380 semi-automatic pistol who killed Johnson. App. 162; R. 139-6, PageID# 2659-65. Both weapons were subsequently recovered from the front porch of Derrick Garrin, another member of the six. App. 162.

Of the six, only Adams, Garrin, and lastly Burns were prosecuted and tried for capital felony murder (murder in the commission of a felony). Adams and Garrin were convicted, but separate capital juries sentenced both to life in prison. The State chose not to prosecute Shaw.[3] App. 64-65.

Burns was tried last. He was convicted of two counts of felony murder. He received a death sentence for the felony murder of Dawson and a life sentence for the felony murder of Johnson.

The different sentences can be explained by the different evidence of culpability for the two deaths. The State did not argue or attempt to prove that Burns shot Johnson.

A. The State attempts to prove that Burns killed Dawson.

The State did, however, attempt to prove that Burns killed Dawson. At Burns' trial, he was implicated as Dawson's killer by two witnesses: surviving victim Eric Thomas and Mary Jones, a neighbor. Thomas did not identify Burns in court, but he indicated that "Number 5" in a photographic lineup shot him and Dawson; at trial,

---

[3] As for the other two members: Richard Morris was called as a witness against Garrin and was not prosecuted. App. 213. While, Benny Buckner was not prosecuted until after he testified as a defense witness at Adams' trial, at which point the trial judge had him arrested and charged with facilitation. App. 161.

the FBI agent who arrested Burns two-months after the offense identified him as "Number 5." App. 73; R. 139-6, PageID# 2699.

Thomas admitted that he previously told detectives that he had been shot by Adams. Thomas testified that this statement was false and that he made it because he thought he was going to die, and that Adams was the only perpetrator's name he knew. R. 139-5, PageID# 2549-51.

Mary Jones testified that she observed two gunmen who both wore Jheri curls: one who was 6'4" in height and one who she named as "Kevin Shaw." One and only one man fired all of the shots at Dawson, the other fired all of the shots at Johnson. R. 139-6, PageID# 2627-30. On direct examination, Mary Jones did not identify Burns. But on cross-examination by defense counsel, she identified Burns as the shooter that she called "Kevin Shaw." Jones based her identification on Burns' appearance in the courtroom. She testified that his long Jheri curl hairstyle was identical to the hairstyle of Dawson's killer. App. 79-80; R. 139-6, PageID# 2639-41.

Like Mary Jones, surviving victim Blackman and eyewitness Eric Jones (Mary Jones' son) both testified that one of the gunmen was a big man in glasses, around 6'4" in height. R. 139-5, PageID# 2556-76. According to Jones this big man, alone, was on the driver side of the victims' car, pointing his gun at Dawson, immediately before the shooting began. R. 139-5, PageID# 2586-2612. Neither Blackman nor Eric Jones implicated, or even identified, Burns. Codefendant Garrin is 6'4" and wears glasses; at his earlier trial he was described as "the big fellow in glasses." App.

10. Burns is 5'7" and does not wear glasses.[4] R. 139-8, PageID# 2968; R. 139-23, PageID# 3981.

The State then introduced a second, conflicting narrative of Burns' involvement in the crime. FBI agents testified that two months after the crime Burns admitted to being at the scene and admitted to firing a gun in the direction of fleeing victim Blackman and other bystanders. App. 194. According to the FBI agents, in his statement, Burns denied approaching the car in which Dawson and Johnson were murdered and denied shooting at either man. *Id.*; R. 139-6, PageID# 2695-98.

B. Counsel prepares the mitigation case in the brief recess between the guilt phase and sentencing phase.

At 4:20 p.m. the jury returned verdicts of guilt for two counts of felony murder and two counts of attempted felony murder. A recess was then held before sentencing commenced later that evening. App. 14.

During this recess, trial counsel met—for the first time—with "about a dozen" possible mitigation witnesses and determined who was "best." App. 14–15. At the sentencing phase, counsel presented six witnesses; their entire testimony occupies a mere fourteen transcript pages.[5] App. 12. In sum, these six witnesses testified that Mr. Burns was religiously faithful. His mother and father testified that they loved him. His brother also indicated that Mr. Burns had been (past tense) a good worker

---

[4] The difference in height between Garrin and Burns is roughly the same as the difference in height between Justices Neil Gorsuch and Elena Kagan.

[5] The total transcript of the sentencing phase is ninety-seven pages in length. Defense counsel's opening takes up half of one page, while closing argument occupies fewer than five pages. R. 139-7, PageID# 2849-2946.

and could get a job in the future. His father testified that he provided Mr. Burns a home to live in.

The entire sentencing hearing was completed by 9:20 p.m. In less than five hours, Burns' attorneys prepared and presented their entire sentencing case. App. 15. Within those five hours, opening statements, sidebar arguments, the prosecution case for death, closing arguments, and sentencing instructions were all completed—there was even time for an hour and fifteen-minute dinner recess between the fourth defense witness, Burns' brother, Phillip Carter, and the final two defense witnesses, Burns' parents. R. 139-7, PageID# 2792-93, 2913-14.

The jury deliberated from 9:20 p.m. to 10:50 p.m. before retiring for the night. It then deliberated from 8:50 a.m. until 11:20 a.m. the next day, when it submitted a number of questions to the trial court, including, "Can we ask for life without parole" and "Can we ask for consecutive life sentences?" App. 132-33. The trial court declined to answer these questions, and, sometime after 1:45 p.m., the jury sentenced Mr. Burns to death for the murder of Dawson and to life for the murder of Johnson. R. 139-7, PageID# 2794.

Mr. Burns was denied relief on direct appeal. *State v. Burns*, 979 S.W.2d 276 (Tenn. 1998).

C. Evidence at the post-conviction hearing demonstrates that Burns did not kill Dawson.

Burns then sought post-conviction relief in Tennessee state court ("PCR Court"). Evidence introduced at a post-conviction hearing, which was not heard by

the jury at Burns' trial, significantly undermined both Thomas' and Jones' identification of Burns as the killer of Dawson.

At Garrin's earlier trial, Thomas testified that both he and Dawson were shot by the "big fellow, heavy build, with glasses." App. 10. He reiterated, "the big fellow with glasses I'm sure he hit Damon [Dawson]." App. 73. The prosecution then argued that Garrin was the only participant who matched this description. App. 10.

Thomas was clear that this "big fellow" fired *all* of the shots that hit Dawson. R. 139-23, PageID# 4279-82. This testimony is consistent with Eric Jones' identification of the 6'4" man with glasses (i.e., Garrin) as the man who he saw holding a gun on Dawson, and it impeaches Thomas' subsequent claim that he and Dawson were shot by "Number 5."

Burns' trial counsel admitted they had the transcript of Thomas' prior testimony, and they recognized that it would have been "strong evidence." App. 74. Unfortunately, they failed to use it because "in the heat of battle things flow. Sometimes you can follow the game plan and sometimes you can't." R. 139-27, PageID# 5009.

Mary Jones' identification, which rested on Burns' hairstyle at the time of trial was refuted by ample and uncontroverted evidence that at the time of the crime his hair could not be worn in a Jheri curl.[6] A half dozen witnesses, including a senior vice-president of the Shoney's Corporation, were available to testify that Burns—

[6] In the three years between his arrest and trial Burns had let his hair grow, and he wore it in a Jheri curl at the time of trial. R. 139-29, PageID# 5338.

unlike the other five potential defendants—had short-cropped hair at the time of the crime. R. 139-27, PageID# 4917-32; R. 139-29, PageID# 5191-5205, 5319, 5334-45; R. 139-30, PageID# 5383-84, 5398-99; R. 139-33, PageID# 5830-34. That is, Burns could not have been either of the two gunmen with Jheri curls that Mary Jones saw shooting Dawson and Johnson.

To be clear, as discussed in detail below, the State was not required to prove that Burns killed Dawson, either to convict Burns of felony murder or to make Burns eligible for the death penalty. But whether Burns personally shot Dawson was highly relevant to his moral culpability, as shown by the jury sentencing Burns to life imprisonment for Johnson's death.

D. Burns presents significant mitigating evidence at the post-conviction hearing.

At the post-conviction hearing, Burns also presented "a full week's worth of testimony from mitigation witnesses: family, friends, teachers, a sociologist/mitigation expert, and a neuropsychiatrist." App. 27. The dissent below compared this proof with what was presented at trial:

> The contrast between the evidence presented at the evidentiary hearing and the evidence presented by trial counsel is stark, and demonstrates that trial counsel failed to investigate even the most basic information about Burns and his background.
>
> . . .
>
> If trial counsel had not been constitutionally inadequate, Burns' sentencing jury would have also learned, among many more life-history details, that Burns lived in eight different houses and apartments before the age of 12; that he took care of his nine siblings, including a severely handicapped older brother; that his father would come to his second family's home only to physically and emotionally abuse Burns, his siblings and their mother; and that Burns' father broke his mother's jaw

> in the family home, landing her in the hospital for three weeks and in a brace for four months.

App. 17.

In addition to refuting Mary Jones' identification (by testifying that Burns' hair could not have been worn in a Jheri curl at the time of the crime), the Shoney's vice-president would have testified that Burns had been a diligent and well-respected worker at the time of the crime. Not only had trial counsel failed to present this testimony at sentencing, they also failed to present evidence that Burns was employed at all, even when his brother's testimony strongly implied the opposite. *See* R. 139-7, PageID# 2884.

Trial counsel had no memory of ever speaking with the Shoney's vice-president, while the vice-president was adamant that if he had been contacted, he would gladly have cooperated with defense counsel. R. 139-26, PageID# 4800-01; R. 139-33, PageID# 5834-35.

E. The state courts deny relief.

The PCR court denied relief, and the TCCA upheld this judgment. With respect to the claim that trial counsel "[f]ailed to thoroughly investigate and present evidence regarding the lesser culpability of the petitioner":

> [T]he proof established, under the testimony of Thomas and Jones, that the petitioner shot into a vehicle, creating a great risk of death. According to the petitioner's FBI statement, he shot at Blackman, admitting that three children were in his line of fire. This statement also supports application of the factor of creating a great risk of death to

> two or more persons other than the victim.[7] *Under either theory, the aggravating circumstance is still established. The petitioner cannot establish that his sentence would have been different.*

App. 199 (emphasis added).

As to the claim that trial counsel "[f]ailed to thoroughly investigate and present sufficient mitigation evidence" and "[f]ailed to prepare defense witnesses to testify":

> The post-conviction court found that the mitigation evidence presented by trial counsel "showed that this was a well-adjusted young man who committed a crime that was out of character for him." Additionally, the court concluded that "[t]he bulk of the mitigation proof dealt with the petitioner's father" but "*offered [no] better insight into why this crime occurred or why the petitioner chose to act the way he did on the day in question*." Thus, the post-conviction court found that, although the petitioner established that additional witnesses were available, the "bulk" of them testified about his father *and did not offer any explanation as to why he had committed the crimes*. Thus, the court concluded that the petitioner failed to show that he was prejudiced by the fact these witnesses had not testified at the trial. The record supports these conclusions.

App. 205 (emphases added). That is, on both claims, the TCCA found that Burns had not suffered prejudice. The TCCA did not address deficiency.

F. Burns seeks habeas relief in federal court.

Burns then petitioned for the writ of habeas corpus in federal court. After relief was denied by the district court, Burns appealed to the Sixth Circuit.

In a 2-1 decision, the panel majority refused to grant Burns habeas relief. With respect to Burns' post-conviction evidence that he did not shoot Dawson and the argument that counsel should have introduced this evidence at sentencing, the Sixth

---

[7] Burns had a single eligibility factor that permitted imposition of the death penalty: "the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during the act of murder." Tenn. Code Ann. § 39-13-204(i)(3).

Circuit relied on an argument never raised by the State. The majority first noted (correctly) that this Court has never held that a defendant has a constitutional right to introduce "residual doubt" evidence at sentencing. App. 6 (citing *Oregon v. Guzek*, 546 U.S. 517, 525 (2006)). It then reasoned (incorrectly) that without a constitutional right to introduce the evidence, Burns' counsel could not have been ineffective. The majority raised this argument sua sponte, without the benefit of any briefing from the parties.

Having reframed Burns' lesser culpability argument as solely involving residual doubt, the panel majority declined to analyze it under Section 2254(d) of AEDPA. Thus, the panel did not consider whether the TCCA's holding that Burns could not establish prejudice unless he could negate the lone aggravating factor was contrary to the clearly established precedent of this Court (as it was).

Finally, with respect to ineffective assistance at sentencing for delaying preparation until after the guilt phase and presenting only minimal evidence, the panel majority held that "[a] fair reading of the record shows that Burns' sentencing counsel did 'a fair amount of investigation in preparation for the mitigation phase.'" App. 7. Because it found that trial counsel was not deficient (an issue not decided by the TCCA), the panel did not address whether the TCCA's prejudice holding (and its nexus requirement) was contrary to clearly established law. App. 10–11.

Outside of referencing Section 2254(d) under "Standard of Review," the majority did not consider its requirements when addressing Burns' ineffective assistance claims, at all. App. 5–10.

Judge Stranch, in dissent, applied the AEDPA analytical framework and concluded that the TCCA's failure to apply the "reasonable probability" standard for prejudice from *Strickland v. Washington*, 466 U.S. 668, 688 (1984), was contrary to clearly established law. App. 24–25. The dissent also concluded that the TCCA violated clearly established law when it imposed a nexus requirement demanding that Burns connect the week's worth of mitigation evidence presented at his PCR hearing with "why this crime occurred." App. 27–28. Having identified errors that met the demanding standards of Section 2254(d)(1), the dissent concluded that Burns was entitled to relief on his ineffective assistance-failure to prepare for mitigation claim. App. 29.

The Sixth Circuit denied rehearing en banc, App. 235, and Burns now respectfully petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This petition presents three straightforward errors.

First, the Sixth Circuit erroneously held that an ineffective assistance claim must be based on an underlying constitutional right:

> Evidence offered to undermine the prosecution's case, which led to the conviction, is the essence of residual doubt evidence and the Court has never established that a capital defendant such as Burns has a constitutional right to introduce such evidence at sentencing. Because the Court has never established such a right, counsel did not err by failing to pursue the introduction of that residual doubt evidence at sentencing, and Burns cannot demonstrate ineffective assistance of counsel in this respect.

App. 6-7.

This analysis is a non sequitur. Under Tennessee law, Burns had the right to introduce evidence of residual doubt at the sentencing phase, and every circuit to address the issue—including the Sixth Circuit in its previous decisions—has held that an ineffective assistance claim may be based on counsel's failure to protect rights under state law.

Second, the panel—having unduly constrained Burns' lesser-culpability argument to being solely about residual doubt—failed to analyze the TCCA holding under AEDPA. Had the panel done so, it would have realized that the TCCA had ruled contrary to clearly established law. Burns had the right to present proof regarding the "circumstances" and the "manner" of the offense in an effort to establish his lesser moral culpability, and his trial counsel was ineffective for failing to do so. The TCCA, in logical and legal error, had ignored this clear right and had held that as long as an aggravating (eligibility) factor was proven, it was of no significance whether Burns had actually killed anyone.

Third, the majority failed to recognize the extreme deficiency in counsel's preparations for the sentencing phase of the capital trial. Burns' lawyers prepared for sentencing, for the first time, during the brief recess between the close of the guilt phase at 4:20 p.m. and the commencement of sentencing later that same evening. Such "preparation" led to a case for Burns' life that was not merely unilluminating and exceptionally brief (fourteen pages of transcript) but was positively harmful. Burns was presented as an unemployed, spoiled layabout—when in fact he was an employed, hardworking young man who had overcome extreme poverty and childhood

trauma. We have located no case in which this Court—or any court of appeals—has held that such rushed preparation for a sentencing phase constitutes anything other than deficient representation in a capital trial.

The claims presented in this petition were fully exhausted and the factual record was completely developed in earlier state court proceedings. No procedural obstacles hinder this Court's review. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1732 (2022); *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

Summary reversal is warranted because "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting) (quoting *Schweiker v. Hansen,* 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)). As will be shown, the Court of Appeals' decision was obviously wrong and squarely foreclosed by this Court's precedent. *Shoop v. Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting).

This Court has clearly established, and the courts of appeals have all recognized, that (1) *Strickland* claims may be based on a deficient failure to assert a right created under state law; (2) capital defendants have the right to present evidence of lesser moral culpability, including evidence related to the "circumstances of the offense," at sentencing—even if it cannot negate an eligibility factor; and (3) trial counsel has an obligation to prepare for sentencing prior to trial.

The decision below breaks with precedent. Summary reversal will prevent an unnecessary and erroneous circuit split and will reaffirm the primacy of this Court's

clearly established precedents. In the alternative, this Court should grant a writ of certiorari on one or all issues.

I. Ineffective Assistance of Counsel Claims May Be Based on Errors Under State Law.

Burns argued below that his trial counsel was ineffective for failing to introduce evidence at sentencing that he did not kill Dawson. The Sixth Circuit rejected this argument for a single reason: "[T]his claim necessarily fails because Burns has no constitutional right to present residual doubt evidence at sentencing." App. 6 (citing *Guzek*, 546 U.S. at 525). It reiterated: "Because the Court has never established such a right, counsel did not err by failing to pursue the introduction of that residual doubt evidence at sentencing, and Burns cannot demonstrate ineffective assistance of counsel in this respect." *Id.*

The Sixth Circuit's reasoning is flawed. This Court, and all of the courts of appeals—including the Sixth Circuit in previous decisions—have uniformly held that federal ineffective assistance claims may be based on the failure to assert rights under state substantive law. *Goff v. Bagley*, 601 F.3d 445, 464 (6th Cir. 2010); *see also, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013). As a matter of Tennessee state law, Burns had the right to present residual doubt evidence and argument at sentencing. *E.g.*, *State v. Ivy*, 188 S.W.3d 132, 155 (Tenn. 2006).

The failure of Burns' counsel to present residual doubt evidence and argument at sentencing (which state law entitled Burns to present) provides a basis for a federal ineffective assistance claim. Petitioner sees no reasonable basis for an argument to

the contrary. To its credit, the State never made the argument relied on by the Sixth Circuit. Nor did the district court or Tennessee courts rely on this principle. What's more, the decision below offers no reasoning in support of its assertion.

For these reasons, this Court should summarily reverse the Sixth Circuit's holding that a federal ineffective assistance claim cannot be based on a deficient failure under state law. In the alternative, if this Court believes that the issue is open to reasonable debate, it should grant certiorari because the decision below has now created a split with every other circuit to address the issue.

A. The decision below is contrary to the clearly established law of this Court and unnecessarily creates a circuit split.

The deficiency prong of an ineffective-assistance claim requires the defendant to show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This Court has eschewed strict and formal requirements, holding instead that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.*

When trial took place in state court, these "circumstances" necessarily include the state's substantive law and procedural rules. Whether counsel's assistance was reasonable depends on the rights that state law provides to raise defenses, make arguments, and introduce evidence.

This Court has made clear no fewer than three times that deficient performance under *Strickland* may be based on failures under state law. In *Hinton v. Alabama*, 571 U.S. 263, 275 (2014), counsel's failure to "understand the resources that state law made available to him" was deficient. In *Williams*, 529 U.S. at 395,

counsel deficiently failed to obtain extensive records because "they incorrectly thought that state law barred access." And in *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986), counsel was deficient for failing to request discovery permitted under state law. *Kimmelman* directly refutes the panel's logic because "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *see also United States v. Ruiz*, 536 U.S. 622, 629 (2002) (same).[8]

Faithful to this Court's precedent, the courts of appeals have uniformly held that an ineffective assistance claim may be based on counsel's failure to protect rights under state law. *See Lynch v. Dolce*, 789 F.3d 303, 311 (2d Cir. 2015); *Priester v. Vaughn*, 382 F.3d 394, 402 (3d Cir. 2004); *Richardson v. Branker*, 668 F.3d 128, 141 (4th Cir. 2012); *Ries v. Quarterman*, 522 F.3d 517, 531 (5th Cir. 2008); *Shaw*, 721 F.3d at 914; *Ford v. Norris*, 364 F.3d 916, 918 (8th Cir. 2004); *Crace v. Herzog*, 798 F.3d 840, 850 (9th Cir. 2015); *Jones v. Stotts*, 59 F.3d 143, 145 n.2 (10th Cir. 1995); *Pinkney v. Sec'y, DOC*, 876 F.3d 1290, 1295 (11th Cir. 2017). We have identified no decision that holds—or even entertains an argument—to the contrary.

In multiple previous decisions, the Sixth Circuit reached the correct result, holding that failures under state law can provide the basis for federal ineffective assistance claims: "Goff's constitutional right to the effective assistance of counsel on appeal has been violated, regardless of the fact that counsel's underlying failure is a

---

[8] Other deficiency findings that involved errors under state law include *Porter v. McCollum*, 558 U.S. 30, 42 (2009); *Knowles v. Mirzayance*, 556 U.S. 111, 114–15 (2009); *Dretke v. Haley*, 541 U.S. 386, 390 (2004); and *Roe v. Flores-Ortega*, 528 U.S. 470, 474 (2000).

matter of state law." *Goff*, 601 F.3d at 464; *see also Bedford v. Collins*, 567 F.3d 225, 237 (6th Cir. 2009) ("[T]he invocation of this state-law right could implicate the Sixth Amendment if the prosecution violated state-law rules about the allocution procedure and defendant's counsel unreasonably failed to object."). More recently a Sixth Circuit panel correctly held that "[w]hen state law offers criminal defendants more extensive protections than federal law, counsel's failure to bring a cognizable claim under state law can violate the federal right to effective assistance of counsel." *Manns v. Beckstrom*, 695 F. App'x 883, 885 (6th Cir. 2017).

The law is clearly established by this Court and—apart from the singular decision below—never appears to have been disputed: federal ineffective assistance claims may be based on the failure to assert rights under state law.

B. Tennessee law allowed Burns to introduce residual doubt evidence at sentencing.

There is no doubt that Tennessee permits the introduction of residual doubt evidence and argument at sentencing. A defendant may "introduc[e] residual doubt evidence during the sentencing or re-sentencing phase of a capital trial" and "defendant may also rely upon residual doubt argument based on evidence that was heard by the jury in the guilt phase of the trial." *Ivy*, 188 S.W.3d at 155 (citing *State v. McKinney*, 74 S.W.3d 291, 307 (Tenn. 2002)). Tennessee courts have acknowledged that this state-law right exceeds the federal constitutional minimum. *State v. Hartman*, 42 S.W.3d 44, 55 (Tenn. 2001). This right includes the right to present impeachment evidence: "Where, as here, the proffered residual doubt proof is impeachment of the testimony of the only witness who offered direct . . . proof of the

defendant's involvement in the crime, such proof clearly is relevant and admissible to establish residual doubt as a mitigating circumstance." *Id.* at 57. Moreover, the existence of this right was established in Tennessee prior to Burns' sentencing hearing. *State v. Teague*, 897 S.W.2d 248, 256 (1995) ("Evidence otherwise admissible under the pleadings and applicable rules of evidence, is not rendered inadmissible because it may show that the defendant did not kill the victim, so long as it is probative on the issue of the defendant's punishment.").[9]

Perhaps unsurprisingly in light of these holdings, the State has never denied—either on appeal or before the district court—that Burns was entitled to introduce residual doubt evidence. As a result, the parties never joined issue on the source of the right to introduce the evidence; everyone agreed that it could be introduced. Because the panel ruled against Burns based on an argument that the State never raised, it was without the benefit of any briefing on the source of Burns' right to introduce residual doubt evidence.

* * *

The error in the decision below is both straightforward and indisputable. *Strickland*, *Hinton*, *Williams* and *Kimmelman* clearly establish that ineffective assistance claims may be based on errors of state law; and ten separate courts of appeal, including the Sixth, had previously recognized this proposition. It is undeniable—and undenied—that Burns had the right under Tennessee law to

---

[9] *Teague* was issued March 27, 1995; Burns' sentencing hearing commenced on September 22, 1995.

introduce residual doubt evidence. The panel's erroneous holding that *Guzek* forecloses Burns' ineffective assistance claim is contrary to clearly established law and, if allowed to stand, would create a circuit split.

Aside from this single outlier decision below, there is no dispute between the circuits. This Court's precedents have been clear, and summary reversal is warranted. Alternatively, should this Court find that there is room for reasoned debate, certiorari should be granted.

II. Counsel provides ineffective assistance if they fail to establish a defendant's lesser moral culpability by demonstrating that he did not kill a victim.

The majority below erred in a second way when it held that Burns' evidence that he did not shoot Dawson was solely relevant as evidence of residual doubt. *See* App. 6 ("The antecedent question, therefore, is whether this evidence—had his counsel attempted to introduce it at sentencing—would have been residual doubt evidence. Clearly, it would have been.").

To convict Burns of felony murder for Dawson's death, the State was not required to prove that he personally shot, let alone killed, Dawson. The conviction of Burns for felony murder of Johnson confirms this fact irrefutably. Evidence that Burns did not shoot Dawson concerns the *means* by which the felony murder was committed. Burns had a clearly established right to present evidence of his lesser culpability at the sentencing phase, by presenting proof regarding the "circumstances" of the offense. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Lockett v. Ohio,* 438 U.S. 586, 605 (1978).

A. *Guzek* reaffirms the already clearly established law: defendants may present sentencing proof regarding the circumstances of their crime.

This Court's decision in *Guzek* reaffirms that a defendant has the right to present evidence of his "minor role" that sheds "light on *the manner* in which he committed the crime for which he has been convicted." 546 U.S. at 523 (emphasis in original). *Guzek* follows the clearly established law of *Lockett* and *Eddings* and makes clear that a defendant has the constitutional right to present in mitigation "evidence that tend[s] to show *how,* [but] not *whether* the defendant committed the crime." *Id.* (emphasis in original).

Since 1976, it has been clearly established that consideration of "the circumstances of the particular offense [are] a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). A sentencing authority must be permitted to consider "*as a mitigating factor, . . .* any of the circumstance of the offense." *Sumner v. Shuman*, 483 U.S. 66, 76 (1987) (emphasis in original). A capital defendant's "punishment must be tailored to his personal responsibility and moral guilt." *Enmund v. Florida*, 458 U.S. 782, 801 (1982). A jury must be permitted to consider, as a mitigating factor, "a defendant's comparatively minor role in the offense." *Lockett,* 438 U.S. at 608.

When addressing ineffective assistance under *Strickland*, this Court has repeatedly held that trial counsel's failure to demonstrate a defendant's lesser moral culpability was deficient and prejudicial. *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003); *Williams*, 529 U.S. at 398. Outside of the Sixth Circuit, the clearly established

law of this Court is well recognized: a defendant has an absolute right to present evidence of his or her lesser role in the offense as a mitigating factor at capital sentencing. *Holland v. Anderson*, 583 F.3d 267, 274–75 (5th Cir. 2009); *Chaney v. Brown*, 730 F.2d 1334, 1351–52 (10th Cir. 1984); *Smith v. Singletary*, 61 F.3d 815, 817 (11th Cir. 1995). Counsel is unaware of any circuit holding to the contrary.

Far from supporting the panel's decision, *Guzek* reaffirms Burns' clearly established right to present mitigating evidence concerning the manner in which the offense was committed. 546 U.S. at 523.

B. Under Tennessee law, a defendant can be guilty of felony murder without personally killing the victim.

The evidence that trial counsel should have introduced at sentencing—evidence that Burns did not shoot or kill Dawson—concerns *how* he committed the crime of felony murder, not *whether* he committed the crime of felony murder.

"Tennessee allows convictions for first degree murder '. . . of persons who did not kill the victim and may not have intended that the victim be killed or suffer any physical harm.'" *State v. Pruitt*, 415 S.W.3d 180, 209 (Tenn. 2013) (quoting *State v. Middlebrooks*, 840 S.W.2d 317, 336 (Tenn. 1992)). Tennessee permits conviction of felony murder for those who aid and abet (termed "criminal responsibility for the conduct of another") a felony during which another felon causes the death of a victim. Tenn. Code Ann. §§ 39-11-402(2), 39-13-202(2); *State v. Dorantes*, 331 S.W.3d 370, 386-87 (Tenn. 2011). The evidence does not need to conclusively establish which participant in the underlying felony caused the victim's death. *Id.* at 389.

Here, the jury could have convicted Burns of felony murder of Dawson based solely on the finding that he participated in the underlying robbery. Indeed, it convicted Burns of the felony murder of Johnson, despite it being clear that someone other than Burns shot him.[10] Evidence that Burns did not kill would have been mitigating, without necessarily impeaching his guilt.

C. The TCCA's holding that it did not matter whether Burns killed Dawson, as long as an aggravating factor was proven, was contrary to clearly established law.

The Sixth Circuit's holding that Burns' evidence was relevant only as "residual doubt" evidence conflicts squarely with the opposite-but-equally-erroneous analysis of the TCCA. Far from holding that the evidence that Burns did not kill was inadmissible, or that counsel was not deficient for failing to present it, the TCCA held that Burns did not suffer prejudice because, even if the jury had found that he did not kill Dawson, Burns was still eligible for the death penalty. App. 198–99. According to the TCCA, regardless of whether "the petitioner shot into a vehicle, creating a great risk of death" or "shot at Blackman, admitting that three children were in his line of fire," the "aggravating circumstance [rendering Burns eligible for a death sentence] is still established." App. 199.

This flawed analysis conflated Burns' *eligibility* for capital punishment with the jury's *selection* of the proper punishment. *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998). The establishment of an aggravating factor is a predicate for the death

---

[10] According to the TCCA, Mary Jones identified Carlito Adams as the killer of Johnson. App. 194.

penalty, but it is not the last word. *Id.* The TCCA failed to recognize that a capital sentencing system first must "perform a narrowing function with respect to the class of persons *eligible* for the death penalty"—in Tennessee this is the decision whether an aggravating factor has been proven beyond a reasonable doubt. *State v. Banks*, 271 S.W.3d 90, 154 (Tenn. 2008). When deciding on eligibility for capital punishment, mitigation—including lesser culpability—has no place. It is only at the second *selection* stage that jurors engage in a "broad inquiry" where they must consider all "constitutionally relevant mitigating evidence" that must be weighed and considered along with evidence in aggravation. *Jones v. United States*, 527 U.S. 373, 381 (1999).

The TCCA held that as long as the FBI agents' contrary narrative (that Burns shot in the direction of Blackman and bystanders) established an aggravating factor (creating risk to two or more other individuals), it was irrelevant whether Burns had in fact killed Dawson because "under either theory, the aggravating circumstance is still established." App. 199. This analysis ignored the relevant question: Regardless of whether Burns was *eligible* for the death penalty, was there a reasonable probability that the jury would have *selected* a life sentence if it believed that Burns did not kill Dawson?

The answer is a matter of common sense: the jury would not have sentenced Burns to death if it understood that he did not kill (or if they had doubts as to whether he had done so). This truth is illustrated by the length of time it took deliberating (deliberations over parts of two days), the unanswered questions jury members asked (could they impose consecutive sentences or life without parole?), and, most

fundamentally, by its verdict sentencing Burns to life for the murder of Johnson (who Burns clearly did not kill). Indeed, the fact that his two codefendants who faced capital trials both received life sentences[11] further demonstrates that the jury would never have imposed a sentence of death if it concluded that Burns did not kill Dawson.

In *Enmund,* this Court recognized that sentencing juries almost never impose the death sentence on individuals convicted of felony murder who do not personally kill. 458 U.S. at 797. Juries consider individual defendants' level of participation as part of their reasoned moral response. The death penalty is reserved for those individuals who truly demonstrate either an intent to kill or an extreme "reckless disregard for human life," almost always coupled with additional aggravating factors. *E.g., Tison v. Arizona*, 481 U.S. 137, 158 (1987).[12]

The panel never reviewed the TCCA's prejudice holding under AEDPA, relying instead on the erroneous deficiency analysis discussed above. App. 6–8. As a result, the panel did not address—or even mention—*Sumner, Lockett, Eddings, Rompilla,*

---

[11] Burns is not arguing that his jury should have been informed of the life sentences given to his codefendants. He simply highlights that two other juries from the same community reviewing nearly identical facts found life to be an appropriate sentence.

[12] No doubt, reasonable jurors could differ as to whether the FBI agents' narrative supports a finding that Burns acted with some degree of "reckless disregard." However, his conduct was indisputably less morally culpable than that of Garrin, who shot both Dawson and Thomas "over and over" (and whose jury sentenced him to life), and Adams, whose absurd overreaction to a traveling call in a basketball game led to the tragic debacle, and who the TCCA identified as the killer of Johnson (and who also received life). Indeed, Burns' culpability appears to be less than that of Shaw, the leader of the group, who the State determined did not have sufficient culpability to prosecute.

Enmund or any other precedent of this Court that clearly establishes the right to present evidence of lesser culpability.

The dissent, in contrast, correctly recognized that the TCCA had applied a prejudice standard that was contrary to clearly established law.[13] The TCCA should have considered "whether 'there is a reasonable probability that at least one juror would have struck a different balance.'" App. 24 (citing *Wiggins*, 539 U.S. at 537). No doubt, with the establishment of a single aggravating factor, "it is *possible* that a jury could have heard the mitigating evidence and still have decided on the death penalty [but] this is not the test." *Rompilla*, 545 U.S. at 393 (emphasis added). Under this Court's law, a defendant is entitled to relief when there is reasonable probability, "a probability sufficient to undermine confidence in the outcome." App. 25 (citing *Strickland*, 466 U.S. at 694).

* * *

The panel's failure to recognize that Burns had a clearly established right to present proof of his minor role at sentencing warrants summary reversal. This case should be remanded so that the court of appeals may, in the first instance, apply AEDPA analysis to the TCCA's decision, and consider whether the TCCA's prejudice analysis was contrary to clearly established law. 28 U.S.C. § 2254(d)(1). These are not legally difficult issues to resolve, and, absent this single outlier opinion, there is

---

[13] The dissent focused on ineffective assistance for failure to prepare for the sentencing hearing; however, the dissent discussed the prejudice standard that the TCCA applied to the lesser-culpability argument as well.

no dispute between the circuits. This Court's precedents have been clear. Alternatively, should this Court find that there is room for reasoned debate, certiorari should be granted so that an emergent circuit split can be resolved.

III. Trial Counsel Provides Ineffective Representation When They Wait Until a Brief Post-Guilt Phase Recess to Begin Preparing for Sentencing.

Burns argued below that his trial attorneys were ineffective for failing to prepare for sentencing until they met "about twelve" possible mitigation witnesses in the recess between the close of the guilt phase at 4:20 p.m. and the start of the penalty phase later that same evening. App. 14–15. Five hours later, at 9:20 p.m., trial counsel had not only completed all preparations for sentencing, but it had completed the sentencing hearing itself (opening, State's proof, defense proof, sidebar arguments, closing arguments and instructions, plus a seventy-five-minute dinner break), having hurriedly presented six witnesses whose testimony occupies only fourteen pages of transcript. App. 12; R. 139-7, PageID# 2849-2946.

As the dissent recognized, the "mitigation case put forth by Burns' counsel falls short of the investigations undertaken in a number of cases where the Supreme Court found counsel's performance deficient." App. 16 (citing *Williams*, 529 U.S. at 395 (preparation began a week before sentencing); *Wiggins*, 539 U.S. at 524–25 (finding that "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"); *Rompilla*, 545 U.S. at 374 (counsel presented jury with nothing more than a "few naked pleas for mercy"); *Andrus v. Texas*, 140 S. Ct. 1875, 1882–84 (2020) (counsel presented a rosy and one-dimensional portrait of Andrus' youth)).

Compared with the fourteen pages of proof presented to Burns' sentencing jury, the state PCR court "heard a full week's worth of testimony from mitigation witnesses; family, friends, teachers, a sociologist/mitigation expert and a neuro-psychiatrist." App. 27, 197. The dissent correctly recognized that the mitigation case omitted "significant information," including the facts that Burns' father "had a second family that also lived in West Memphis," that his father "physically and mentally abused" Burns' mother, and that this abuse was "continuously viewed by her children including Burns." App. 18.

Applying the legally correct standard for prejudice, the dissent recognized that "there is a reasonable likelihood that at least one juror would have voted in favor of a sentence less than death had the jury been informed of Burns' difficult and dysfunctional childhood." App. 25.

Burns argued to the Sixth Circuit that even more compelling than the sad history of abuse and neglect was the fact that Burns had overcome the challenges of his childhood. At sentencing, counsel not only failed to present this picture but presented an inconsistent one: trial counsel led the jury to believe that Burns was a willfully unemployed miscreant who could "get a job if he wanted to" (but apparently chose not to) and who was spoiled by his father, who provided him a house free of charge. Trial counsel should have presented evidence that—at the time of the murders—Burns was a well-respected employee at Shoney's and that he had been asked to help start a new store in Arkansas. Far from being spoiled, Burns had overcome significant financial and familial hardships to succeed in life.

The PCR Court and the TCCA rejected this ineffective assistance claim solely under the prejudice prong of *Strickland*. The PCR court held: "After listening [to a full week's worth of testimony] *this court heard nothing about the petitioner that offered any better insight into why this crime occurred or why the petitioner chose to act the way he did on the day in question*." App. 199, 205, 216 (emphasis added). The TCCA approved of this analysis: "[T]he post-conviction court found that, although the petitioner established that additional witnesses were available, the 'bulk' of them testified about his father and *did not offer any explanation as to why he had committed the crimes*. Thus, the court concluded that the petitioner failed to show that he was prejudiced by the fact these witnesses had not testified at the trial. The record supports these conclusions." App. 205 (emphasis added). That is, Tennessee required Burns to establish a nexus between his mitigation proof and his reason for having participated in a felony murder.

Rather than analyzing the TCCA's prejudice ruling under AEDPA, the panel majority rejected Burns' argument based on deficiency (an issue the TCCA had conspicuously chosen not to address). The panel then concluded, contrary to established precedents of this court and the uncontroverted facts in the record, that despite waiting until the close of the guilt phase to first prepare for sentencing, "Burns' sentencing counsel did a fair amount of investigation in preparation for the mitigation phase." App. 7.

To reach this unusual conclusion, the panel majority focused on the fact that trial counsel had spoken with Burns' parents prior to trial and had hired an

investigator. App. 7–8. However, the dissent observed, correctly, that the pretrial conversations with Burns' parents focused on "plea negotiations, [and] counsel did not discuss mitigation with [them], nor prepare them to take the witness stand." App. 13. While the investigator may have identified potential witnesses pretrial, trial counsel did not speak to any of the possible witnesses, or otherwise attempt to prepare them to testify, until summoning "about twelve" to the post-guilt recess. *Id.* Indeed, until that recess, trial counsel had no idea "which ones we wanted to use, which ones were the best witnesses, which ones we thought would be more convincing to the jury." *Id.*

The panel's deficiency holding is an extreme outlier that is radically inconsistent with the precedents of this Court. While the panel's failure to address the TCCA's prejudice holding violated its obligations under the AEDPA.

A. The panel's decision is an extreme outlier, ignores this Court's explicit precedents, and unnecessarily creates a circuit split.

This Court has never countenanced representation as woefully lacking as that provided to Burns. Nor has any court of appeals.

As noted correctly by the dissent, this Court's precedents establish that penalty-phase preparation is required prior to trial. App. 14–24. In *Andrus* this Court found trial counsel's representation deficient on facts that are materially

indistinguishable from those here. App. 18–19; *Andrus,* 140 S. Ct. at 1882–84.[14] *Andrus* was not an outlier; this Court long ago established that defense counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Williams,* 529 U.S. at 396 (beginning preparation for sentencing a week before trial was deficient).

In *Sears v. Upton*, trial counsel had already been found deficient by the lower courts (and summary reversal was granted on the prejudice prong) for meager preparations that are, yet again, materially indistinguishable from those undertaken here: "the cursory nature of counsel's investigation into mitigation evidence—limited to one day or less, talking to witnesses selected by defendant's mother—was on its face constitutionally inadequate." 561 U.S. 945, 952 (2010) (cleaned up).

This Sixth Circuit panel, standing alone, rejects this clearly established law and finds that commencing sentencing preparation midtrial is not deficient. This creates an unnecessary split with all other circuits that have addressed similar facts. *See, e.g.*, *Jermyn v. Horn*, 266 F.3d 257, 275–76 (3d Cir. 2001) (finding trial counsel deficient where they "scrambled around" after guilty verdict came in Friday afternoon and requested that clerk find some "mercy witnesses" to be present the next morning for sentencing); *Walbey v. Quarterman*, 309 F. App'x 795, 801 (5th Cir. 2009) (determining counsel deficient for failing to prepare for sentencing until "a week

[14] The significant difference between *Andrus* and *Burns* is that Andrus indisputably killed two victims and was obliged to present significant mitigation to offset the aggravated nature of his crime; thus, on remand, he failed to prevail on the prejudice prong. *Andrus v. Texas*, 142 S. Ct. 1866 (2022).

before trial"); *Sanders v. Davis*, 23 F.4th 966, 995 (9th Cir. 2022) (finding counsel deficient as he "made next to no effort to prepare for the penalty phase until days before it began"); *Young v. Sirmons*, 551 F.3d 942, 957 (10th Cir. 2008) (finding trial counsel deficient where he briefly talked with a couple of the mitigation witnesses prior to trial but "his plan had been to interview each of the mitigation witnesses in somewhat greater depth immediately prior to the start of [sentencing]."); *Anderson v. Sirmons*, 476 F.3d 1131, 1143 (10th Cir. 2007) (deeming trial counsel deficient where the attorney focused exclusively on guilt phase, while mitigation investigator "spent only twenty-three hours in substantive investigation, all of which was undertaken in the month before trial"); *Johnson v. Sec'y, DOC*, 643 F.3d 907, 932 (11th Cir. 2011) (finding counsel deficient where he "waited until the eleventh hour to begin preparing for [sentencing]"). Each of these cases finding counsel to be deficient involved materially greater preparation for the penalty phrase than the preparation of Burns' counsel. We located no case—ever—in which counsel was held to have provided adequate representation in a capital case despite preparing the entire case in mitigation in the hours between guilt and penalty.

The panel's deficiency holding is also an outlier among Sixth Circuit opinions, as observed by the dissent. App. 16–17 (citing *Foust v. Houk*, 655 F.3d 524, 536 (6th Cir. 2005); *Harries v. Bell*, 417 F.3d 631, 639 (6th Cir. 2005); *Greer v. Mitchell*, 264 F.3d 663, 677–79 (6th Cir. 2001)). Indeed, the three cases cited by the dissent all involved *more* preparation for sentencing than was undertaken here. All three cases, applying this Court's clearly established precedents, correctly found counsel deficient.

Yet, by issuing this outlier decision based on deficiency the panel avoided applying AEDPA analysis to the TCCA's actual holding, which had focused entirely on prejudice and had imposed a nexus requirement. App. 205.

B. Nexus requirements are contrary to clearly established law.

Nexus requirements are directly contrary to this Court's clearly established law. *Smith v. Texas*, 543 U.S. 37, 45 (2004); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). As the dissent recognized, "[t]he evidence of Burns' unfortunate upbringing need not have offered any 'rationale' for the murder he committed in order for the jury to have considered it as weighty mitigation." App. 28. "It would be enough if there were a 'reasonable probability' that, because of Burns' past, the jury's 'reasoned moral response' would instead have been to spare his life and sentence him to life imprisonment instead." *Id.*

Had the panel engaged in the analysis required by 28 U.S.C. § 2254(d)(1), it would have recognized that the TCCA's decision was contrary to clearly established law. *Smith* explicitly rejected the use of nexus requirements and held that mitigation includes any evidence that would provide "a reason to impose a sentence more lenient than death." 543 U.S. at 45–46; *see also Tennard*, 542 U.S. at 287. Both *Brown v. Payton*, 544 U.S. 133, 142–43 (2005), and *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), clearly established that issues entirely unrelated to why the murder was committed may be considered as mitigation. The TCCA's decision was contrary to those clear precedents, and it was contrary to the dictates of *Wiggins* and *Williams*, which establish that anything that "might have influenced" the jury to impose a sentence of life should be considered as mitigation. 539 U.S. at 538; 529 U.S. at 399.

The dissent recognized these legal truths, App. 28–29, while the panel majority declined to address them, or to otherwise apply 28 U.S.C. § 2254(d).

That nexus requirements are unconstitutional appears to be so well-recognized that it is rarely litigated. However, those courts of appeals that have addressed the matter have all applied this Court's binding precedent. *See e.g. Allen v. Stephan*, 42 F.4th 223, 256 (4th Cir. 2022); *Poyson v. Ryan*, 879 F.3d 875, 891 (9th Cir. 2018); *Barwick v. Sec'y, Fla. Dep't of Corr.,* 794 F.3d 1239, 1256 (11th Cir. 2015).

* * *

Summary reversal is appropriate. The outlier decision below was not faithful to this Court's clear precedents, either on deficiency or regarding prejudice, and its holding has unnecessarily created a split with all other courts of appeals.

CONCLUSION

This is an exceptional case. No fewer than three times did the Sixth Circuit disregard this Court's clearly established precedents. This is the rare case where a panel denied habeas relief by employing legal analysis that was "fundamentally inconsistent with AEDPA." *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020).

If allowed to stand, this outlier decision will create a circuit split in fundamental, and previously uncontroversial, areas of capital habeas law. There is no need to create such a split. The law is well settled, the facts are not in dispute, and the decision below is obviously wrong and squarely foreclosed by this Court's precedents. *Shoop*, 142 S. Ct. at 2057 (Thomas, J., dissenting); *Pavan*, 137 S. Ct. at 2079 (Gorsuch, J., dissenting). The facts relied upon were fully developed in the state

court record, and no other procedural obstacles hinder the exercise of this Court's jurisdiction.

Summary reversal is proper. In the alternative, should there be room for fairminded disagreement regarding any of the holdings of the Sixth Circuit, then certiorari should be granted.

Respectfully submitted,

/s/ Richard Lewis Tennent
RICHARD LEWIS TENNENT*
DAVID FLETCHER
Assistant Federal Public Defenders
KATHERYN P. THOMAS
Research & Writing Attorney
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
Richard_Tennent@fd.org

*Counsel of Record