

No. 22-5891

**IN THE
SUPREME COURT OF THE UNITED STATES**

KEVIN BURNS,

Petitioner,

vs.

TONY MAYS, WARDEN,

Respondent.

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

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether summary reversal is warranted in this federal habeas corpus appeal when a fairminded jurist could conclude, as the state court did, that the petitioner’s sentencing counsel were not ineffective in the development and presentation of mitigation evidence—on either the petitioner’s supposed “lesser participation” in the offense or on his family background—because the petitioner did not offer sufficient evidence of prejudice in state post-conviction review.

LIST OF DIRECTLY RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 15.2, the respondent supplements the list of proceedings provided by the petitioner under Supreme Court Rule 14.1(b)(iii) with the following matters:

Burns v. Tennessee, 527 U.S. 1039 (1999) (denying certiorari on direct appeal).

Burns v. State, No. W2000-02871-CCA-R9-PD, 2001 WL 912817 (Tenn. Crim. App. Aug. 9, 2001) (no perm. app. filed) (reversing interlocutory order disqualifying appointed counsel in post-conviction proceedings).

Burns v. State, No. W2003-01878-CCA-R10-PD (Tenn. Crim. App. Aug. 1, 2003) (no perm. app. filed) (denying extraordinary appeal concerning expert services in post-conviction proceedings).

In re Burns, No. W2003-01880-SC-S13-PC (Tenn. Jul. 31, 2003) (denying petition to review restriction on expert services in post-conviction proceedings).

Burns v. State, No. W2008-00794-CCA-R28-PD (Tenn. Crim. App. May 29, 2008), *perm. app. denied* (Tenn. Sep. 29, 2008) (denying permission to appeal order denying first motion to reopen post-conviction proceedings).

Burns v. Tennessee, 557 U.S. 906 (2009) (denying certiorari on first motion to reopen post-conviction proceedings).

Burns v. State, No. W2016-01684-CCA-R28-PD (Tenn. Crim. App. Oct. 18, 2016), *perm. app. denied* (Tenn. Crim. App. Oct. 18, 2016), *perm. app. denied* (Tenn. Tenn. Jan. 23, 2017) (denying permission to appeal order denying second motion to reopen post-conviction proceedings).

Burns v. Tennessee, 138 S. Ct. 179 (2017) (denying certiorari on second motion to reopen post-conviction proceedings).

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INTRODUCTION

Thirty years ago, the petitioner and his accomplices repeatedly shot into a car full of young men after robbing them. Two of the men died, and the petitioner was convicted of felony murder on the strength of the testimony of multiple eyewitnesses, including one of the surviving victims and a woman standing nearby during the shooting. The petitioner admitted to his involvement in the shootings, which he continues to acknowledge before this Court. The jury sentenced him to death for one of the murders.

Over the ensuing decades, this case has withstood scrutiny in collateral review, but the petitioner now seeks a new sentencing hearing. He faults his trial counsel for failing to prove that he may not have fatally shot one of the victims. Even if true, this would not undermine his conviction—again, he admitted his involvement in the shootings and was convicted of felony murder—but he claims it may have created enough residual doubt to justify a lesser sentence. He also faults his counsel for not offering further mitigation proof about his difficult upbringing, namely, that his father was abusive and had a second family.

The state courts held that the petitioner did not offer enough evidence in state post-conviction review to establish ineffective assistance of counsel under either of these theories. The petitioner did not call the critical victim-witness he claims would support his theory that he did not fire the fatal shot, and the eyewitness he did call at the post-conviction hearing not only reconfirmed her identification of the petitioner but also further corroborated her identification testimony. And the state court recognized that the additional mitigation proof the petitioner offered about his family background was simply not compelling enough to undermine its confidence in the jury's verdict. The district court concluded that the state courts reasonably applied federal law in resolving the petitioner's claims. The Sixth Circuit affirmed under a different theory (that there

was no deficient performance at all), although one judge dissented regarding the additional mitigation proof of the petitioner's family background.

Before this Court, the petitioner seeks summary reversal, challenging aspects of the Sixth Circuit's reasoning. But summary reversal is not called for in this case. Even if the Court remanded for further proceedings, the petitioner would not be able to overcome the heavy deference that must be paid to the state court's prejudice findings on both claims. And this case has already undergone thirty years of litigation, so a futile remand would only provide further unwarranted delay. The petition therefore should be denied.

STATEMENT OF THE CASE

I. State Court Proceedings

A. Proof at trial

The proof at trial established that, around 3:15 p.m. on April 20, 1992, Damon Dawson, Tracy Johnson, Eric Thomas, and Tommie Blackman were seated in a parked sedan in Dawson's driveway, facing the road. *State v. Burns*, No. 02C01-9605-CR-00170, 1997 WL 418492, at *1 (Tenn. Crim. App. Jul. 25, 1997), *aff'd*, 979 S.W.2d 276 (Tenn. 1998). Carlito Adams and the petitioner walked up to the passenger side of the vehicle. Adams argued with Blackman and told him to get out of the car, and the petitioner walked around to the driver's side. Blackman initially refused to comply, at Dawson's direction. But then Blackman threw the door open, knocking Adams down, and fled to Dawson's house. Adams said, "Get him," and two to four men emerged from behind nearby bushes and shot at Blackman several times. Blackman sustained a bullet wound to his right arm. *Id.* at *1-*2.

The assailants surrounded the three remaining occupants, pointed pistols at them, and robbed them, taking money from Thomas and jewelry from Johnson and Dawson. They then shot into the car. Thomas was shot in the chest and stomach, after which he lay down and pretended to be dead. The assailants ran off, but Thomas heard footsteps shortly thereafter. The shooting recommenced, with bullets hitting Thomas in the upper leg and striking Dawson again. According to Thomas, one of the assailants said, "We got 'em," after which the men left. Thomas survived the shooting, and he saw Dawson in the driver's seat with multiple gunshot wounds. He saw Johnson lying on the sidewalk. Dawson sustained five gunshot wounds to arm, buttocks, chest, and hip, and he died at the hospital. Johnson was shot once in the chest and died at the scene. *Id.* at *2, *4, *6.

Eric Jones, a fourteen-year-old boy who lived across the street, was playing basketball in Dawson's yard with two other boys at the time of the offense. He saw the men pointing guns at the four occupants, and he recognized Adams as one of the assailants. The man standing at Dawson's driver's side door said, "Drop it off," and the men in the car took out their jewelry and money. Blackman ran toward Eric and told him to run. They fled into the house while the other boys ran away, and once inside the house, Eric heard seven or eight more shots. The other boys were also in the line of fire directed at them. *Id.* at *3.

Eric's mother, Mary Jones, was across the street at home when she heard a gunshot. She looked out her front door and saw the petitioner and another man running up Dawson's driveway toward his car. The petitioner ran to the driver's side while the other man ran to the passenger side; both had guns drawn. The petitioner shot Dawson on the driver's side several times, and the other man shot Johnson on the passenger side once in the chest. The petitioner stopped shooting, walked around the front of the car, returned to the driver's side, and shot more into the car. *Id.* at *3.

Ms. Jones unequivocally identified the petitioner as the driver's side shooter and testified that he had a "Jheri curl" hairstyle. The other man, whom she described as the "big guy," had his hair in a ponytail. She initially referred to the driver's side shooter as "Kevin Shaw," but she acknowledged that she "may have his name mixed up." She explained that she "know[s] his face," and she pointed to the petitioner as the one who shot Dawson. (D.E. 139-6, PageID# 2639-2641, 2644-2645.)¹ Because the car directly faced her home, she could see who was in the car, and she "got a real good look" at the petitioner's face as he ran down Dawson's driveway toward her front door and driveway. (D.E. 139-6, PageID# 2646.) She explained she was unable to identify the

¹Docket entries referenced in this brief relate to the habeas corpus petition filed in the Western District of Tennessee under No. 2:06-cv-02311.

shooters from a photographic lineup because the photos used were out of date. *Burns*, 1997 WL 418492, at *3, *6.

Two days after the offense, Thomas identified the petitioner from a photographic lineup as the man who shot him, took his money, and shot someone else. He acknowledged that shortly after the offense, while still on the scene and believing that he was going to die, he told law enforcement officers that Adams shot him. He explained that he did so because Adams was the only assailant that he knew. *Id.* at *2, *4, *6.

About two months later, the petitioner was arrested in Chicago and gave a statement to law enforcement officers admitting his role in the shooting. The petitioner explained that, on the day of this offense, he received a call from Kevin Shaw, who reported that four men “jumped” Shaw’s cousin in East Memphis. The petitioner, Shaw, and three others met at Shaw’s house and went in two cars to fight the four men. Shaw gave the petitioner a handgun.

After they arrived at the scene, and as they approached Dawson’s car, the petitioner and two others held back while Shaw and another continued toward the car. Shaw talked with one of the occupants, and the petitioner heard a gunshot and saw one of the occupants run. Shaw and the other man shot at the fleeing occupant. The petitioner stepped toward the driveway, and from ten to twenty feet away, he shot three times as the fleeing occupant ran across the yard. The shooting continued, and the petitioner and the others eventually ran back to their cars and left. *Id.* at *4. The petitioner brandished a .32 caliber handgun in this offense, and law enforcement officers found four .32 caliber cartridges and one .32 caliber bullet inside Dawson’s car, along with one .32 caliber cartridge by the driver’s side rear wheel. (D.E. 139-6, PageID# 2665.)

At the conclusion of the guilt phase of the trial, the jury convicted the petitioner as charged. During the sentencing phase, the petitioner’s mother, Leslie Burns, testified that petitioner was 26

years old, had 12 brothers and sisters, graduated from high school, and presented no disciplinary problems while in school. *Burns*, 979 S.W.2d at 279. The petitioner’s father, Reverend Obra Carter, testified that his son had always been obedient and well-mannered. *Id.* Phillip Carter, the petitioner’s brother, testified that the petitioner had been active in the church and had always tried to avoid trouble. *Id.* Norman McDonald, the petitioner’s Sunday School teacher, testified that he had known petitioner for several years, and the petitioner was a “faithful” young man who had always attended church regularly. *Id.* Mary Wilson, a Captain with the Shelby County Sheriff’s Department, and Bennet Dean, a volunteer chaplain, both testified that petitioner actively participated in religious services while in custody. *Id.*

At the conclusion of the sentencing phase of the trial, the jury found one aggravating circumstance—that the petitioner knowingly created a great risk of death to two or more persons other than the victim—and it imposed a death sentence as to the murder of Dawson and a life sentence as to the murder of Johnson. On direct appeal, the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court affirmed the petitioner’s first-degree felony murder convictions.² *Id.*

B. State post-conviction proceedings

The petitioner filed a petition for post-conviction relief in state court. As relevant here, he claimed that trial counsel provided ineffective assistance of counsel by failing to investigate and develop proof of “legitimate defenses and mitigating evidence, including compelling evidence that petitioner’s involvement in the offense was far less than that alleged by the State at trial.” (D.E. No. 139-45, PageID# 5931.) The petitioner acknowledged his participation in this offense, but he disputed that he was Dawson’s shooter.

²The state courts reversed the attempted first-degree felony murder convictions. *Burns*, 979 S.W.2d at 279-80.

In the petitioner's view, trial counsel should have done more during both phases of the trial to show his "lesser participation" in this offense, specifically that he did not shoot and kill Dawson. Counsel should have interviewed potential witnesses, including the co-defendants Derrick Garrin and Carlito Adams, who were tried and convicted prior to the petitioner's trial. Likewise, counsel should have reviewed the transcripts from their trials. Counsel should have interviewed other unindicted co-participants, Kevin Shaw, Benny Buckner, and Richard Morris, some of whom testified at the co-defendants' trials. Counsel should have more effectively cross-examined Eric Thomas and Mary Jones about their identification of the petitioner as Thomas's and Dawson's shooter. For Thomas, who identified the petitioner from a photographic lineup, counsel should have questioned him about inconsistencies with his testimony at Garrin's trial. Trial counsel should have offered proof that the petitioner had a closely-shaved head at the time of the offense and did not have a "Jheri curl" as Mary Jones testified. As for mitigation evidence specifically, the petitioner alleged that trial counsel failed to offer evidence on "the statutory mitigating factor of lesser participation." (D.E. 139-35, PageID# 5910; D.E. No. 139-45, PageID# 5931-5934, 5939-5943.) The petitioner also claimed that trial counsel provided ineffective assistance of counsel at sentencing by failing to fully develop and present mitigating evidence about his family background. (D.E. No. 139-35, PageID# 5910; D.E. No. 139-45, PageID# 5934.)

After several evidentiary hearings, the trial court denied the petition, finding no ineffectiveness as to the petitioner's identification as Dawson's shooter and as to the mitigating evidence presented at trial. (D.E. 139-22, PageID# 3898-3901, 3906-3910.) First, particularly concerning prejudice, the court noted that the petitioner presented no proof in the post-conviction proceedings that someone else shot Dawson. Indeed, none of the co-defendants and co-participants testified in the post-conviction proceedings. Although the petitioner claimed that trial

counsel should have cross-examined Eric Thomas about his testimony in Derrick Garrin's trial, the petitioner failed to call Thomas as a post-conviction witness to show any impact that further trial testimony by Thomas might have had in the petitioner's trial. (D.E. No. 139-22, PageID# 3898-3900, 3906-3909.)

Second, regarding his hairstyle, the petitioner presented no proof that he ever gave trial counsel the names of witnesses who could testify that his hair was shorter at the time of the offense. Nor did the petitioner show that the longer hairstyle matched another defendant. And while Mary Jones was called as a post-conviction witness, she was not questioned about the circumstances surrounding her identification of the petitioner as Dawson's shooter. But she did state again that the petitioner shot Dawson and that he had a "Jheri curl," and she stated that he wore a trench coat. (D.E. 139-22, PageID# 3900, 3908-3910.) This matched the testimony/ statements of Carlito Adams and Kevin Shaw that the petitioner was wearing a black trench coat during this offense. (D.E. 139-22, PageID# 3899.)

Third, the petitioner offered little to support his claim that trial counsel should have presented "lesser participation" evidence at sentencing. The court found that the petitioner's own last-minute decision not to testify directly undermined counsel's efforts to present this proof. And for whatever reason, the petitioner did not testify as a post-conviction witness, nor did he offer any other proof on post-conviction review about his supposed "lesser participation." (D.E. 139-22, PageID# 3901, 3911.)

Fourth, as for ineffectiveness regarding mitigating evidence on the petitioner's family background, the trial court found neither deficient performance nor prejudice because (1) the petitioner's own last-minute election not to testify undermined counsel's efforts here, and (2) the

mitigation evidence developed on post-conviction review did not undermine that developed and presented at trial. (D.E. 139-22, PageID# 3901-3902.)

The Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief. On the identification issue as relevant to the guilt phase of the trial, the court found neither deficient performance nor prejudice. *Burns v. State*, W2004-00914-CCA-R3-PD, 2005 WL 3504990, at *50-*57 (Tenn. Crim. App. Dec. 21, 2005), *perm. app. denied* (Tenn. Apr. 24, 2006). “The conflicting testimony of the codefendants, the petitioner’s refusal to cooperate with counsel, his statement to FBI agents, and his decision not to testify at trial hindered trial counsel’s efforts to pursue a theory of lesser culpability.” *Id.* at *57. Even if trial counsel were deficient, there is no prejudice. “The proof, including the petitioner’s statement to the FBI, established, beyond a reasonable doubt, that he was guilty of the felony murders of the victims, Johnson and Dawson.” *Id.* Consequently, he “failed to show that he was prejudiced by counsel’s alleged failure to further investigate his lesser culpability and the alleged failure to present evidence of his lesser culpability.” *Id.*

According to trial counsel, all the co-defendants except for Derrick Garrin identified the petitioner as the shooter. *Id.* at *47-*48, *55-*56. In view of the petitioner’s inculpatory statement, trial counsel believed that the best proof to show that the petitioner was not the shooter was his own trial testimony. But the petitioner decided on the day of his expected trial testimony not to take the stand. *Id.* at *55.

As for counsel’s failure to better cross-examine Eric Thomas, the petitioner did not call Thomas to testify anew at the post-conviction hearing to add further clarity. And counsel did cross-examine Thomas about inconsistencies with his prior identification of Adams as his shooter. *Id.* at *34-*35, *54-*55. The appellate court agreed with the trial court’s determination that,

“without seeing the petitioner’s theories of cross-examination tested on Mr. Thomas, [it] could not” find prejudice. *Id.* at *35.

Further, regarding the hairstyle claim, the petitioner provided trial counsel with no names of witnesses who would say that he had shorter hair at the time of the offense, and the petitioner rejected counsel’s suggestion that he cut his hair shorter for trial. Even if trial counsel were deficient in some way regarding the hairstyle evidence, the petitioner failed to show prejudice when his identity as Dawson’s shooter did not rest solely on his hairstyle. Both Adams and Shaw “described the shooter as wearing a black trench coat,” and the petitioner presented no proof on post-conviction review “that any of the participants other than the petitioner was wearing a trench coat during the shootings.” Despite the petitioner’s argument to the contrary, the record, as developed, is not so clear that Kevin Shaw had a “Jheri curl” and wore a trench coat around the time of this offense and that Ms. Jones confused the two in her testimony at both the trial and the post-conviction evidentiary hearing, identifying the petitioner as Dawson’s shooter. *Id.* at *35-*36, *51-*57. Conflicting evidence on Shaw’s hair and dress failed to identify him “as wearing a black trench coat or wearing a long Jheri curl at the time of the offenses,” and under this record, the trial court “properly concluded that the petitioner failed to present evidence establishing that he was mistakenly identified as the shooter.” *Id.* at *56-*57.

On the sentencing-phase identification claim, the Tennessee Court of Criminal Appeals found no prejudice. The court reiterated its guilt-phase conclusion that the proof showed, “under the testimony of Thomas and Jones, that the petitioner shot into a vehicle.” This created a great risk of death. Additionally, the petitioner’s own statement that he shot at Blackman while “three children were in the line of fire” further supported the aggravating circumstance for creating a great risk of death to others. *Id.* at *58.

On the mitigation issue regarding the petitioner's family background, the petitioner presented post-conviction testimony from a number of witnesses, including several family members, a mitigation specialist, and a neuropsychologist. In view of the mitigation evidence presented at trial and assessing the substance of what was developed on post-conviction review, the state appellate court concluded that the record supported the trial court's determination of no prejudice. *Id.* at *62-*68. The newly developed evidence was "cumulative and corroborative of the mitigation evidence presented at the penalty phase. While information was revealed relating to the life of the petitioner's mother, the disciplinary tactics of the petitioner's father, and the petitioner's alleged 'impaired judgment,' we cannot conclude that this evidence would have persuaded the jury not to impose the death penalty." *Id.* at *68.

II. Federal Court Proceedings

The petitioner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Western District of Tennessee. He raised both guilt-phase (in Claim 1) and sentencing-phase (in Claim 11) ineffectiveness allegations challenging his identification as Dawson's shooter. (D.E. 8, PageID# 154-159, 171, 184-185.) In Claim 11, he also asserted that trial counsel provided ineffective assistance of counsel in failing to investigate and present mitigation evidence about his personal background. (D.E. 8, PageID# 171-185.)

For both the guilt-phase and the sentencing-phase ineffectiveness allegations related to the identification of the petitioner, the district court denied relief because the petitioner could not overcome deferential review under 28 U.S.C. § 2254(d) on the state court's finding of no prejudice under the record presented to it. (D.E. 95, PageID# 1407-1424, 1455-1458.) Specifically on the sentencing-phase issue, the district court noted that further cross-examination of Eric Thomas and Mary Jones "would not negate the fact of Burns' presence and participation [in the shooting], nor

would it negate Thomas' and other witnesses' testimony that more than one person fired a weapon. Burns has not demonstrated prejudice where the Court can only speculate about the effect of additional testimony that might have been presented through further cross-examination of Thomas and Jones." (D.E. 95, PageID# 1457.) On the mitigation issue concerning personal background evidence, the petitioner could not overcome deferential review of the state court's finding of no prejudice under the post-conviction review record. (D.E. 95, PageID# 1458-1468.) The district court granted a certificate of appealability on the petitioner's allegations of ineffective assistance of counsel at sentencing raised in Claim 11. (D.E. 95., PageID# 1496-1497.)

On appeal, the Sixth Circuit expanded the certificate of appealability to include additional, non-ineffectiveness claims, and it remanded for consideration of procedurally defaulted claims under *Martinez v. Ryan*, 566 U.S. 1 (2012). On remand, the district court denied relief under *Martinez*, and the Sixth Circuit declined to expand the certificate of appealability further. *Burns v. Carpenter*, 2:06-cv-02311, 2014 WL 12975682 (W.D. Tenn. Aug. 6, 2014).

In affirming the district court's judgment, as relevant here, the Sixth Circuit concluded that the petitioner's allegations of ineffective assistance of counsel concerning his identification as Dawson's shooter exceeded the certificate of appealability to the extent that the petitioner sought relief for alleged ineffectiveness in the guilt phase of the trial. To the extent that the petitioner claimed ineffectiveness during the sentencing phase of the trial, the Sixth Circuit found no ineffective assistance of counsel because this Court has not clearly established that the presentation of residual doubt evidence is constitutionally compelled. *Burns v. Mays*, 31 F.4th 497, 502-503 (2022).

As for alleged ineffectiveness in developing and presenting mitigation evidence, the court assessed what actions trial counsel took investigating mitigation evidence, the barriers to that task

placed by the petitioner and his parents, and the strategic decisions made by trial counsel to avoid the admission of unfavorable evidence. “All told, Burns’s sentencing counsel was not objectively unreasonable in how they conducted the mitigation investigation or in their strategic decision not to pursue a narrative that risked opening the door to character evidence that counsel believed could have harmed Burns in the eyes of the jury.” *Id.* On this issue, Judge Stranch dissented, concluding that the state-court adjudication of the claim reflected an unreasonable determination of the facts and an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 507-519.

Following the petitioner’s unsuccessful petition for rehearing en banc in the Sixth Circuit, he filed this petition.

ARGUMENT

The petitioner seeks summary reversal on two sentencing-related ineffectiveness claims, but reversal is not warranted on either claim. First, in the petitioner's view, the Sixth Circuit erroneously determined that sentencing counsel did not act deficiently in failing to offer residual doubt evidence—based on his claim that he did not personally shoot one of the victims—because the Constitution does not guarantee a right to present residual doubt evidence. But this parsing of the Sixth Circuit's analysis is immaterial. As the district court rightly concluded, the petitioner simply did not provide sufficient proof at the state post-conviction hearing to establish prejudice. Thus, even if this claim were reconsidered by the Sixth Circuit, the petitioner, at the very least, could show no unreasonable application of *Strickland* under the deferential review required by 28 U.S.C. § 2254(d) in the state court's determination that the petitioner failed to prove prejudice.

Second, the petitioner seeks summary reversal on his claim that sentencing counsel was ineffective by failing to develop and present more fulsome mitigation evidence on his family background. Again, he takes issue with the nuances of the Sixth Circuit's reasoning on deficient performance. But as with his residual doubt claim, and as the district court correctly determined, the petitioner can show no unreasonable application of *Strickland* in the state court's conclusion that the petitioner failed to prove prejudice under the record presented to it. On this claim, he simply disagrees with the assessment that every court has made about the persuasiveness of the additional mitigation proof he offered the state court.

Summary reversal for further consideration would simply delay the inevitable: a denial of federal habeas corpus relief. But this case has already undergone decades of collateral review, and the Court should not entertain any additional delay for further (and futile) proceedings in the Sixth Circuit. The petition for writ of certiorari should be denied.

The Court Should Not Grant Summary Reversal Because the State Court Reasonably Applied *Strickland* When It Denied Relief.

Both the claims the petitioner presents concern the ineffective assistance of trial counsel. Under the well-settled *Strickland* standard, a habeas corpus petitioner cannot prove ineffective assistance of counsel unless he shows both deficient performance *and* prejudice. *Strickland*, 466 U.S. at 691-92. For deficient performance, counsel’s representation must have fallen below an objective standard of reasonableness, “outside the wide range of professionally competent assistance,” to the extent that counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth amendment.” *Id.* at 687-688, 690. For prejudice, the petitioner must show a reasonable probability—sufficient to undermine confidence in the outcome—that, but for counsel’s deficient performance, the result of the proceeding would have been different. *Id.* at 694.

When a federal court reviews the state-court adjudication of a federal claim under the deferential review required by 28 U.S.C. § 2254(d), the court’s assessment is limited to the record presented to the state court. *Cullen v. Pinholster*, 563 U.S. 170, 181-83 (2011). The petitioner must show that the state-court adjudication was “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Conversely, habeas corpus relief is unavailable “so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Id.* at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

- A. A fairminded jurist could—and did—conclude that the petitioner did not prove prejudice from counsel’s alleged deficient performance in challenging the State’s proof that the petitioner shot Dawson.**

The petitioner has argued throughout his post-conviction and federal habeas corpus proceedings that trial counsel should have done more to show that he was not the assailant who

shot Dawson. But he presented minimal evidence on post-conviction review to prove this point, and the state court reasonably concluded that the proof did not establish prejudice.

First, the petitioner offered Eric Thomas's testimony from Derrick Garrin's trial, which he claimed was inconsistent with Thomas's testimony at the petitioner's trial, and argued that trial counsel should have done a more thorough cross-examination of Thomas about this testimony. But the petitioner failed to call Thomas as a witness in the post-conviction proceedings. Thus, whatever impact doing so might have had is purely speculative at this juncture. As the district court aptly noted when assessing the petitioner's guilt-phase challenge on Thomas's cross-examination, "Burns has not demonstrated prejudice where the Court can only speculate about the effect of additional testimony that might have been presented through further cross-examination of Thomas and Jones." (D.E. 95, PageID# 1457.)

The petitioner seeks to avoid this consequence of his failings in state post-conviction review by characterizing the Tennessee Court of Criminal Appeals' decision as unreasonably limited to whether sufficient evidence of aggravating circumstance was established under the trial record. *Burns*, 2005 WL 3504990, at *58. But this ignores the extent to which both the trial court and the Tennessee Court of Criminal Appeals considered the identification issue more broadly, as to both guilt and sentencing. Earlier in its analysis, the state appellate court assessed the evidence developed on post-conviction review and determined that it did not exclude the petitioner as Dawson's shooter. The petitioner's reliance on inconsistencies in Thomas's testimony from both trials, at most, raised questions, and without post-conviction hearing testimony from Thomas, there were few answers. As the district court noted in its analysis on the guilt-phase issue, "[t]he Court of Criminal Appeals agreed with the post-conviction court's finding that, without seeing the petitioner's theories of effective cross-examination tested on Thomas to clarify the apparent

inconsistencies in testimony, the court could not conclude that questioning Thomas as Burns contends counsel should would have changed the outcome of the case.” (D.E. 95, PageID# 1419.)

Moreover, and as the Sixth Circuit rightly observed, Thomas’s testimony between the two trials on the petitioner’s identification as his shooter was not necessarily inconsistent. *Burns*, 31 F.4th 505-07. At the petitioner’s trial, Thomas identified the petitioner not by name but through a photographic lineup, and a law enforcement officer testified that the selected photograph matched the petitioner. (D.E. 139-5, PageID# 2537-2538.) At Garrin’s trial, Thomas testified that a person wearing a trench coat fired five or six times at Blackman as he ran from the car, after which the person in a trench coat and others approached the driver side of the car and told them to “give it up.” (D.E. 139-23, PageID# 4276-4278.) Thomas gave them cash, while Dawson gave them three rings, and Johnson gave them a necklace. (D.E. 139-23, PageID# 4278-4279.) When asked what happened next, Thomas testified, “They opened fire,” and “the big fellow with the glasses” shot him twice. (D.E. 139-23, PageID# 4279-4280.) Thomas then saw the “big fellow with the glasses” shoot Dawson, but he acknowledged that he was lying down in the back seat “in shock” from being shot. He confirmed that he had no idea how many shots were fired in total. (D.E. 139-23, PageID# 4281-4282.) Thomas further stated that “[a]fter [he] was shot in the stomach and shot in the chest, and [Dawson] and [Johnson] were shot by *various individuals . . . somebody else . . .* came and shot [him] again.” (D.E. 139-23, PageID# 4282) (emphasis added).

As the Sixth Circuit indicated, it is possible that more than one person, not just the “big fellow with glasses,” shot Thomas. *Id.* at 506. Thomas’s testimony at Garrin’s trial did not exclude the possibility that someone in addition to the “big fellow with glasses” shot him and Dawson. At Garrin’s trial, Thomas referred generally to an armed group of men who approached Dawson’s car and “opened fire.” (D.E. 139-23, PageID# 4279.) He testified that he had no idea how many shots

were fired in total. And he responded affirmatively to a question suggesting that “various individuals” shot Dawson and that “somebody else” came and shot him again. (D.E. 139-23, PageID# 4282.) This testimony from Garrin’s trial is entirely compatible with Thomas’s photo identification of petitioner in this case. And the fact that Thomas’s testimony between the two trials is reconcilable makes the petitioner’s speculation about how cross-examination may have aided him all the more difficult to accept.

Second, the petitioner asserts that trial counsel should have cross-examined Mary Jones more thoroughly. At trial, Ms. Jones testified that she was across the street when she heard a gunshot, and she saw the petitioner shoot Dawson several times, walk around the front of the car, return to the driver’s side, and then shoot more into the car. *Burns*, 1997 WL 418492, at *3. She unequivocally identified the petitioner and testified that he had a “Jheri curl” hairstyle. She said that she had “a real good look in [the petitioner’s] face” as he ran toward her after the shooting. *Id.*

The petitioner faults trial counsel’s impeachment of Ms. Jones, relying on evidence developed at the post-conviction hearing from new witness testimony about his hair length, so as to undermine the credibility of Mary Jones’s trial testimony. But he did not clearly prove what his hairstyle was at the time of this offense or even what the co-defendants’ and co-participants’ hairstyles were. Despite the petitioner’s reliance on various statements and sworn testimony by them to bolster his assertion that he did not shoot Dawson, he called none of these individuals to testify at more than two weeks of evidentiary hearings conducted on his post-conviction petition. Indeed, even the petitioner himself did not testify to add further clarity on this issue.

And what proof he did offer cut against his claim. When Ms. Jones testified in the post-conviction proceedings, the only new evidence elicited was that the petitioner—whom she again

identified as Dawson’s shooter—was wearing a long, black trench coat. (D.E. 139-26, PageID# 4754-4756.) This matched statements from other co-defendants that the petitioner was wearing a black trench coat during this offense. *Burns*, 2005 WL 3504990, at *56. Further, “it is clear that the identification of him as the shooter does not rest solely on his hairstyle.” *Id.* at *57. In the district court’s correct view, “[e]ven with the additional evidence presented at the post-conviction hearing about Burns’ hair, Burns’ post-conviction counsel did not demonstrate that Jones’ identification of Burns as Dawson’s shooter was inaccurate.” (D.E. 95, PageID# 1423.)

Upon a review of the entirety of the state-court adjudication on whether counsel provided ineffective assistance of counsel in failing to show that the petitioner was not Dawson’s shooter, it is readily apparent that, at the very least, a fairminded jurist could conclude, as the state court did, that the petitioner failed to prove *Strickland* prejudice under the limited record developed on this issue in the post-conviction review process. Stated simply, he failed to establish that he was not Dawson’s shooter. The state court did not unreasonably apply *Strickland*, and no further review is merited on this claim, regardless of the nuances of the Sixth Circuit’s analysis.

B. A fairminded jurist could—and did—conclude that the petitioner did not prove prejudice from counsel’s alleged deficient performance in not presenting additional mitigation evidence on the petitioner’s family background.

The petitioner claims that trial counsel belatedly attempted to develop mitigation proof on his family background, to the petitioner’s detriment. The Sixth Circuit majority applied de novo review and found no deficient performance. The dissenting judge concluded that the petitioner could overcome the deferential review in 28 U.S.C. § 2254(d) and that relief should be granted on the claim.

As the district court concluded, “[d]espite any lack of information presented in mitigation at trial, Burns was not prejudiced by counsel’s failure to search deeper into Burns’ development

and family background.” (D.E. 95, PageID# 1464.) Deferential review applies to the state court’s prejudice assessment, despite the petitioner’s argument to the contrary. And at the very least, a fairminded jurist could conclude, as the state court did, that the petitioner failed to prove *Strickland* prejudice under the record developed on post-conviction review. For this reason alone, the petitioner cannot prove ineffective assistance of counsel on this claim.

Reviewing the newly developed mitigation proof, the trial court determined that the “bulk” of this evidence concerned the petitioner’s father but “did not offer any explanation as to why he had committed the crimes.” For the trial court, the petitioner provided insufficient proof to establish *Strickland* prejudice, and the Tennessee Court of Criminal Appeals agreed that the record supported this conclusion. *Burns*, 2005 WL 3504990, at *66. A fairminded jurist reviewing this record could reach the same conclusion. Several members of the petitioner’s family testified at the evidentiary hearings on his post-conviction about the petitioner and his family background, including information concerning his father’s two separate families. As the district court determined under this record, “[t]he evidence presented in the post-conviction proceedings does not demonstrate that there is a reasonable probability that a jury, having been given additional evidence about the family situation, poverty, abuse suffered by Burns’ mother, and the strict/abusive nature of Obra Carter’s treatment of his children, would have given Burns a life sentence.” (D.E. 95, PageID# 1464.)

Trial counsel pursued a mitigation theory that petitioner was a good person and that the murders were outside his usual character, and they sought out witnesses who would “have something good to say about [petitioner].” Counsel confirmed that they wanted to portray petitioner as having a good family, being a good kid in the family, having gone to school, and having held down jobs. (D.E. 139-28, PageID# 5077, 5097.) The petitioner’s mother testified that

he graduated from high school and presented no disciplinary problems while in school. *Burns*, 979 S.W.2d at 279. His father testified that his son had always been obedient and well-mannered. *Id.* His brother testified that the petitioner had been active in the church and had always tried to avoid trouble. *Id.* His Sunday School teacher testified that the petitioner was a “faithful” young man who had always attended church regularly. *Id.* A Captain with the Shelby County Sheriff’s Department and a volunteer chaplain at the jail both testified that the petitioner had actively participated in religious services while in custody. *Id.* As for the petitioner’s work ethic, his brother, Phillip Carter, explained that he and the petitioner held jobs together, and the petitioner “left a good attendance record” where he worked. (D.E. 139-7, PageID# 2884.)

The petitioner argues that deferential review under 28 U.S.C. § 2254(d) should not apply because the state appellate court’s adjudication on prejudice is contrary to clearly established precedent from this Court. Specifically, he argues that the state court erroneously required a nexus between the mitigation evidence and an explanation for the offenses. However, he confuses the admissibility of mitigation evidence with a reasonable weighing of the developed post-conviction proof to assess *Strickland* prejudice, and he fails to show that the state-court adjudication is contrary to this Court’s clearly established precedents.

A sentencer may not “refuse to consider, as a matter of law, any relevant mitigating evidence.” *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (emphasis omitted); *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Accordingly, a State may not exclude mitigating evidence simply because there is no causal nexus between that evidence and the crime. *Tennard v. Dretke*, 542 U.S. 274, 285-88 (2004); *see also Smith v. Texas*, 543 U.S. 37, 44 (2004).

The sentencer may, however, “determine the weight to be given relevant mitigating evidence.” *Eddings*, 455 U.S. at 114-15. Thus, a sentencer may consider the absence of a causal

nexus when assessing the weight of the evidence. *Hedlund v. Ryan*, 854 F.3d 557, 587 n.23 (9th Cir. 2017) (“[A] court may consider causal nexus in assessing the *weight* of mitigating evidence, but not in assessing its *relevance*.” (emphasis in original)).

The weight of the mitigating evidence is also the primary focus of *Strickland*’s prejudice inquiry in the mitigation context, where a defendant must prove “there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695. A reviewing court therefore “reweigh[s] the evidence in aggravation against the totality of available mitigating evidence.” *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). Because a sentencer may consider the lack of a nexus in weighing mitigation evidence, a court may also consider the lack of a nexus when deciding the prejudice prong of a *Strickland* claim.

Indeed, a number of courts have explicitly or implicitly held as much. *E.g.*, *Hannon v. Sec’y, Dep’t of Corr.*, 562 F.3d 1146, 1157 (11th Cir. 2009) (noting the proof did not “establish any nexus” between the petitioner’s mental impairment and his offenses); *Ploof v. State*, 75 A.3d 840, 864 n.105 (Del. 2013) (noting there is “no requirement that a causal nexus exist,” but “mitigating evidence that provides an explanation for a defendant’s behavior is more powerful than evidence that does not provide an explanation”); *In re Crew*, 254 P.3d 320, 339 (Cal. 2011) (holding mitigation proof may have “elicited some jury sympathy,” but there was no prejudice in part because there was “no causal connection” to the offense); *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006) (“[T]he failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.”).

These lower court decisions indicate that, in terms of deferential review under 28 U.S.C. § 2254(d), the state-court prejudice adjudication here is certainly not contrary to this Court’s “clearly

established” precedents. And the decisions relied upon by the petitioner do not compel a contrary conclusion. Particularly, in *Allen v. Stephan*, 42 F.4th 223 (4th Cir. 2022), a divided panel recently disagreed on the very issue presented, whether this Court’s precedents compel a sentencer to both consider and apply (i.e., give “meaningful consideration” of) all mitigating evidence offered, in a particular way. That the panel divided is further indication that the Court has not “clearly established” the petitioner’s requested expansion of *Smith* and *Tennard*, requiring a particular application of certain mitigation evidence. While mitigating evidence must be allowed and considered regardless any nexus to the offense, “[t]he sentencing judge . . . is not required by clearly established federal law to give particular weight to any evidence offered in mitigation.” *Id.* at 263 (Rushing, J., dissenting). Simply put, the petitioner cannot show under 28 U.S.C. § 2254(d) that the state court’s assessment and adjudication of prejudice under admitted mitigation evidence is contrary to clearly established federal law, particularly when the trial court noted its consideration of “all of the mitigation proof presented.” (D.E. 139-22, PageID# 3901-3902.)

And a fairminded jurist could conclude, as the state court did, that the petitioner did not show a reasonable probability of a different result had the jury heard and considered the mitigation proof developed on post-conviction review about his family background, including his family’s poverty and his father’s second family. The evidence establishing the aggravating factor was overwhelming while the additional mitigation proof was cumulative, unconvincing, or both. The state-court decision reached under this record is not “so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103.

CONCLUSION

The petitioner asks this Court to summarily reverse the lower court's rejection of two allegations of ineffective assistance by sentencing counsel, both of which claims the parties agree were exhausted in state court and are subject to consideration under 28 U.S.C. § 2254(d). As shown, the petitioner cannot overcome that deferential review on either claim and is not entitled to habeas corpus relief on them. Consequently, there is no error for the Court to correct, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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