

No. 22-5891
CAPITAL CASE

**In The
Supreme Court of the United States**

KEVIN B. BURNS,
Petitioner,

v.

TONY MAYS, WARDEN,
Respondent.

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

**BRIEF FOR *AMICUS CURIAE*
LAY AND ORDAINED MINISTERS
IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICUS CURIAE*¹

Under the tenets of the *amicus* parties' faith and the law of the land, if the death penalty is ever to be applied, it must be reserved for the worst offenders. Because Petitioner Kevin Burns did not take a life, it is unjust for the state to put him to death. Due to the ineffective assistance of counsel, the jury that passed Burns's sentence was not given the opportunity to take his lack of moral culpability into account in making its decision. This error cannot be allowed to stand.

Amicus curiae are lay and ordained Christian ministers concerned that the use of capital punishment be morally justified. *Amicus curiae* can also speak to Burns's ordination as a Christian minister while incarcerated and to the positive impact his ministry has had both in prison and in the broader community. *Amicus curiae* are compelled to share their views and experiences out of concern that without this Court's intervention, Burns's good works will unjustly be cut off. *Amicus curiae* are:

Shane Claiborne is a prominent Christian speaker, activist, and bestselling author. He is the author of nine books. His work has appeared in leading national news publications, and he has given

¹ No counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made such a monetary contribution. The parties were given proper notice and consented to this filing.

academic lectures at some of the country's premier universities.

Rev. Dr. Joe Ingle has worked in prison ministry throughout the South since 1974. In his work with the condemned, he has been spiritual adviser to men in several cases where this Court has ruled on constitutional standards: David Washington in *Strickland v. Washington*, 466 U.S. 668 (1984); Alvin Ford in *Ford v. Wainwright*, 477 U.S. 399 (1986); and Warrant McCleskey in *McCleskey v. Kemp*, 481 U.S. 279 (1987). Ingle has written three books about his experiences. He is a United Church of Christ minister, the author of the denomination's statement about the death penalty in the General Synod of 1979, and a leading voice in seeking prison and sentencing reform. He graduated from Union Theological Seminary, where he lived and worked in East Harlem, and was awarded a Merrill Fellowship to Harvard University. He has been nominated twice for the Nobel Peace Prize.

Dan Mann is a talent representative who visits inmates on Tennessee's death row and knows Burns and his ministry.

Rev. Dr. Kevin Riggs is the Senior Pastor at Franklin Community Church in Franklin, Tennessee. He regularly visits inmates on Tennessee's death row, and through that work developed a relationship with Burns, who became an ordained minister through Franklin Community Church five years ago. The church now employs Burns as a minister. Burns regularly delivers sermons to the church and teaches

Bible study for church members, besides ministering to other death row inmates.

Wes Yoder is a literary agent and author who represents faith-based authors and speakers. Among other notable accomplishments, Yoder is the Director of the New Canaan Society of Middle Tennessee and represented Paul Young in publishing *The Shack*.

Paul Young is the author of several books, including the New York Times bestselling novels *The Shack*, *Eve*, and *Cross Roads*. Young's books explore topics of Christianity and morality.

STATEMENT OF THE CASE

“For such a time as this”

—*Esther 4:14*

The statement of the case in Burns's petition for writ of certiorari discusses the background related to Burns's legal proceedings. *Amicus curiae* write separately to share their experience of the remarkable life Burns leads despite his confinement in prison.

When people ask how he is doing, Burns is known to respond, “Today is the best day of my life.” One of Burns's greatest achievements is that he became an ordained minister five years ago through the Franklin Community Church in Franklin, Tennessee. This was no small feat. Burns's ordination was the culmination of a multi-year process that required Burns to prove his active ministry by tracking and recording his ministries over time and to

answer questions about Christian doctrine.² Burns's accomplishment is all the more impressive because he is self-taught in prison, relying on little more than his well-worn copy of the Bible.

But Burns is committed to his ministry. "Pastor Kevin," as he is known even by the prison guards, draws inspiration from a passage from the Book of Esther: "And who knows but that you have come to royal position for such a time as this." *Esther* 4:14. Burns embodies the teaching of this passage to turn one's circumstances into a calling to act for the benefit of others.

Burns uses his death sentence to be of service to fellow inmates, especially those facing execution. He established a church—the Church of Life—through which he ministers to fellow inmates. Burns gave particular comfort to inmates during the COVID-19 pandemic: outside ministries were prohibited from entering the prison, but every week there was a church service on death row because Pastor Kevin could lead it. Burns is often one of the last people inmates speak with before their execution.

Burns's ministry extends well beyond prison. Burns is employed as a minister at Franklin Community Church and regularly preaches to

² A video of Burns's licensure, a step in the ordination process, is available online. Franklin Community Church, *The Licensure of Kevin Burns and Lorraine Dunlap*, YouTube (Mar. 5, 2017), <https://www.youtube.com/watch?v=q5QQfUVEJpo>.

members of the church by telephone.³ This year, for instance, he will deliver sermons to the church during Thanksgiving and Christmas. Burns also teaches a weekly Bible study for Franklin Community Church families. From death row, Burns has launched a ministry benefitting both those in prison and in the larger community.

SUMMARY OF THE ARGUMENT

This Court's precedents require the jury to consider all relevant mitigation evidence when deciding whether to impose a sentence of death. *Kansas v. Marsh*, 548 U.S. 163, 171 (2006). The record shows that Burns did not take another human life. But due to the ineffective assistance of counsel, the jury was not able to consider that fact because Burns's trial counsel unreasonably failed to impeach the witnesses who identified Burns as the killer. Because Burns's counsel did not present the jury with evidence of Burns's innocence—which Burns had a right to present under state law—Burns was deprived of his constitutional right to counsel. His capital sentence is incompatible with constitutional standards of justice.

Putting Burns to death is also inconsistent with Christian ethics, which similarly require the consideration of moral culpability in sentencing and the exercise of mercy whenever possible. Because the jury was unable to consider evidence that Burns was

³ Many of Burns's sermons are available on the Franklin Community Church YouTube page. *See* <https://www.youtube.com/@franklincommunitychurch2134>.

not the killer, it cannot have rendered a punishment that was just.

ARGUMENT

I. Burns's Sixth Amendment Right to Counsel Was Violated Because His Counsel Unreasonably Failed to Present Mitigating Evidence to the Jury

a. This Court's Precedents Require Consideration of Moral Culpability in Capital Sentencing

This Court has recognized that “the penalty of death is qualitatively different from a sentence of imprisonment.” *Woodson v. N.C.*, 428 U.S. 280, 305 (1976) (“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”) (plurality opinion). Thus “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Va.*, 536 U.S. 304, 319 (2002)). In other words, capital punishment is reserved for the “worst offenders.” *Id.* at 569.

To give effect to this limitation, this Court has held that in making “the moral judgment between life and death,” *Glossip v. Gross*, 576 U.S. 863, 902–03 (2015) (Thomas, J., concurring), the jury must consider the defendant’s “personal responsibility and

moral guilt.” *Enmund v. Fla.*, 458 U.S. 782, 801 (1982). A key feature of the jury’s exercise of moral judgment is its consideration of mitigating evidence. “[A]s a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation.” *Kansas v. Marsh*, 548 U.S. 163, 171 (2006). And a defendant “has wide latitude to raise as a mitigating factor ‘any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.’” *Roper*, 543 U.S. at 568 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)).

This Court’s precedents recognize the discretion states are afforded in regulating the sentencing process, including the use of mitigating evidence. *See Marsh*, 548 U.S. at 175. Under the Tennessee sentencing laws applicable here, a defendant possesses the right to introduce residual doubt evidence as a mitigating circumstance. *See State v. Ivy*, 188 S.W.3d 132, 156 (Tenn. 2006). This right is grounded in Tennessee statute. *See id.* (citing Tenn. Code Ann. § 39–13–204(c) (“In the sentencing proceeding, evidence may be presented as to the nature and circumstances of the crime; the defendant’s character, background history, and physical condition; . . . and any evidence tending to establish or rebut any mitigating factors.”)). And it includes the right to introduce impeachment evidence at the sentencing phase. *See State v. Hartman*, 42 S.W.3d 44, 57 (Tenn. 2001) (“Where, as here, the proffered residual doubt proof is impeachment of the testimony of the only witness who offered direct rather

than circumstantial proof of the defendant's involvement in the crime, such proof clearly is relevant and admissible to establish residual doubt as a mitigating circumstance.”).

These protections mean nothing, of course, if the defendant is not adequately represented by counsel, whose job it is to “ensure that the adversarial testing process works to secure a just result.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel who fails to present relevant mitigating evidence to the jury fails to vindicate the defendant's “right to present sentencers with information relevant to the sentencing decision” and bars the jury from meeting its obligation “to consider that information in determining the appropriate sentence.” *Marsh*, 548 U.S. at 175.

b. Ample Record Evidence Shows that Burns Did Not Kill Dawson

This case illustrates the need for competent counsel to present mitigating evidence in capital sentencing. Both witnesses who identified Burns as Dawson's killer could—and should—have been impeached on their identifications.

First, victim Eric Thomas identified Dawson's shooter as “Number 5” in a photo lineup, which was identified at trial as Burns. App. 73; R. 139-6, PageID# 2699. But during the previous trial of defendant Derrick Garrin, Thomas had testified that Dawson was shot by “the big fellow with glasses.” App. 73. Burns is 5' 7” and does not wear glasses;

Garrin is 6'4" and does wear glasses. App. 10; R. 139-8, Page ID# 2968; R. 139-23, PageID# 3981. Witness Eric Jones similarly identified a 6'4" man with glasses as the person pointing a gun at Dawson, further undermining Thomas's identification of Burns as Dawson's shooter. R. 139-5, PageID# 2586-2612.

Second, witness Mary Jones testified that there were two gunmen who both wore Jheri curls, and identified Burns (on cross-examination by defense counsel) as one shooter based on his hairstyle in court. App. 79-80, R. 139-6, PageID# 2639-41. Yet Burns had short hair at the time of the shooting that he did not wear in a Jheri curl. R. 139-27, PageID# 4926; R. 139-29, PageID# 5193; R. 139-30, PageID# 5383-84, 5398-99; R. 139-33, PageID# 5830-34.

But for the ineffective assistance of counsel, this impeachment evidence would have been presented to the jury and would have been material to the jury's sentencing decision. Indeed, the jury imposed a life sentence on Burns for the death of Johnson, whom it was clear Burns did not kill. Moreover, the record demonstrates that counsel's failure to present this evidence to the jury was not a "strategic choice." *Strickland*, 466 U.S. at 681. How could it have been? It appears that counsel simply missed it. R. 139-27, PageID# 5009. Under the Sixth Amendment, counsel in a capital case should always be expected to impeach a witness who identifies the defendant as the killer where such mitigation evidence is permitted as of right under state law, as it was for Burns. Because Burns's counsel failed to arm the jury with this critical information to be weighed in making the sentencing

decision, this Court should summarily reverse the Sixth Circuit's decision or, in the alternative, grant certiorari.

II. Putting Burns to Death Is Incompatible with Christian Ethics, Which Require Consideration of Moral Culpability in Capital Sentencing

In a related context, this Court has looked to the views of "religious communities in the United States," including the Christian community, when evaluating the appropriateness of the death penalty under the Eighth Amendment. *See Atkins*, 536 U.S. at 316 n. 21. Here, *amicus curiae* write to affirm their understanding that Christian ethics require punishment to be based on an offender's conduct and intentions. Under Christian doctrine, a sentence that does not consider moral culpability cannot be just.

Start with the Hebrew Scriptures. The Old Testament Laws, beginning with the Noahic Covenant, allow for the death penalty to be imposed in some circumstances, including for murder. *Exodus* 21:12–14. But the Hebrew Scriptures contain examples where God spares the lives of people who have committed murder. For instance, Cain killed his brother Abel, yet God showed Cain mercy and spared his life. *Genesis* 4:8–15. Moses murdered an Egyptian, *Exodus* 2:11–12, but God showed him mercy and spared his life. And David murdered Uriah, *2 Samuel* 11, yet God showed him mercy and spared his life.

The New Testament likewise stresses the importance of mercy. Saul, who became the Apostle Paul, killed Stephen and an unknown number of other Christians. *Acts* 7:57–8:3. Once again, God showed him mercy and spared his life. Jesus expressed his disapproval of capital punishment when he refused to condemn to death a woman caught in adultery. *John* 8:1–11. And in the Beatitudes, Jesus taught that, “Blessed are the merciful, for they will be shown mercy.” *Matthew* 5:7. Jesus similarly rebuked the Pharisees, saying, “Woe to you, teachers of the law and Pharisees, you hypocrites! You give a tenth of your spices—mint, dill and cumin. But you have neglected the more important matters of the law—justice, **mercy**, and faithfulness. You should have practiced the latter, without neglecting the former. You blind guides! You strain out a gnat but swallow a camel.” *Matthew* 23:23–24 (emphasis added).

How can God have spared these people when God’s Laws purportedly said that murder requires capital punishment? The explanation is that while capital punishment may be allowed, nowhere is it mandated. Instead, the Bible teaches that in all situations we are to seek restoration and reconciliation over punishment for its own sake. In other words, if there is a path that shows mercy, that is the path we must take.⁴ The prophet Micah said,

⁴ The examples cited above also show the profound benefits that can follow an act of mercy, highlighting the imperative for juries to show mercy whenever possible. Moses led the Israelites from slavery to the edge of the Promised Land; David became the greatest king of Israel; and Paul went on to write at least 13 of the 27 books in the New Testament. None of those

“He has showed you, O man, what is good. And what does the LORD require of you? To act justly, and to *love mercy* and to walk humbly with your God.” *Micah* 6:8 (emphasis added).

If the death penalty is ever to be appropriate, it must be reserved for the worst of the worst offenders. Evidence that a defendant did not kill the victim is therefore material to the jury’s decision whether to impose a sentence of death or life. Even the Hebrew Scriptures required the testimony of “two or three witnesses” “to convict a man accused of any crime.” *Deuteronomy* 19:15. And they made clear that punishment would be inappropriate for those falsely accused of a crime. *Id.* at 19:16–18.

Killing Kevin Burns, who killed no one himself, is inconsistent with Christian ethical principles that require consideration of the offender’s individual conduct. Because the sentencing jury was deprived of evidence of Burns’s innocence, its pronouncement could not have been just. His sentence violates God’s admonition to show mercy wherever possible and puts Christian believers who will have to participate in his execution in a compromised moral and spiritual position.

accomplishments would have been possible if God had chosen execution over life. They are also a reminder of what will be lost if Burns’s ministry and good works are unjustly cut short by Burns’s execution.

CONCLUSION

Pastor Kevin Burns, one of the “least of these brothers of mine” that Jesus refers to in Matthew 25:40, lives out the teachings of the gospel of Jesus in a life of mercy, forgiveness, love, and reconciliation. He manages to do that in a maximum security prison on death row. Burns’s model of Christian faith is one that all Christians should aspire to.

Our state governments have the authority to punish those who commit crimes, but not the authority to punish those who are innocent. Because of the ineffective assistance of counsel, Burns is scheduled to die without having taken a life. Consistent with this Court’s precedent and the principles of Christian ethics, this Court should grant Burns the relief he seeks in his petition.

Respectfully submitted,

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