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

REPLY TO STATE'S BRIEF IN OPPOSITION

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As the Petition explains, the Sixth Circuit committed three separate errors in its published opinion denying habeas relief for ineffective assistance of counsel in this capital case:

> (1) holding that the absence of a federal right to present residual doubt evidence forecloses petitioner's ineffective assistance claim based on the failure to present this evidence, despite the existence of a state-law right;
>
> (2) holding that petitioner's evidence that he did not personally kill a victim was cognizable only as residual doubt evidence and not as relevant to his lesser culpability; and
>
> (3) holding that counsel's preparation of a short and cursory penalty-phase case in the brief time after the guilt-phase constituted adequate performance.

Petitioner argued that each of these holdings is indefensible and warrant summary reversal.

The Brief in Opposition confirms Petitioner's arguments. To its credit, the State does not defend the reasoning of the Sixth Circuit. Rather than defend the panel's ruling, the State presents entirely new arguments for the denial of habeas relief. But the State's arguments are properly directed to the Sixth Circuit, not to this Court. This is "a court of review, not of first view." *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). Following this Court's usual practice, the State's arguments should be "le[ft] for the lower cour[t] to consider in the first instance." *Id.*

What matters now is that the published and precedential decision below denies capital habeas relief on three grounds that are so facially incorrect—and contrary to this Court's precedent—that even the prevailing party is unwilling to defend them.

This Court should summarily reverse the decision below, vacate, and remand for appropriate consideration of the State's new arguments.

I. The State Does Not Defend the Decision Below.

The Petition made clear that it sought summary reversal to correct three independent errors of law in the Sixth Circuit's denial of habeas relief.

The first two involve trial counsel's failure to present evidence at the sentencing phase that Burns did not personally shoot Damon Dawson. At the guilt stage, Burns had been found guilty of two counts of felony murder: one for Dawson and one for Johnson. For Dawson, the jury sentenced Burns to death; for Johnson, they gave him life in prison.

The only material difference between the two crimes—and thus the only explanation for the different sentences—was the jury's mistaken conclusion that Burns personally shot Dawson. It is undisputed that Burns did not shoot Johnson, but the State contended—and trial counsel failed to adequately dispute—that he personally killed Dawson. But for trial counsel's errors, the jury would never have concluded that Burns shot Dawson (or at the least, they would have held significant doubts about whether he did); *see* Pet. 26–28, and thus, but for trial counsels' errors, there is a reasonable probability that Burns would not have received a death sentence. *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (*per curiam*). A stronger case for prejudice is difficult to imagine.

The Sixth Circuit did not address prejudice. It rejected Burns' arguments based on its own simple, logically flawed analysis of deficiency:

> 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 reasoning contains the first two errors warranting summary reversal.

First, although there is no federal constitutional right to introduce residual doubt evidence at sentencing, there is a Tennessee constitutional right to introduce such evidence. Pet. 20–21. And every court to have addressed the issue, including the Sixth Circuit and several decisions of this Court, has recognized that a federal ineffective assistance claim can be based on the failure to exercise rights under state law. Pet. 18–20 (citing cases).

The State has no response. It does not dispute that Tennessee provides a right to introduce residual doubt evidence at sentencing, nor does it dispute that the failure to exercise this state-law right provides a basis for a federal ineffective assistance claim. As the Petition explains, there is no good-faith defense of the Sixth Circuit's reasoning. The State does not disagree, and summary reversal is warranted.

Second, independently, the decision below errs by characterizing the evidence that Burns did not shoot Dawson as relevant only to residual doubt. Even if the jury believed that Burns did not shoot Dawson, it could still have convicted him of felony murder, as it did for Johnson. The evidence was relevant to the *manner* in which Burns committed the offense, not only to his guilt. Pet. 22–25.

Again, the State makes no effort to defend the Sixth Circuit's logic. The State does not deny that the manner of the offense and lesser culpability are valid sentencing considerations. Thus, seeing this implicit concession of error, this Court should summarily reverse, and on remand the court of appeals can resolve the State's new arguments for the denial of habeas relief.

As to the third error, the panel majority, over a dissent by Judge Stranch, held that trial counsel was not deficient in its preparation and presentation of Burns' mitigation case. Trial counsel waited 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. The entire mitigation case comprised six witnesses who testified for a total of fourteen transcript pages. Pet. 29–35. No other decision has held that trial counsel provided adequate representation when preparation for the sentencing phase of a capital trial was so rushed and the presentation was so cursory. *See* Pet. 32–33 (noting this Court's cases holding that effective assistance requires counsel to prepare for sentencing before trial). Judge Stranch's dissent details the majority's errors. App. 24–28 (Stranch, J., dissenting).

As with the other errors in the decision below, the panel's analysis is indefensible and goes unaddressed by the State. The Brief in Opposition does not argue that the panel majority correctly held that trial counsel was not deficient. The panel's decision cannot be harmonized with this Court's cases (or other circuit decisions) addressing effective assistance in preparation for the sentencing phase of a capital trial.

The grounds for reversal raised in the Petition are unanswered by the State. The Brief in Opposition does not deny that each of these errors is so facially incorrect that it warrants summary reversal, vacatur of the denial of habeas relief, and remand.

II. The State's New Arguments Are No Barrier to Relief Before this Court.

Rather than defend the errors in the decision below, the State attempts to defend the judgment on alternative grounds not addressed by the Sixth Circuit. As to ineffective assistance for failure to establish lesser culpability, the State raises a new contention that Burns did not suffer prejudice. BIO 15–19. And as to ineffective assistance for failure to prepare for sentencing, the State argues for the first time that the Tennessee Court of Criminal Appeals (TCCA) did not impose a "nexus requirement." BIO 21–23.

The State's arguments do not provide a basis for this Court to refrain from granting summary reversal. To be clear, Burns does not ask this Court to address the State's new arguments and render judgment that he receive habeas relief. The Petition merely asks this Court to reverse the errors in the decision, vacate the denial of habeas relief, and remand for further consideration. The State's arguments can be fully addressed by the court of appeals on remand.

In asking this Court to deny certiorari on alternative grounds, the State fails to recognize this Court's responsibility to ensure the uniformity and supremacy of federal law. In the precedential decision below, the Sixth Circuit committed three significant legal errors. Certiorari—whether in the form of summary reversal or in a full grant for briefing and argument—is warranted because the decision below "entered a decision in conflict with the decision of another United States court of appeals on the same important matter" and "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10. Regardless of whether Burns ultimately receives relief, these significant legal errors should be corrected by this Court.

If this Court wished to entertain the State's new arguments, the proper remedy would be granting certiorari to address these claims after full briefing and argument. But such an approach is unnecessary. This is a court of review and not first view. *Holland v. Florida*, 560 U.S. 631, 654 (2010). Ordinarily, this Court refrains from deciding in the first instance issues not decided below. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *Nat'l Collegiate Athletic Ass'n. v. Smith,* 525 U.S. 459, 470 (1999). This Court leaves to the court of appeals resolution of arguments that were previously unaddressed. *E.g., Brownback v. King*, 141 S. Ct. 740, 747 n.4 (2021); *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020).

Thus, even if the State's new arguments are valid, the State offers no reason that this Court depart from its ordinary procedures: summarily reverse the mistakes in the decision below, vacate its judgment, and remand for further proceedings, including consideration of the State's previously unaddressed arguments.

III. Remand Would Not Be Futile or the Result Inevitable.

Even if it were relevant to the proper disposition before this Court, the State dramatically overstates the strength of its new arguments. The arguments are both factually flawed, and, quite probably, unpreserved. *See United States v. White*, 920 F.3d 1109, 1114 (6th Cir. 2019) (generally an appellant's failure to rise an argument in his appellate brief forfeits that issue on appeal).

Regarding Burns' lesser culpability claim, the State argues that a fair-minded jurist could conclude that Burns did not suffer *prejudice*. BIO 15–19. However, before the Sixth Circuit, the State relied instead on a procedural point, contending that the lesser culpability claim was not properly before that court. Appellee Br. 32–33. In the alternative, the State argued that trial counsel had not been *deficient*. *Id.* at 34–42.[1]

Regarding prejudice from trial counsel's failure to prepare for sentencing, the State raises a new defense. Today, the State argues that the TCCA did not impose a "nexus requirement" but instead it did not give significant *weight* to the omitted

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[1] The State's primary focus, as represented in Argument sub-headings, was that trial counsel had, in fact, effectively impeached the witnesses against Burns. *See* Appellee Br. 34 ("Counsel impeached Thomas' identification of petitioner."); *id.* at 38 ("Counsel did not elicit Ms. Jones' identification of petitioner."); *id.* at 40 ("Counsels' reaction to Ms. Jones' identification was proper."). These arguments are abandoned before this Court.

mitigation proof. BIO 21–23. Thus, the State now claims the TCCA's decision was not contrary to clearly established law. *Id.* This argument was not previously addressed by the Sixth Circuit because the State conspicuously failed to address Burns' "nexus requirement" argument in its briefing below.[2] Appellee Br. 22–32.

This Court has made clear that it will not consider arguments that were not first raised in the lower courts. *Byrd v. United States*, 138 S. Ct. 1518, 1527, 1530 (2018) (declining to consider new arguments raised both by the defendant and the government); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 432 (1999) ("Respondent advanced this argument for the first time in his Brief in Opposition to Certiorari in this Court, . . . having failed to raise it before either the BIA or the Court of Appeals. We decline to address the argument at this late stage."). When a party raises a new argument, "[t]he proper course is to remand for the argument and potentially further factual development to be considered in the first instance by the Court of Appeals or by the District Court." *Byrd*, 138 S. Ct. at 1530. This Court should leave these questions, as well as the question of preservation, to the Sixth Circuit in the first

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[2] Burns contended that the TCCA had imposed a contrary to clearly established law "nexus requirement," under which, evidence regarding his childhood had to "explain why he committed the crime." In support of this argument he relied on *Brown v. Payton*, 544 U.S. 133 (2005), *Smith v. Texas*, 543 U.S. 37 (2004), *Skipper v. South Carolina*, 476 U.S. 1 (1986), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Appellant Br. 76-79. The State's brief failed to address this argument, or even cite any of those cases. Indeed, the State's Sixth Circuit brief did not even include the word "nexus."

instance on remand, rather than relying on the State's assertions that remand is futile.

Moreover, the State overstates the factual strength of its new arguments. In claiming that Burns did not suffer prejudice from trial counsel's failure to demonstrate his lesser culpability, the State states "it is possible that more than one person, not just the 'big fellow with glasses,' shot Thomas [and killed Dawson]." BIO 17. A careful examination of the underlying trial record reveals, however, that only two men fired into the car, and only one gun was used to shoot Dawson. First, ballistic evidence established that "[t]he two weapons recovered from codefendant Garrin's porch were determined to be the murder weapons, one used to kill each victim." App. 162. Second, the State's key witness, Mary Jones, testified unambiguously that a single gunman fired all of the shots into the driver's side of the car. R. 139-6, PageID# 2627–30. Third, both surviving victim Blackman and eyewitness Eric Jones testified that they saw a single big man by the driver's side of the car. *Id.* at 2576–77, 2596–97, 2605, 2612–13. Fourth, this factual argument is inconsistent with the State's position at trial, where the prosecution vigorously argued at both the guilt phase and at sentencing that Burns alone fired all of the shots that hit Thomas and killed Dawson. *See* R. 139-6, PageID# 2759–60, 2762, 2764–65, 2767, 2785–86; R. 139-7, PageID# 2924, 2926, 2932, 2935–36.

The State also argues that Mary Jones identified Burns not only based on his hairstyle but also because he was, allegedly, the only man identified as wearing "a long, black trench coat." BIO 18–19. Again, this argument was not made in the

State's briefing to the court of appeals.[3] And more importantly, it is directly contrary to the proof at trial. According to Eric Jones, the big man between 6' and 6'5" in height (i.e., Garrin) was wearing a long black trench coat that came down to his calf. R. 139-5, PageID# 2596–98, 2612. Eric Jones was the only trial witness who referenced a trench coat, whatsoever. *See* R. 139-5, R. 139-6, R. 139-7. Neither Mary Jones, nor Thomas claimed that Burns was wearing a trench coat at the time of the crime, and neither testified that they identified Burns based on his clothing. R. 139-5, PageID# 2527–53; R. 139-6, PageID# 2623–31, 2638–46. To the extent that the trench coat is relevant, it only confirms that Burns did not shoot Dawson (and that Garrin did).

Of course, it should not be the burden of this Court to resolve these fact-bound arguments. Possibly, following scrupulous review of the record, the court of appeals will agree with the State. But it is properly the role of that court to engage in that analysis in the first instance. *Yeager v. United States*, 557 U.S. 110, 126 (2009) ("[W]e decline to engage in a fact-intensive analysis of the voluminous record. . . . If it chooses, the Court of Appeals may revisit its factual analysis in light of the Government's arguments before this Court.").

[3] The State's brief to the Sixth Circuit mentions a trench coat only once: noting that at Garrin's earlier trial, Thomas "testified that a person wearing a trench coat fired five or six times at Blackman as Blackman ran from the car." Appellee Br. 34.

CONCLUSION

As the Petition for Writ of Certiorari set forth, the reported decision below committed significant legal errors in denying habeas relief to Burns. These errors create an unnecessary circuit split and are inconsistent with this Court's precedent. The State does not defend the Sixth Circuit's reasoning. Thus, this Court should summarily reverse the decision below, vacate the denial of habeas relief, and remand for further proceedings.

In the alternative, should this Court conclude that a good-faith argument could be made in support of the decision below, then full certiorari should be granted and the case set for briefing and argument in the ordinary course.

Respectfully submitted,

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