No. _____

In The
Supreme Court of the United States

CHARLES L. BURTON, JR.,

Petitioner,

v.

JOHN Q. HAMM, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE
Execution scheduled during the time frame beginning at 12:00 a.m. on Thursday, March 12, 2026, and expiring at 6:00 a.m. on Friday, March 13, 2026 Central Time

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February 27, 2026

CAPITAL CASE
QUESTION PRESENTED

The Talladega County trial court deprived Petitioner Charles L. Burton, Jr., of counsel by forcing his attorneys, against their strategic judgment, to call two co-defendants as witnesses. Prejudice ensued. The co-defendants denied even knowing Mr. Burton, and the State introduced otherwise inadmissible evidence to show they lied. The state appellate courts refused to correct these constitutional errors.

Mr. Burton fared no better during federal habeas proceedings. Mr. Burton argued *Jones v. Barnes* clearly established that witness choice is a strategic matter and not one of the fundamental case decisions left to the defendant. Both the district court and the Eleventh Circuit court of appeals rejected his argument. The court of appeals held that *Jones v. Barnes* did not clearly establish that witness choice is counsel's strategic decision, nor did any other Supreme Court case in existence at the time. Its narrow construction of § 2254(d)(1) prevented the court of appeals from reaching Mr. Burton's constitutional questions. So, in 2019, after this Court decided *McCoy v. Louisiana*, Mr. Burton tried again to have the State of Alabama recognize the trial court interfered with his right to counsel. He was again unsuccessful.

This Court recently clarified the meaning of "clearly established Federal law" in *Andrew v. White*. Mr. Burton moved under Rule 60(b)(6) to reopen his federal habeas proceedings on the merits. But the district court dismissed the motion as an unauthorized successive habeas petition and stated it would not issue a certificate of appealability ("COA"). The Eleventh Circuit likewise refused to grant a COA despite the question raised being clearly debatable by jurists of reason.

This case presents three questions in need of resolution:

1. Did the court of appeals, in denying Mr. Burton a COA, perpetuate a circuit split, violate Mr. Burton's equal protection rights, and deprive him of "one full round of federal habeas review"?
2. Was it debatable by jurists of reason whether Mr. Burton's Rule 60(b) motion was a "true" 60(b) motion under *Gonzalez v. Crosby*?
3. Did the courts' refusal to grant a COA perpetuate Alabama courts' continued misapplication of federal constitutional law on the issue of counsel's role versus that of the client?

LIST OF PARTIES

Petitioner is Charles L. Burton, Jr. Respondent is John Q. Hamm, Commissioner of the Alabama Department of Corrections. Because Petitioner is not a corporation, Supreme Court Rule 29.6 does not require a corporate disclosure statement.

LIST OF RELATED PROCEEDINGS

State Court

State v. Burton, No. CC-91-341-A (Talladega Cnty. Cir. Ct. May 8, 1992) (capital sentencing order)

Burton v. State, No. CR-91-1185 (Ala. Crim. App., Dec. 30, 1993) (affirming conviction and sentence)

Ex parte Burton, No. 1930770 (Ala. Sept. 16, 1994) (affirming conviction and sentence)

Burton v. State, No. CC-91-341.60 (Talladega Cnty Cir. Ct. Jul. 17, 2001) (denying relief in post-conviction)

Burton v. State, No. CR-00-2472 (Ala. Crim. App. Feb. 20, 2004) (affirming denial of relief in post-conviction)

Ex parte Burton, No. 1031200 (Ala. Sept. 24, 2004) (writ denied, no opinion)

Burton v. State, No. CC-1991-000341.62 (Talladega Cnty Cir. Ct. Dec. 20, 2019) (denying relief in post-conviction)

Burton v. State, No. CR-19-0400 (Ala. Crim. App. Dec. 17, 2021) (affirming denial of relief in post-conviction)

Ex parte Burton, No. 1210407 (Ala. May 20, 2022) (writ denied, no opinion)

Federal Court

Burton v. Alabama, No. 94-8401 (U.S. May 15, 1995) (denying petition for writ of certiorari from direct appeal)

Burton v. Campbell, 4:05-cv-308-CLS-PWG (N.D. Ala. Mar. 27, 2009) (denying petition for writ of habeas corpus)

Burton v. Campbell, 4:05-cv-308-CLS-PWG (N.D. Ala. May 2, 2011) (granting in part, and denying in part, application for certificate of appealability)

Burton v. Comm'r, Ala. Dep't of Corr., 700 F.3d 1266 (11th Cir. Nov. 7, 2012) (affirming denial of petition for writ of habeas corpus)

Burton v. Hamm, No. 4:05-cv-308-CLS (N.D. Ala. Oct. 8, 2025) (denying motion to alter judgment denying petition for writ of habeas corpus)

Burton v. Comm'r, Ala. Dep't of Corr., No. 25-13870 (11th Cir. Dec. 2, 2025) (denying motion for certificate of appealability)

Burton v. Comm'r, Ala. Dep't of Corr., No. 25-13870 (11th Cir. Jan. 13, 2026) (denying motion for reconsideration of December 2, 2026, order)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles L. Burton, Jr., an indigent prisoner sentenced to death in Alabama, respectfully requests this Court grant certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Order of the United States District Court for the Northern District of Alabama denying Mr. Burton's Rule 60(b) motion and noting no certificate of appealability ("COA") would issue is attached as Appendix C.[1] The Court of Appeals for the Eleventh Circuit's single-judge Order denying a COA is attached as Appendix B.[2] And the three-judge panel Eleventh Circuit Order denying Mr. Burton's motion to reconsider the COA denial is attached as Appendix A.[3]

JURISDICTION

The district court denied Mr. Burton's Rule 60(b) motion on October 8, 2025, stating it lacked subject-matter jurisdiction and therefore also could not issue a COA.[4] The court of appeals denied Mr. Burton's COA application, first by way of a single-judge order on December 2, 2025,[5] then on reconsideration by a three-judge panel on January 13, 2026.[6] In federal habeas proceedings, federal courts have jurisdiction to consider Rule 60 motions like Mr. Burton's that "attack[ ] not the substance of the federal court's resolution of a claim on the merits, but some defect

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[1] Pet. App. 4a–9a.
[2] *Id.* at 3a.
[3] *Id.* at 1a–2a.
[4] Pet. App. 9a n.2.
[5] Pet. App. 3a.
[6] Pet. App. 1a–2a.

in the integrity of the federal habeas proceedings."[7] And this Court has jurisdiction to consider the lower courts' COA denials.[8] Mr. Burton therefore invokes this Court's jurisdiction under 28 U.S.C. § 1254.

RELEVANT STATUTORY & CONSTITUTIONAL PROVISIONS

28 U.S.C. § 2244 (b) provides, in relevant part:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)
>
> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)
>
> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. . . .

[7] *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005).
[8] *Hohn v. United States*, 524 U.S. 236, 238 (1998).

> (4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."[9]

28 U.S.C. § 2253 provides, in relevant part: "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."[10]

28 U.S.C. § 2254 provides, in relevant part: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[11]

28 U.S.C. § 2254 further provides, in relevant part: "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."[12]

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[9] 28 U.S.C. § 2244(b).
[10] 28 U.S.C. § 2253(c)(2).
[11] 28 U.S.C. § 2254(a).
[12] 28 U.S.C. § 2254(d).

The Fifth Amendment to the United States Constitution, in relevant part, provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law."[13]

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[14]

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[15]

The Fourteenth Amendment provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[16]

INTRODUCTION

Facing a possible death sentence, Charles Burton was entitled to counsel's effective assistance. His attorneys used their best strategic judgment to advocate for a life-sparing sentence, refusing their client's misbegotten request to call his two co-defendants to testify.[17] The trial court forced them to call those witnesses anyway.[18] Disaster ensued.

The co-defendants testified they did not know Mr. Burton, which opened the door to otherwise inadmissible evidence, including video showing Mr. Burton with

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[13] U.S. Const. amend. V.
[14] U.S. Const. amend. VI.
[15] U.S. Const. amend. VIII.
[16] U.S. Const. amend. XIV, § 1.
[17] *Burton v. State*, 651 So. 2d 641, 656 (Ala. Crim. App. 1993).
[18] *Id.*

the co-defendants on the day of the offense.[19] That evidence was especially damaging due to the alibi defense employed during the trial's guilt phase. While he was represented by counsel, the choice to raise an alibi defense belonged to Mr. Burton as a decision involving the representation's objectives.[20] Witness choice, however, was a *strategic* decision reserved to counsel.[21] By removing counsel's strategic witness choice in favor of Mr. Burton's, the trial court violated Mr. Burton's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

Mr. Burton first raised this issue on direct appeal in state court.[22] He raised a related ineffective assistance of counsel ("IAC") claim in state post-conviction.[23] He presented both claims to the district court[24] and court of appeals[25] during

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[19] *Id.*; *see Burton v. State*, No. CR-00-2472, mem. op. at 62 (Ala. Crim. App. Feb. 20, 2004).

[20] *See id.* at 15 (quoting *Burton v. State*, No. CC-91-341.60, mem. op. at 13–14 (Talladega Cnty Cir. Ct. Jul. 17, 2001)) ("The Court concludes that trial counsel pursued an alibi defense based upon what they were told by Burton and at Burton's direction."); *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983) (quoting American Bar Ass'n, Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982)) ("A lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued.... In a criminal case, the lawyer shall abide by the client's decision, ... *as to a plea to be entered, whether to waive jury trial and whether the client will testify.*") (emphasis added).

[21] *See Taylor v. Illinois*, 484 U.S. 400, 418 (1988); *see also Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) ("Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop.")).

[22] *See Burton*, 651 So. 2d at 656.

[23] *See Burton*, No. CR-00-2472, mem. op. at 60–62.

[24] *See* Pet. App. 187a, 300a.

[25] Pet. App. 10a–19a (*Burton v. Comm'r, Ala. Dep't of Corr.*, 700 F.3d 1266 (11th Cir. 2012), *cert denied*, *Burton v. Thomas*, 571 U.S. 903 (2013) (mem.)).

federal habeas proceedings. But Mr. Burton was ultimately denied relief because he "ha[d] not and [could]not point to any clearly established federal law from [this Court] on the question of whether the ultimate authority to call trial witnesses rests with counsel or the client."[26]

In 2018, this Court decided *McCoy v. Louisiana*, in which it explicitly included "the witnesses to call" in the category of decisions reserved to counsel.[27] Mr. Burton again sought relief in state court and was again denied.[28]

This Court recently clarified what constitutes a case "holding"—and clearly establishes federal law—in *Andrew v. White*.[29] When the Court "relies on a legal rule or principle to decide a case, that principle *is* a 'holding' of the Court for purposes of AEDPA."[30] Mr. Burton moved under Rule 60(b)(6) to reopen his federal habeas proceedings given *Andrew*,[31] noting the district court's previous finding that *Jones v. Barnes* was "clearly established Federal law" ("CEFL").[32] The district court

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[26] Pet. App. 18a (*Burton*, 700 F.3d at 1270).
[27] 584 U.S. 414, 423 (2018).
[28] *Burton v. State*, No. CR-19-0400 (Ala. Crim. App. Dec. 17, 2021), *cert denied*, *Ex parte Burton*, No. 1210407 (Ala. May 20, 2022).
[29] 604 U.S. 86 (2025).
[30] *Id.* at 92 (emphasis added); *see* 28 U.S.C. § 2254(d)(1) (the section of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") allowing federal courts to grant the writ of habeas corpus where a state prisoner shows the state court adjudication of his federal constitutional claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court); *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) ("[C]learly established Federal law . . . is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision" (internal quotation marks omitted)).
[31] *See* Pet. App. 5a–6a.
[32] Pet. App. 193a–94a.

treated his motion as an unauthorized successive habeas petition[33] and, because it did "not have subject-matter jurisdiction, [the court was] unable to file a certificate of appealability."[34] The court of appeals also refused to allow an appeal.[35]

This is the story of a diligent attempt to raise a valid claim and the judicial system's failure to provide a procedural mechanism for doing so. Mr. Burton is facing imminent execution without receiving the "valuable right" to which he is entitled: "one full round of federal habeas review."[36] This Court should grant certiorari, vacate the judgment, and remand the case.

STATEMENT OF THE CASE

Mr. Burton neither witnessed nor condoned shooting Doug Battle, yet he was convicted[37] of capital robbery-murder.[38] Without understanding the legal ramifications, Mr. Burton requested that two co-defendants testify during the

[33] Pet App. 9a.
[34] *Id.* at 9a n.2.
[35] Pet. App. 3a.; *id.* at 1a–2a.
[36] *See Gonzalez*, 545 U.S. at 541 (Stevens, J., joined by Souter, J., dissenting).
[37] *Burton*, 651 So. 2d 641.
[38] *See* Ala. Code § 13A-5-40(a)(2).

penalty phase.[39] After forcing Mr. Burton's counsel to call the co-defendants, the trial court imposed a death sentence.[40]

The state appellate courts affirmed the conviction and sentence on direct appeal,[41] declining to address the trial court's violation of Mr. Burton's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.[42] The Alabama Court of Criminal Appeals based its denial on Rule 1.2 of the Alabama Rules of Professional Conduct, which states a lawyer must "abide by a client's decisions concerning the objectives of representation."[43] The state supreme court affirmed.[44] During state post-conviction, Mr. Burton claimed his trial counsel was ineffective for failing to object to the trial

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[39] *See* Pet. App. 13a–14a (*Burton*, 700 F.3d at 1268) ("Burton expected their testimony to reinforce his alibi defense, even though that defense was unsuccessful during the guilt phase of trial. Both men took the stand and denied participation in the robbery, and denied knowing Burton. But Burton's strategy backfired because their testimony opened the door to previously inadmissible impeachment evidence that Burton now claims irreparably damaged his counsel's mitigation strategy. The state was able to admit into evidence Jones's post-arrest confession admitting his participation in the AutoZone robbery with Burton and the other co-defendants. The state also used Jones's confession confirming the group's initial intention to rob a bank in Sylacuaga, Alabama. The confessions were corroborated by a bank surveillance videotape purportedly showing Jones, Brantley, and Burton together, inside the City National Bank in Sylacuaga, shortly before the robbery of the AutoZone. In addition, two AutoZone customers testified and identified Jones and Brantley as members of the group that robbed the store.").

[40] *Burton*, 651 So. 2d at 656.

[41] *Id.* at 659.

[42] *Id.* at 656.

[43] *Id.* (quoting Ala. R. Prof'l Conduct 1.2).

[44] *Ex parte Burton*, 651 So. 2d 659 (Ala. 1994), *cert. denied*, *Burton v. Alabama*, 514 U.S. 1115 (1995) (mem.)

court's penalty-phase interference.[45] Again, the state courts denied relief under the ethics rule.[46]

Mr. Burton petitioned under 28 U.S.C. § 2254, arguing the same federal constitutional violations he raised in state court.[47] Specifically, he argued *Jones v. Barnes*,[48] CEFL,[49] recognized that an "accused has the ultimate authority to make certain fundamental decisions regarding the case, an accused does not have a constitutional right to direct matters of strategy."[50] *Jones* declared that the goal of the 1967 case, *Anders v. California*[51]—"vigorous and effective advocacy"—would be disserved by judges second-guessing "reasonable professional judgments and impos[ing] on appointed counsel a duty to raise every 'colorable' claim suggested by a client[.]"[52]

The district court agreed with Mr. Burton that *Jones* was CEFL but reasoned the claim was governed instead by *Faretta v. California*.[53] The court recognized

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[45] *See Burton*, No. CR-00-2472, mem. op. at 60–62.
[46] *Id.*; *Burton v. State*, 910 So. 2d 831 (Ala. Crim. App. 2004); *cert. denied*, *Ex parte Burton*, No. 1031200 (Ala. Sept. 24, 2004).
[47] *See* Pet. App. 187a, 300a.
[48] *Jones v. Barnes*, 463 U.S. 745 (1983).
[49] 28 U.S.C. § 2254(d)(1).
[50] *See* Pet. App. 187a (internal quotation marks omitted).
[51] 386 U.S. 738 (1967). *Anders*' controlling legal principle was that, to satisfy the Sixth Amendment, counsel must act "in the role of an active advocate in behalf of his client as opposed to that of amicus curiae." *Id.* at 741. This Court applied that principle in *Jones*, emphasizing the importance of counsel's "reasonable professional judgments" as to which claims to raise even where a client disagrees. *Jones*, 463 U.S. at 754.
[52] *Id.* at 754.
[53] 422 U.S. 806 (1975). According to the court's Memorandum Opinion, the trial court infringed on the attorney-client relationship. Pet. App. 198a.

witness choice as a "trial tactical decision normally entrusted to counsel" and agreed that the trial court's actions infringed on the attorney-client relationship. Yet the district court determined the "error was not of constitutional proportions because the choice of which witnesses to call, and which not to call, ultimately belongs to the defendant."[54] In other words, because *Faretta* held the Sixth Amendment protects a defendant's right to self-representation, including when he makes detrimental choices, Mr. Burton had the ultimate authority on which witnesses to call.[55] However, the district court granted a COA on two issues: whether "[t]he trial court interfered with, and irreparably harmed, defense counsel's mitigation strategy when it forced Mr. Burton's counsel to call two co-defendants as witnesses during the penalty phase," and whether counsel was ineffective for failing to object when the trial court interfered in that manner.[56]

Unlike the district court, the Eleventh Circuit declined to reach the merits, citing § 2254(d)(1) and reasoning:

> While the Supreme Court has said at various times, either in holding or in dicta, that certain fundamental decisions—such as whether to plead guilty, *Brookhart v. Janis*, 384 U.S. 1 (1966); waive a jury, *Taylor v. Illinois*, 484 U.S. 400 (1988); waive the right to counsel, *Faretta v. California*[]; testify on his or her own behalf, *Jones v. Barnes*[]; or take an appeal, *id.*—ultimately belong to the client, it has never had occasion to address the

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[54] *Id.* (citing *Blanco v. Singletary*, 943 F.2d 1477, 1495 (11th Cir. 1991)).
[55] *See id.* at 170–71 (quoting *Faretta*, 422 U.S. at 834, and citing the dissent in *Jones*, as support for the proposition that a defendant is merely entitled to assistance of counsel, rather than *effective* assistance,463 U.S. at 759 (Brennan, J., dissenting)).
[56] Pet App. 22a, 27a.

> division of decision-making authority in the trial context of calling witnesses.[57]

The appeals court further reasoned, "We do not read *Jones* as clearly establishing that a defendant is deprived of his constitutional right to counsel when his lawyers are forced to follow the defendant's strategic directives."[58] Ultimately, the court held:

> Burton has not and cannot point to any clearly established federal law from the United States Supreme Court on the question of whether the ultimate authority to call trial witnesses rests with counsel or the client. Consequently, AEDPA bars relief of Burton's claims.[59]

In 2019, Mr. Burton sought relief in state court based on this Court's explicit recognition in *McCoy v. Louisiana*, that "the witnesses to call" is a choice reserved to counsel and does "not require client consent."[60] The state courts again denied relief, declaring the claim procedurally barred as already raised on direct appeal[61] and finding no exception because Mr. Burton did "not argue, much less show, that

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[57] Pet. App. 17a (*Burton*, 700 F.3d at 1269).
[58] *Id.* at 18a (*Burton*, 700 F.3d at 1270).
[59] *Id.*
[60] Pet. App. 345a–346a n.1 (quoting *McCoy*, 584 U.S. at 423) ("Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles. See *Gonzalez*[*v. United States*], 553 U.S.[242], [ ] 249[ ] ('[n]umerous choices affecting conduct of the trial' do not require client consent, including 'the objections to make, the witnesses to call, and the arguments to advance')").
[61] Pet. App. 344a (*Burton*, No. CR-19-0400, at 6 ("Clearly, the ground that Burton raised in the instant Rule 32 petition and reiterates on appeal was raised and addressed on direct appeal.").

McCoy announced a 'new rule' of constitutional law that must be applied retroactively to his case on collateral review."[62]

On May 30, 2025, shortly after this Court decided *Andrew v. White*,[63] Mr. Burton moved under Rule 60(b)(6) to reopen his federal habeas proceedings.[64] He distinguished between the *district court's* incorrect 2009 *constitutional* decision, and the *statutory interpretation* question confronted in *Andrew*—which supported the *court of appeals'* denial. Mr. Burton posited *Andrew* clarified the meaning of CEFL such that, contrary to the court of appeals' prior ruling, AEDPA[65] did not bar full merits review and relief on his claims.[66]

Andrew explains that when this Court has "relie[d] on a legal rule or principle to decide a case," and that principle is "indispensable" to the outcome, the principle constitutes CEFL.[67] Just as the due process rule in *Andrew* found its source in *Payne v. Tennessee*,[68] the strategic decision-making principle on which Mr. Burton relied was both well-established and indispensable to the *Jones v. Barnes* outcome.[69]

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[62] *Id.* at 346a (*Burton*, No. CR-19-0400, at 8) (quoting *Acra v. State*, 105 So. 3d 460 (Ala. Crim. App. 2012)).
[63] *See Andrew*, 604 U.S. 86. The case was decided January 21, 2025.
[64] *See* Pet. App. 7a.
[65] The Antiterrorism and Effective Death Penalty Act, specifically 28 U.S.C. § 2254(d).
[66] *See* Mot. for Relief from Judgment Under Fed. R. Civ. P. 60(b)(6) at 6–12, *Burton v. Hamm*, No. 4:05-CV-00308-CLS (N.D. Ala. May 30, 2025) (ECF No. 51).
[67] *Andrew*, 604 U.S. at 92–93, 95.
[68] *Payne v. Tennessee*, 501 U.S. 808 (1991).
[69] *Compare Jones*, 463 U.S. at 754 (discussing the non-viability of a judicially imposed duty on appointed counsel to abide by every client decision) *with Payne*, 501 U.S. at 825 (discussing, in the context of victim impact evidence, that "the Due

Although the district court initially acknowledged *Jones* was CEFL, the court of appeals reasoned instead that Mr. Burton failed to produce a Supreme Court case explicitly stating "the ultimate authority to call trial witnesses rests with counsel."[70] Such a case did not exist when the court of appeals originally ruled. But the undergirding legal principle did and was critical to *Jones*' holding. The 60(b) argument, therefore, focused on how the court of appeals misinterpreted § 2254(d)(1), preventing review of the constitutional questions the district court decided incorrectly.

On October 2, 2025, while the 60(b) motion was still pending, Alabama moved the state supreme court to authorize setting Mr. Burton's execution date.[71] The district court then denied the 60(b)(6) motion for lack of subject-matter jurisdiction, deeming it, in substance, an unauthorized second successive habeas petition.[72] Because the district court also noted it would not grant a COA,[73] Mr. Burton applied to the court of appeals. That too was denied, first in a one-sentence order

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Process Clause of the Fourteenth Amendment provides a mechanism for relief [against the introduction of evidence] "that is so unduly prejudicial that it renders the trial fundamentally unfair") *and Andrew*, 604 U.S. at 93 (holding, with regard to introduction of "irrelevant evidence, including evidence 'that [Ms. Andrew] had extramarital sexual affairs with two other men,' that she had 'come on to' another witness's sons, and that she had dressed provocatively at a restaurant," that "[t]he legal principle on which Andrew relies, that the Due Process Clause can in certain cases protect against the introduction of unduly prejudicial evidence at a criminal trial, was therefore indispensable to the decision in *Payne*. That means it was a holding of this Court for purposes of AEDPA.").

[70] Pet. App. 18a (*Burton*, 700 F.3d at 1270).

[71] *See* Notice to the Court of Execution Motion, *Burton v. Hamm*, No. 4:05-CV-00308-CLS (N.D. Ala. Oct. 2, 2025) (ECF No. 57).

[72] Pet. App. 9a.

[73] *Id.* at 9a n.2.

issued by a single judge,[74] then on motion for reconsideration heard by a three-judge panel, again in a one-sentence order.[75]

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit remains an outlier in prohibiting *en banc* COA review.

The Eleventh Circuit requires a COA to initiate a Rule 60(b) appeal in the habeas context.[76] To obtain a COA, the applicant must make "'a substantial showing of the denial of a constitutional right.'"[77] This means "[t]he applicant must establish that jurists of reason could disagree with the resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further."[78] When the applicant seeks a COA to appeal a Rule 60(b) denial, the relevant question is "whether a reasonable jurist could conclude that the district court abused its discretion."[79] And when the adverse final ruling rests on procedural grounds, "a COA should issue . . . if the petition states a valid claim of the denial of a constitutional right, *and* . . . jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[80]

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[74] Pet. App. 3a.
[75] *Id.* at 1a–2a.
[76] *See Mills v. Comm'r, Ala. Dep't of Corr.*, 102 F.4th 1235, 1238 (11th Cir. 2024) ("A party who seeks to appeal the denial of a motion for relief from a judgment denying habeas relief must obtain a certificate of appealability.").
[77] *Id.* (quoting 28 U.S.C. § 2253(c)(2)).
[78] *Id.* at 1238–39 (internal quotations omitted).
[79] *Id.* at 1239 (citing *Buck v. Davis*, 580 U.S. 100, 123 (2017)).
[80] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added).

A petitioner seeking a COA need only show that the claim is debatable, and a claim is debatable "even though every jurist of reason might agree, after the COA has been granted and the case has received *full consideration*, that petitioner will not prevail."[81] That an applicant faces a sentence of death "is a proper consideration in determining whether to issue a" COA.[82]

How the COA application was handled deprived Mr. Burton of access to the courts and violated his equal protection rights.[83] Specifically, the Eleventh Circuit's COA practice, which prohibits seeking *en banc* review of a single-judge or three-judge panel COA denial,[84] conflicts with the principles underlying this Court's decision in *Hohn v. United States*.[85] There, this Court stated:

> The recognition that decisions made by individual circuit judges remain subject to correction by the entire court of appeals reinforces our determination that decisions with regard to an application for a certificate of appealability should be regarded as an action of the court itself and not of the individual judge.[86]

Here, as in *Hohn*, a three-judge panel ultimately denied the COA.[87] However, in *Hohn*, unlike here, the three-judge panel issued a reasoned, reviewable opinion.[88]

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[81] *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (emphasis added).
[82] *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).
[83] *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (explaining that similarly situated persons must be treated alike).
[84] Eleventh Circuit Rule 22-1(c) ("The denial of a certificate of appealability, whether by a single circuit judge or by a panel, may be the subject of a motion for reconsideration but may not be the subject of a petition for panel rehearing or a petition for rehearing en banc.")
[85] 524 U.S. 236 (1998).
[86] *Id.* at 244–45.
[87] *Compare* Pet. App. 1a–2a *with id.* at 240.
[88] *Compare* Pet. App. 1a–2a *with Hohn*, 524 U.S. at 245.

Hohn also distinguished the administrative and judicial functions of Article III judges, explicitly identifying COA rulings as judicial functions:

> Decisions regarding applications for certificates of appealability, in contrast, are judicial in nature. It is typical for both parties to enter appearances and to submit briefs at appropriate times and for the court of appeals to enter a judgment and to issue a mandate at the end of the proceedings, as happened here. Construing the issuance of a certificate of appealability as an administrative function, moreover, would suggest an entity not wielding judicial power might review the decision of an Article III court. In light of the constitutional questions which would surround such an arrangement, we should avoid any such implication.[89]

The conclusion? "It is more consistent with the Federal Rules and the uniform practice of the courts of appeals to construe § 2253(c)(1) as conferring the jurisdiction to issue certificates of appealability upon the court of appeals rather than by a judge acting under his or her own seal."[90] And if the court, not just the judge, issues the COA, then the court, not just the judge, must have the opportunity to review the application.

Practice in every other circuit follows the principle underlying *Hohn*: As long as the COA denial is reasonably reviewable, the circuit's practice does not run afoul of the Constitution. No other circuits expressly forbid *en banc* review.[91] Indeed, many offer additional protections. For example, the First Circuit requires three-

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[89] *Hohn*, 524 U.S. at 245–46 (internal citations omitted).
[90] *Id.* at 245.
[91] *See* Second Circuit Local Rule 22.1; Third Circuit Local Rule 22.1; Fourth Circuit Local Rule 22(a); Fifth Circuit Rule 22; Sixth Circuit Rule 22; Seventh Circuit Rule 22; Eighth Circuit Rule 22A; Ninth Circuit Rule 22-1; and Tenth Circuit Rule 22.1. The First and D.C. Circuits do not have local rules governing this issue.

judge panel review of COA applications in capital habeas cases.[92] The Third Circuit requires review by a three-judge panel in *all* habeas cases, allowing denial only if *all three judges* agree no COA should issue.[93] This Court should grant certiorari to resolve the circuit split, determine the due process required for COA applications in capital cases, and provide Eleventh Circuit petitioners equal protection under the law.

II. Whether Mr. Burton's motion was a "true" 60(b) motion or an unauthorized successive habeas petition is debatable by jurists of reason.

Gonzalez v. Crosby compared "true Rule 60(b) motion[s]"[94] and those that are, in substance, second or successive habeas petitions.[95] According to *Gonzalez,* 60(b) motions that are disguised second or successive habeas petitions include those which "attack the federal court's previous resolution of a claim on the merits."[96] "True" 60(b) motions, on the other hand, "allege some defect in the integrity of the federal habeas proceedings"[97] or "assert a previous ruling that precluded a merits determination was in error."[98]

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[92] *See* First Circuit I.O.P. VII.A.
[93] *See* Third Circuit Local Rule 22.3.
[94] *See Gonzalez*, 545 U.S. at 531.
[95] *Id.* at 530–36.
[96] *Id.* at 532 (emphasis omitted).
[97] *Id.*
[98] *Id.* at 532 n.4.

Mr. Burton's motion *was* a "true" 60(b) motion. And jurists of reason "would find it debatable whether the district court was correct in its procedural ruling"[99] that lack of subject-matter jurisdiction meant it could not consider the motion.[100]

A. Mr. Burton raised a "valid claim of the denial of a constitutional right."

The district court issued a COA in the first instance, specifically finding Mr. Burton had "made a substantial showing of the denial of constitutional rights in connection with" his claims of "trial court interference" and "ineffective assistance of counsel for failing to object to trial court interference" related to "whether the decision to call witnesses at trial is ultimately a fundamental right of the defendant, or reserved for counsel as an inalienable strategic matter."[101] His *constitutional* claims remained the same when he moved under Rule 60(b). There is no dispute, therefore, that Mr. Burton stated a "valid claim of the denial of a constitutional right."[102] He simply sought full merits adjudication instead of one curtailed by the overly strict construction of CEFL this Court disavowed in *Andrew*.

B. Jurists of reason would find the district court's 60(b) denial debatable.

1. Mr. Burton's argument properly fell under Rule 60(b), yet the district court artificially narrowed the scope.

The district court summarized Mr. Burton's argument: "In essence, he argues that the court should have granted his habeas petition under *Jones v. Barnes* on his

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[99] *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added).
[100] Pet. App. 9a n.2 ("Further, because this Court does not have subject-matter jurisdiction, it is unable to file a certificate of appealability for the denial of Burton's Rule 60(b) motion." (citing *Williams v. Chatman*, 510 F.3d 1290, 1294–95 (11th Cir. 2007)).
[101] Pet. App. 23a.
[102] *Slack*, 529 U.S. at 484.

prejudicial-witness argument, especially in view of the Supreme Court's new *Andrew*[] *v. White* opinion."[103] But that was not the extent of Mr. Burton's argument, and the court's attempt to whittle the argument down to its "essence" creates a straw-man which betrays the argument's nuance. The district court ultimately found the argument

> challenges the validity of Burton's state sentence, attacks the merits of the prior court rulings, and does not point to or allege a defect in the integrity of this court's prior judgment denying his original habeas petition—indicating that the motion is a second habeas petition as defined in *Gonzalez*[.][104]

Not so. While Mr. Burton asserted *Faretta* was the wrong CEFL,[105] that is not all he argued. The crux of the motion was that the court of appeals should have found *Jones* qualified as CEFL.[106] This argument is distinct from the district court's gloss, as Mr. Burton never asserted the *district court* should have granted his habeas petition because of *Andrew*. Instead, the district court correctly applied *Andrew*'s holding well before *Andrew* was decided. Therefore, as Mr. Burton recognized, *Andrew* could not impact the *district court's* prior ruling.

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[103] Pet. App. 7a (internal citations omitted).
[104] *Id.*
[105] *See* ECF No. 51 at 14–15.
[106] *See id.* at 9 ("In finding *Jones* could suffice as clearly established federal law under § 2554(d)(1), this Court too emphasized the importance of counsel's professional judgments versus the client's wishes in determining what best aligns with the Constitution[.] . . . It was the Eleventh Circuit that determined Mr. Burton had not cited clearly established federal law sufficient to allow habeas relief under § 2254(d)(1)"); *id.* at 13 ("Mr. Burton was prejudiced by the lack of merits review in the Eleventh Circuit.").

2. Mr. Burton's motion attacked a defect in the integrity of his federal habeas proceedings, not the district court's previous merits resolution.

Mr. Burton's 60(b) motion did not "attack the federal court's previous resolution of a claim on the merits," which would have constituted a disguised successive habeas petition prohibited by *Gonzalez*.[107] Mr. Burton's motion *agreed with* the district court's § 2254(d)(1) statutory interpretation—that *Jones* sufficed as CEFL.[108] And, as he argued, intervening precedent—*Andrew v. White*—justifies 60(b)(6) relief because it controls which CEFL—*Faretta or Jones*—governs under § 2254 (a).[109]

In *Ramirez v. United States*, the Seventh Circuit ruled a motion properly filed under Rule 60(b)(6), describing the rule as "fundamentally equitable in nature" and identifying several "[p]ertinent considerations" for determining whether "extraordinary circumstances justify relief."[110] One such pertinent consideration was "a change in the Supreme Court's approach to the fundamental rules for deciding habeas corpus cases."[111] The *Andrew* decision falls into this category because this Court provided critical clarity on what counts as CEFL under §

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[107] *Gonzalez*, 545 U.S. at 532.
[108] *See* ECF No. 51 at 9 ("In finding *Jones* could suffice as clearly established federal law under § 2554(d)(1), this Court too emphasized the importance of counsel's professional judgments versus the client's wishes in determining what best aligns with the Constitution.").
[109] *See id.* at 14–15 ("The Eleventh Circuit never addressed this Court's conclusion that *Faretta* was the governing law because, by that Court's logic, neither *Jones* nor *Faretta* clearly established where the decision-making authority on calling witnesses rests.")
[110] *Ramirez v. United States*, 799 F.3d 845, 850–51 (7th Cir. 2015).
[111] *Id.*

2254(d)(1). Had Mr. Burton applied for a COA in the Seventh Circuit, his appeal would have been heard, demonstrating jurists of reason would debate the Eleventh Circuits' resolution.

Justice Sotomayor explained how intervening precedent may undermine a final judgment:

> *Gonzalez* left open the possibility that in an appropriate case, a change in decisional law, alone, may supply an extraordinary circumstance justifying Rule 60(b)(6) relief. Although this Court observed that "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final," the Court also noted that "[a] change in the interpretation of a substantive statute may have consequences for cases that have already reached final judgment, particularly in the criminal context."[112]

Thus, a justice of this Court too contemplated Rule 60(b)(6) as a vehicle for raising claims impacted by refinements in the interpretation of federal statutes. Title 28 U.S.C. § 2254(d)(1) is a federal statute. Again, jurists of reason would find the court of appeals' resolution debatable.

Mr. Burton requests only to be afforded a vehicle to raise his claim, but the district court treated his motion as an unauthorized successive habeas petition in part because it did "not point to or allege a defect in the integrity of" *the district court's* prior judgment, effectively ignoring the plain language of *Gonzalez.*[113] The district court misconstrued the argument as "address[ing] the integrity of the

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[112] *Crutsinger v. Davis*, 140 S. Ct. 2, 2–3 (2019) (mem.) (statement of Sotomayor, J., respecting the denial of certiorari) (citation omitted).
[113] Pet. App. 7a.

court's prior judgment . . ."[114] But the standard is whether Mr. Burton alleged "some defect in the integrity of the federal habeas *proceedings*."[115] The word "proceedings" encompasses both district and appellate court activity. Mr. Burton alleged the defect in his federal habeas proceedings was the inconsistency between the district court's and the court of appeals' interpretations of what constitutes CEFL.[116] By construing "clearly established Federal law" too narrowly, per *Andrew*, the court of appeals never reached the merits of Mr. Burton's federal constitutional claim under § 2254(a). In other words, the court of appeals' prior ruling "precluded a merits determination."[117]

Gonzalez included, in a footnote, a list of potential rulings precluding merits determinations that are appropriate 60(b) subjects: "'failure to exhaust, procedural default, or [a] statute-of-limitations bar.'"[118] Like the phrase "clearly established Federal law," these are statutory and doctrinal—rather than constitutional—concepts.[119] But the district court treated this list, appearing as dicta in *Gonzalez*, as exhaustive, deeming Mr. Burton's motion an unauthorized successive habeas petition merely because the rulings in his case were not explicitly included. This

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[114] Pet. App. 8a.
[115] *Gonzalez*, 545 U.S. at 532 (emphasis added).
[116] *See* ECF No. 51 at 14–15.
[117] *See id.* at 14 (quoting *Gonzalez*, 545 U.S. at 532 n.4).
[118] Pet. App. 8a (quoting *id.*).
[119] *See* 28 U.S.C. § 2244(d) (AEDPA's statute of limitations); 28 U.S.C. § 2254 (b)-(c) (discussing exhaustion of state remedies); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (defining "procedural default" as when "a habeas petitioner [] has failed to meet the State's procedural requirements for presenting his federal claims[, thus] depriv[ing] the state courts of an opportunity to address those claims in the first instance").

prevented merits review. Indeed, Mr. Burton's argument is *like* that made by the petitioner in *Gonzalez*. There *Artuz v. Bennett* changed the interpretation of another AEDPA statutory provision—the § 2244(d) statute of limitations—and this change constituted "extraordinary circumstances" justifying reopening the judgment under Rule 60(b).[120] There is no reason, therefore, to draw the distinction the district court drew.

This Court has the opportunity to clarify the effect of intervening precedent and what rulings precluding a merits determination qualify under Rule 60(b). As *Gonzalez* explicitly contemplated, Mr. Burton's motion "attack[ed], not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings."[121] A man's life should not rest on an incomplete, example-based, definition of what constitutes a "true" 60(b) motion. That definition, appearing in a footnote, left refinement to the lower courts, but the lower courts here abdicated their duty. They refused to grant a COA even though, inevitably, reasonable jurists will disagree when such ambiguity is present. The need for clarity is further illustrated by the fact that *even the parties* agreed that

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[120] *See Gonzalez*, 545 U.S. at 536 ("Petitioner contends that *Artuz* [*v. Bennett*, 529 U.S. 1065 (2000)]'s change in the interpretation of the AEDPA statute of limitations meets this description.").
[121] *Gonzalez*, 545 U.S. at 532.

Rule 60(b) was the proper vehicle for Mr. Burton's claim.[122] This is sufficient to "deserve encouragement to proceed further."[123]

III. The court of appeals' refusal to grant a COA perpetuates the Alabama courts' continued misapplication of federal constitutional law.

Decided in 1983, *Jones* recognized that the accused's "authority to make certain fundamental decisions regarding the case" does not extend "to direct matters of strategy."[124] In *Jones*, this Court cited professional standards, including the ABA Model Rules of Professional Conduct, and concluded, "With the exception of these specified fundamental decisions [what plea to enter, whether to waive jury trial, and whether to testify], an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client."[125] In briefing to the court of appeals, Mr. Burton cited *Florida v. Nixon*, a 2004 case in which this Court, quoting *Jones*, delineated the roles held by the defendant and counsel at trial.[126] He quoted *Taylor v. Illinois*, a 1988 case in which this Court stated, "[T]he lawyer has—and must have—full authority to manage the conduct of

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[122] *See* Resp't's Obj. to Pet'r's Rule 60(b)(6) Mot., *Burton v. Hamm*, No. 4:05-CV-00308-CLS (N.D. Ala. June 27, 2025) (ECF No. 55) (raising no jurisdictional objection or argument that the motion should be treated as a second or successive habeas petition).

[123] *Barefoot*, 463 U.S. at 893.

[124] *See* Pet. App. 187a (internal quotation marks omitted).

[125] *Jones*, 463 U.S. at 753 n.6 (citing American Bar Ass'n, Model Rules of Professional Conduct, Proposed Rule 1.2(a) (Final Draft 1982)); *see also id.* ("The ABA Defense Function Standards provide, however, that, with the exceptions specified above, strategic and tactical decisions are the exclusive province of the defense counsel, after consultation with the client.") (citing American Bar Ass'n, Standards for Criminal Justice 4–5.2 (2d ed. 1980)).

[126] Br. of Appellant at 15–16, *Burton*, 700 F.3d 1266 (No. 10-12108-P) (citing *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (quoting *Jones,* 463 U.S. at 751)).

the trial. The adversary process could not function effectively if every tactical decision required client approval."[127] And he quoted Chief Justice Burger's 1977 concurrence in *Wainwright v. Sykes*, which explicitly recognized the calling of witnesses as counsel's decision:

> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, *which witnesses, if any, to call,* and what defenses to develop.[128]

Thus, since at least 1977, this Court's "cases [have] recognize[d] that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance."[129] This was no more apparent than during Mr. Burton's penalty phase where, as the district court found

> the trial judge cut Burton off in mid-sentence, as Burton began to volunteer an explanation of why he had asked his attorneys to call [the co-defendants] "earlier before this," saying: "You answered my question." If the trial judge had taken a moment to inquire, he would have learned that Burton expected [the co-defendants] to corroborate his concocted alibi defense: *hence*, Burton's incompletely-stated "desire to call them earlier before this—before the sentencing became" an issue. Of course, Burton's alibi defense was no longer relevant during the penalty phase; it had been rejected by the jury's verdict on the issue of Burton's guilt or innocence of the charged offense. That obviously was the basis for defense attorney William Willingham's stated opinion that neither [co-defendant] could provide
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> > any testimony that would *mitigate* my client's guilt in this case. If he insists on calling them and you

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[127] *Id.* at 16 (quoting *Taylor*, 484 U.S. at 418).
[128] *Id.* (quoting *Wainwright*, 433 U.S. at 93 (Burger, C.J., concurring)) (internal quotation marks omitted).
[129] *Geders v. United States*, 425 U.S. 80, 88 (1976).

> instruct me to question them, I will. But it would be my decision not to call them as witnesses, because they, in my opinion, *they would have nothing which would mitigate the Defendant's guilt in this case.*[130]

The principle that witness selection is a strategic decision reserved to counsel is long-established and widely recognized at the time of trial.[131] Yet the trial court

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[130] Pet. App. 191a (citation omitted) (emphasis supplied by district court).

[131] *See Riley v. State*, 608 P.2d 27, 29 n.9 (Alaska 1980) ("The decisions on what witnesses to call . . . and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client."); *State v. Lee*, 689 P.2d 153, 157 (Ariz. 1984)("[T]he power to decide questions of trial strategy and tactics rests with counsel, and the decision as to what witnesses to call is a tactical, strategic decision.") (citations omitted); *Bell v. United States*, 260 A.2d 690, 691 (D.C. 1970) ("The decision to call or not to call witnesses on behalf of a defendant is part of the strategy utilized by counsel in the preparation of the defense. It is a question of judgment, and this court will not engage in a subjective determination of the wisdom of counsel's strategy.") (citation omitted); *Cobb v. State*, 505 N.E.2d 51, 54 (Ind. 1987) ("As a general proposition, the decision whether to call a particular witness is encompassed within the attorney's trial strategy."); *State v. Gagne*, 554 A.2d 795, 796 (Me. 1989) ("We find the decision not to call these witnesses to be well within the scope of defense strategy."); *People v. Grant*, 301 N.W.2d 536 (Mich. Ct. App. 1980); *State v. Pratts*, 365 A.2d 928, 929 (N.J. 1976) ("Faretta recognized that when a defendant chooses to have a lawyer represent him at trial, ordinarily such counsel controls trial strategy. Here, despite defendant's objection at the time, trial counsel's decision not to call a witness whom he had interviewed and whose testimony he was satisfied would be more damaging than helpful to defendant's case, cannot be faulted. The trial court's decision not to involve itself in what was purely a matter of trial strategy was quite correct under the circumstances."); *Smith v. State*, 697 P.2d 904, 908 (Okla. Crim. App. 1982) ("We recognize that the attorney for a defendant may, at times, have legitimate reasons for not calling certain witnesses to testify. The decision of which witness, if any, to call at trial is one of strategy best left to counsel and generally will not be second-guessed on appeal."); *Davis v. Peyton*, 178 S.E.2d 679, 681 (Va. 1971) ("[F]ailure to summons or call witnesses is usually an exercise of judgment and trial strategy by defense counsel and not a basis for an allegation of ineffective representation."); *Whitmore v. State*, 203 N.W.2d 56, 60 (Wis. 1973) ("An attorney's strategic decision based upon a reasonable view of the facts not to call a witness is within the realm of independent professional judgment."); *Blanco v. Singletary*, 943 F.2d 1477, 1495 (explaining the "trial court overreached its authority and infringed upon the relationship between

went rogue, overruling that principle by forcing Mr. Burton's attorneys to call witnesses against their professional judgment. In so doing, the trial court substituted its decision-making for the reasoned, strategic choice of counsel.

Mr. Burton lacked an informed choice regarding the co-defendants' testifying. Deprived of counsel's assistance, Mr. Burton was also deprived of the protections guaranteed by *Faretta*, that any decision to represent oneself be made with "*informed* free will."[132] In that case, the trial judge "warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure."[133] The colloquy covered whether Mr. Faretta had done legal research and whether he understood the basics of trial procedure, including jury selection and evidence admissibility.[134] Not so here: The district court "disagree[d] with the state appellate court's characterization of the trial judge's colloquy with Burton as 'lengthy'; it was anything but that."[135]

As it stands, Mr. Burton could not access the constitutional .guarantees explained in either case—*Jones or Faretta*—because the Alabama courts decided his case using a flawed interpretation of a state professional conduct rule discussing the "objectives" of representation.[136] That rule, Rule 1.2 of the Alabama Rules of Professional Conduct, mirrors ABA Model Rule of Professional Conduct 1.2(a),

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Blanco and his attorneys by requiring defense counsel to call two additional witnesses.")

[132] 422 U.S. at 835 (emphasis added).

[133] *Id.* at 835–36.

[134] *See id.* at 808 n.3.

[135] *Id.*

[136] *Burton*, 651 So. 2d at 656 (quoting Ala. R. Prof'l Conduct 1.2).

which is discussed in *McCoy*, and states that a "lawyer shall abide by a client's decisions concerning the objectives of the representation."[137] In *McCoy*, this Court clearly distinguished "between strategic choices about how best to *achieve* a client's objectives" and "choices about what the client's objectives in fact *are*,"[138] putting witness choice squarely in the category of strategic choices belonging to *counsel*, not the client.[139]

Witness choice is not, and never has been, an "objective" of representation.[140] For at least half a century, this Court has been clear in its holdings on this matter. Indeed, in the decades since the state courts first denied Mr. Burton's direct appeal claim, this Court *continued* to rely on *Jones* to establish the legal presumption that attorneys have "better understanding of the procedural choices," that is, the "choices affecting conduct of the trial, including . . . the witnesses to call."[141] To this day, no reviewing court has corrected these clear constitutional violations.

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[137] 584 U.S. 423 (quoting ABA Model Rule of Prof'l Conduct 1.2(a)).
[138] *Id.* at 422 (emphasis in original).
[139] *Id.* at 423 ("Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles. See *Gonzalez* [v. *United States*], 553 U.S.[242,] 249 [(2008)]('[n]umerous choices affecting conduct of the trial' do not require client consent, including 'the objections to make, the witnesses to call, and the arguments to advance'))." Notably, the quote from *Gonzalez v. United States* is derived from, and cites to, *Jones*. *See Gonzalez*, 553 U.S. at 249–50.
[140] *McCoy*, 584 U.S. at 423 (quoting *id.* at 249 ("Numerous choices affecting conduct of the trial" do not require client consent, including "the objections to make, the witnesses to call, and the arguments to advance.") (internal quotation marks omitted)).
[141] *Gonzalez v. United States*, 553 U.S. 242, 249 (2008).

In denying *McCoy* relief, the Alabama Court of Criminal Appeals acknowledged in a footnote this distinction but doubled down on its incorrect assessment that allowing the client to make strategic decisions comports with the Sixth Amendment:

> We also note that the Alabama Supreme Court has recognized that United States Supreme Court's decisions which hold that counsel does not need the client's approval for every tactical decision do not "imply that a trial court commits reversible error if it permits the defendant to make a tactical decision after the defendant has been advised by counsel regarding that decision" and that "[s]imply because defense counsel may make the tactical decision ... it does not follow that the trial court is required to follow the wishes of defense counsel as to every decision regarding trial strategy under any circumstance, even over the objection of the defendant." *Ex parte Mills*, 62 So. 3d 574, 590 (Ala. 2010).[142]

In *Ex parte Mills*, the state supreme court concluded, on plain-error review,

> Based on the foregoing, we conclude that under these circumstances—i.e., Mills received extensive time to discuss the matter with his attorneys and his attorneys did not clearly object to Mills's decision not to request lesser-included-offense instructions—the trial court did not commit plain error in permitting Mills to decide whether to request instructions as to lesser-included offenses.[143]

In other words, the Alabama courts denied Mr. Burton relief based on caselaw borne of a very different situation—one in which it was at least arguable that the client understood the risks inherent in his strategic decision and his attorneys did not raise a clear objection when he made it.

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[142] Pet. App. 345a–346a n.1.
[143] 62 So. 3d 574, 590 (Ala. 2010).

The state courts denied Mr. Burton a fair reading of the federal constitution in 1993, and they denied him again in 2021. Most recently, on January 22, 2026, the state supreme court denied Mr. Burton relief on this issue yet again after he raised it in response to the state's motion to authorize an execution date.[144] This is not justice.

Rule 60(b)(6) "vests power in courts . . . to enable them to vacate judgments whenever such action is appropriate to accomplish justice."[145] Justice here would be to allow Mr. Burton a full merits adjudication of his federal constitutional claims. Justice here would be to allow him his "day in . . . court before [his life is] extinguished."[146]

CONCLUSION

The *Andrew* decision represented a change in this Court's approach to interpreting § 2254(d)(1). Mr. Burton has been nothing but diligent in pursuing relief on the meritorious constitutional claims that should free him from the death sentence. But he was denied relief under the too-narrow construction of § 2254(d)(1) rejected in *Andrew*. Given these circumstances, the court of appeals' one-sentence denial issued by a single judge is insufficient to deprive Mr. Burton of one *full* opportunity to have his federal constitutional claims adjudicated. This issue is

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[144] *See* Order, No. 1930070 (Ala. Jan. 22, 2026). In those proceedings, Mr. Burton also raised the argument that, if his claim *was* governed by *Faretta*, he should have been granted relief on his direct-appeal claim that he was deprived of access to the courts during a critical stage in the proceedings. *See* Resp. to the State of Alabama's Mot. to Set an Execution Date at 15–24 (Ala. Dec. 10, 2025).

[145] *Klapprott v. United States*, 335 U.S. 601, 615 (1949).

[146] *Dobbert v. Strickland*, 670 F.2d 938, 940 (11th Cir. 1982).

deserving of a COA, as jurists of reason *have already* debated whether issues like those presented in Mr. Burton's motion were cognizable and properly raised under Rule 60(b)(6).

If Mr. Burton is correct that his death sentence was unconstitutionally imposed, then denying him the opportunity to reopen his habeas proceedings denies him the full protection of the federal constitution and the writ of habeas corpus for which it explicitly provides. Now that the Eleventh Circuit has declined to issue a COA, a writ of certiorari offers Mr. Burton his only remaining path to vindicate his constitutional rights before his scheduled execution date of March 12, 2026. And although the issues he raised are, at their core, a matter of statutory interpretation, the constitutional import cannot be ignored. The question is: Will this Court interpret statutory law—AEDPA—such that a man is put to death without the full protection he is afforded under the United States Constitution?

Respectfully submitted,

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