Nos. 25-6943 and 25A964
CAPITAL CASE

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

OPPOSITION TO APPLICATION FOR STAY OF EXECUTION AND PETITION FOR WRIT OF CERTIORARI

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March 3, 2026

EXECUTION SCHEDULED MARCH 12, 2026

CAPITAL CASE

QUESTIONS PRESENTED
(Restated)

Charles Burton was sentenced to death in 1992 for the robbery-murder of Douglas Battle, who was shoved to the ground and shot in the back by one of Burton's partners when he failed to get on the floor quickly enough during the armed robbery of an AutoZone.

Burton's habeas proceedings concluded in 2013. In May 2025, he filed a Rule 60(b) motion, arguing that the courts had erred and that he was entitled to relief under *Andrew v. White*, 604 U.S. 86 (2025), which expanded the realm of what constitutes clearly established federal law. The district court—the same court that had rejected his habeas claims in 2009—held that the motion was functionally an unauthorized successive habeas petition, and the Eleventh Circuit denied a COA and reconsideration, concluding the proceedings on January 13, 2026. Not until February 27—thirteen days before his execution—did Burton bother to come before this Court to seek certiorari and a stay.

The questions presented are:

1. Whether this Court should review the Eleventh Circuit's denial of a COA where the district court held that it lacked jurisdiction to consider Burton's self-styled Rule 60(b) motion because, under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the claim was in fact a merits attack on the final judgment of Burton's initial habeas petition.

2. Whether, even if Burton had brought a "true" Rule 60(b) motion, *Andrew* expanded *Jones v. Barnes*, 463 U.S. 745 (1983), to prohibit a trial court from allowing a defendant to call witnesses against the advice of counsel.

3. Whether Burton is entitled to a stay of execution, particularly given that he unreasonably delayed seeking a stay of his lawfully imposed sentence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Charles L. Burton, Jr., is scheduled to be executed on **March 12, 2026**, for the murder of Douglas Battle nearly thirty-five years ago.

I. Burton claims that the district court erred in denying his Rule 60(b) motion for lack of jurisdiction. He also claims that the Eleventh Circuit rule prohibiting the rehearing en banc of denials of applications for certificates of appealability (which are considered by one judge, then appealed to a three-judge panel) falls afoul of this Court's precedent. As to the latter, Burton fails to point to clearly established federal law invalidating the Eleventh Circuit rule. As to the former, the district court correctly denied relief under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), because Burton's Rule 60(b) claim was functionally a merits attack, not a "true" Rule 60(b) claim. The claim should have been brought as a successive habeas petition, which requires precertification, and Burton never sought this from the Court of Appeals.

II. Though the lower courts did not reach the merits of Burton's claim, it is meritless. Burton contends that during his original habeas proceedings, the lower courts read the holding of *Jones v. Barnes*, 463 U.S. 745 (1983), too narrowly, and that *Andrew v. White*, 604 U.S. 86 (2025), would allow the courts to grant the relief he sought by finding that *Jones* constitutes clearly established federal law. But *Andrew* does not suggest that such a broad reading of *Jones* is warranted, particularly where the issue at the heart of this claim is whether the trial court erred by allowing Burton to call two witnesses against his counsel's better judgment.

III. Burton has known since January 13, 2026, that the Eleventh Circuit would

not grant relief on this claim, yet he waited until February 27—thirteen days before his execution—to seek certiorari and a stay. He has been on death row since April 1992, and his death sentence is long overdue. His delay, as well as the public interest in justice, weigh against granting a stay of execution. Burton faces no irreparable harm where the State carries out a lawful and just sentence.

STATEMENT OF THE CASE

Burton is scheduled to be executed on March 12 for the senseless robbery-murder of Douglas Battle.

A. Burton masterminds a fatal robbery.

The following is taken from the Alabama Court of Criminal Appeals' (ACCA) decision on direct appeal. *Burton v. State*, 651 So. 2d 641, 643-45 (Ala. Crim. App. 1993).

In August 1991, six men—Charles Burton, Derrick DeBruce, Deon Long, LuJuan McCants, Willie Brantley, and Andre Jones—conspired to commit a robbery. Burton, forty-one, was the ringleader; according to McCants, Burton "organized the criminal activity and…told the others what to do during the robbery."

On August 16, the men met at the home of Barbara Spencer, Long's mother, in Montgomery, Alabama, to discuss their plans. Long, Burton, and DeBruce left to find guns, and once they were armed, the six men drove to Talladega in two vehicles. They stopped at a carwash and discussed robbing the nearby AutoZone auto parts store. Leaving one car at the carwash, they piled into the other and drove to their target. Once they arrived, Burton told McCants and Long to watch the door, and "that if anyone caused any trouble in the store to let him handle the situation." Everyone who went into the store was armed except Long.

Larry McCardle, the manager, was at the cash register when Burton walked in. Burton purchased several items and asked for the restroom. McCardle told him where to go, and as Burton walked away, DeBruce pulled a gun and ordered everyone to get on the floor. Burton turned and grabbed McCardle, then pointed a gun at him

and ordered McCardle to take him to the safe. McCardle complied. Meanwhile, the other robbers began taking the customers' valuables.

Douglas Battle, a would-be customer, walked in while the robbery was in progress. DeBruce ordered him to the ground, but Battle had difficulty getting down, and the two men began to argue. DeBruce hit Battle, knocking him to the floor, then fatally shot him in the back. Burton had already left the store when the shooting occurred.

The men jumped into their car, retrieved the other at the carwash, and drove back to Spencer's house to divide the spoils. According to Spencer, the men seemed to be upset when they arrived. They had a considerable amount of money on them, and Burton oversaw its distribution. The men gave Spencer $100, but she ultimately gave that to McCants.

Seventeen of Burton's fingerprints were found at the AutoZone, both on the items that McCardle identified as Burton's purchases as well as on other items.

B. Burton is convicted, sentenced to death, and unsuccessful on appeal.

Burton was convicted of capital murder in April 1992. At the conclusion of the penalty phase, the jury unanimously recommended the death penalty, and the trial court accepted that recommendation. *Id.* at 643. ACCA affirmed, *id.* at 659, as did the Alabama Supreme Court, *Ex parte Burton*, 651 So. 2d 659 (Ala. 1994). This Court denied certiorari. *Burton v. Alabama*, 514 U.S. 1115 (1995) (mem.).

Burton's state postconviction (Rule 32) proceedings commenced in December 1996, and relief was denied at every level. *Burton v. State*, 910 So. 2d 831 (Ala. Crim. App. 2004) (table); *Ex parte Burton*, No. 1031200 (Ala. Sept. 24, 2004). He did not

seek certiorari in this Court.

Burton filed a 28 U.S.C. § 2254 petition in the Northern District of Alabama in February 2005. The district court denied relief in a 311-page memorandum opinion on March 27, 2009, Pet. App'x F, and the Eleventh Circuit Court of Appeals affirmed in November 2012, *Burton v. Comm'r, Ala. Dep't of Corr.*, 700 F.3d 1266 (11th Cir. 2012) (Pet. App'x D). This Court again denied certiorari on October 7, 2013, *Burton v. Thomas*, 571 U.S. 903 (2013) (mem.), concluding Burton's conventional appeals.

C. Burton seeks relief by various avenues.

In May 2016, Burton filed a 42 U.S.C. § 1983 complaint in the Middle District of Alabama alleging that Alabama's lethal injection protocol was unconstitutional. That case was consolidated and dismissed on the parties' joint motion in July 2018 after the plaintiffs (including Burton) elected nitrogen hypoxia. *In re: Alabama Lethal Injection Protocol Litigation*, 2:12-cv-00316 (M.D. Ala. July 11, 2018).

In January 2017, after DeBruce was resentenced to life without parole,[1] Burton filed a successive Rule 32 petition challenging his death sentence, which was summarily dismissed. *Burton v. State*, 61-CC-1991-000341.61 (Talladega Cnty. Cir. Ct. Mar. 31, 2017). ACCA affirmed, *Burton v. State*, CR-16-0812 (Ala. Crim. App. Feb. 2, 2018), the Alabama Supreme Court denied certiorari, *Ex parte Burton*, No. 1170536 (Ala. Apr. 20, 2018), and this Court did likewise, *Burton v. Alabama*, 586 U.S. 949

1. In July 2014, the Eleventh Circuit reversed in part the district court's denial of habeas relief, finding that DeBruce's trial counsel rendered ineffective assistance during the penalty phase. *DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263 (11th Cir. 2014). The Talladega County District Attorney's Office declined to retry the penalty phase more than two decades after the fact, and so DeBruce's sentence was commuted to life without parole. Order, *DeBruce v. Dunn*, 1:04-cv-02669 (N.D. Ala. Sept. 22, 2015), DE55.

(2018) (mem.).

In April 2019, Burton initiated a second § 1983 action in the Middle District of Alabama alleging that the Alabama Department of Corrections' (ADOC) refusal to allow inmates to have non-ADOC spiritual advisors in the execution chamber infringed upon his religious rights. ADOC changed their policy, and the litigation was dismissed by agreement in November 2021. *Burton v. Dunn*, 2:19-cv-00242 (M.D. Ala. Nov. 30, 2021).

While his federal litigation was pending, Burton filed a second successive Rule 32 petition in May 2019 based on *McCoy v. Louisiana*, 584 U.S. 414 (2018). The petition was summarily dismissed. *Burton v. State*, 61-CC-1991-000341.62 (Talladega Cnty. Cir. Ct. Dec. 20, 2019). After a remand to determine whether Burton had paid a filing fee or obtained IFP status—neither, as it so happened—ACCA affirmed, *Burton v. State*, CR-19-0400 (Ala. Crim. App. Dec. 17, 2021) (Pet. App'x G), and the Alabama Supreme Court denied certiorari, *Ex parte Burton*, No. 1210407 (Ala. May 20, 2022).

D. Burton tries to reopen his habeas litigation, and the State moves for his execution.

As set forth above, Burton's habeas litigation concluded in October 2013. On May 30, 2025—more than fourteen years after the district court denied his habeas petition—Burton filed a Rule 60(b) motion ostensibly based on this Court's recent decision in *Andrew v. White*, 604 U.S. 86 (2025).

On October 2, the State of Alabama moved in the Alabama Supreme Court for Burton's execution to be authorized. Six days later, the district court—notably, the

same judge who had considered Burton's petition years before—denied Burton's Rule 60(b) motion in a memorandum opinion, holding that the court lacked jurisdiction because "Burton's motion is functionally a second habeas petition, and he did not receive precertification from the Eleventh Circuit Court of Appeals to file a successive petition." Pet. App'x C at 4a. On November 4, Burton applied for a certificate of appealability from the Eleventh Circuit, asking for expedited review and a stay of execution. The application was denied without elaboration on December 2. Pet. App'x B. Nearly two weeks later, Burton moved for reconsideration, and the court denied the motion without elaboration on January 13, 2026. Pet. App'x A.

Eight days later, on January 22, the Alabama Supreme Court authorized Burton's execution. Governor Kay Ivey scheduled his execution to begin on March 12 by letter dated February 5.

Despite his imminent execution date, Burton took no further action in his habeas proceedings until the afternoon of February 27—forty-five days after his Eleventh Circuit proceedings concluded, thirty-six days after the Alabama Supreme Court authorized his execution, twenty-two days after it was scheduled, and thirteen days before it is to commence—when he filed the petition and stay motion at bar.

STANDARD OF REVIEW

For Burton "[t]o obtain a stay pending the filing and disposition of a petition for a writ of certiorari," he "must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a

likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

REASONS CERTIORARI AND A STAY OF EXECUTION SHOULD BE DENIED

I. The lower courts correctly denied relief because Burton's purported Rule 60(b) motion was in fact an unauthorized successive habeas petition.

A. Background.

Before Burton's Rule 60(b) motion can be properly analyzed, some background as to the claims raised is warranted.

At trial, Burton wanted to call two of his codefendants, Brantley and Jones, to testify during the penalty phase. His counsel disagreed with this strategy and told the trial court as much. Vol. 7 at R. 919-20.[2] At the conclusion of the guilt phase, the court determined that Brantley and Jones were willing to testify, then engaged in a colloquy with counsel and Burton:

> MR. WILLINGHAM: Judge, I would like to put on the record—
>
> THE COURT: Come around here so she can get you real good.
>
> MR. WILLINGHAM: —that I have interviewed the witnesses, and it would be my opinion that neither of them can give any testimony that would mitigate my client's guilt in this case. If he insists on calling them and you 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.
>
> THE COURT: You concur?
>
> MR. MORRIS: I concur, Your Honor.

2. "Vol." citations are to the habeas record, which has not been uploaded into PACER. The habeas checklist was filed on August 26, 2005, and the sixty-volume record was manually filed with the district court. Should the Court require specific volumes of the record to be scanned and transmitted electronically for reference, the undersigned could do so.

> THE COURT: Okay. Mr. Burton.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: You have heard the recommendation of your lawyers stated in open court relative to these two witnesses not being called, that they don't desire to call them, and they've indicated you want to call them. Is that your desire?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay, I am going to allow you to call them.
>
> THE DEFENDANT: It was my desire to call them earlier before this—before the sentencing became, you know, but they advised me that, you know, that—
>
> THE COURT: You answered my question. That's fine.
>
> […]
>
> THE COURT: …Mr. Willingham, if you will assist the Defendant, he wants you to ask questions and he's got some he wants to ask, you ask them.

Vol. 7 at R. 991-94. Unfortunately for Burton, his witnesses' testimony proved unhelpful. As the district court explained:

> Moreover, as the testimony of Brantley and Jones evolved during the penalty phase, the basis for defense counsel's refusal to honor Burton's request to call those witnesses during the guilt-innocence phase of trial became abundantly clear: their testimony—to the effect that neither Brantley nor Jones knew Burton, and neither of them had been involved in the robbery—was thoroughly discredited by the prosecutor, who impeached both witnesses with their prior inculpatory statements *and* a bank surveillance videotape showing Brantley, Jones, and Burton together, inside the City National Bank of Sylacauga, shortly before the robbery of the Talladega Auto Zone store.

Pet. App'x F at 192a. As Burton's manufactured—and rejected—alibi defense was immaterial during the penalty phase, the district court concluded that this "obviously was the basis" for defense counsel's statement that Brantley and Jones could not

provide mitigating evidence. *Id.* at 191a.

On direct appeal, Burton argued that "the trial court interfered with his attorney-client relationship" by overriding counsel's wishes and allowing them to testify. *Burton*, 651 So. 2d at 656. ACCA found there was no error: Burton wanted to call the witnesses, and the trial court held a colloquy on the matter. *Id.* ACCA concluded:

> An attorney represents a criminal defendant and is obliged by Rule 1.2, Alabama Rules of Professional Conduct, to "abide by a client's decisions concerning the objectives of representation…." An attorney can only make recommendations to a client as to how to conduct his defense; the ultimate decision, however, lies with the client. There was no interference with the attorney-client relationship here, when the trial court was honoring the appellant's wishes.

Id.

In state postconviction, Burton argued that trial counsel were ineffective for allowing the court to interfere in the defense's penalty-phase presentation to his detriment. The circuit court denied relief, and ACCA affirmed, quoting the lower court:

> "The record plainly reveals that the witnesses in question were called to testify at the insistence of Burton and against the express advice of Mr. Willingham.…
>
> […]
>
> A claim of ineffective assistance of counsel regarding this issue is plainly without merit. The ultimate decision to call the witnesses in question was Burton's. Counsel was not ineffective because their client rejected their advice. This claim is denied."

Mem. Op. at 60-61, *Burton v. State*, CR-00-2472 (Ala. Crim. App. Feb. 20, 2024).

Burton brought both claims before the district court in habeas (as IV.N and

VI.P in the memorandum opinion). In claim IV.N, Burton relied upon *Jones v. Barnes*, 463 U.S. 745 (1983), in which this Court held that counsel has no duty to raise every nonfrivolous issue the defendant raises. But as the district court noted:

> The *Jones* decision does not address issues of "trial strategy." Even so, this court has not found Supreme Court precedent holding that the decision to call, or not to call, certain witnesses at trial is materially distinguishable from the analogous appellate issue addressed in *Jones*: that is, and paraphrasing the Court's holding in *Jones*, *if* an indigent defendant does *not have* "a constitutional right to compel appointed counsel to press *nonfrivolous* points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points," then certainly an indigent defendant has *no right* to compel appointed counsel to press *frivolous* points, or worse, *damaging* points, such as calling witnesses whose testimony cannot benefit the client's defense in the guilt-innocence phase, or mitigate his guilt in the penalty phase, of a capital trial. *Cf. id.* at 754 ("For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders*. *Nothing in the Constitution or our interpretation of that document requires such a standard.*") (emphasis added, footnote omitted).

Pet. App'x F at 193a-194a. Burton also directed the district court to *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991), which offered similar, albeit distinguishable, facts to his case. *See id.* at 167-70. But the court found a more compelling argument elsewhere:

> The Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, provides in the part that is here pertinent: "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense." U.S. Const., amend VI (1791). The Constitution does not explicitly define the phrase "assistance of counsel," but the Supreme Court placed a gloss upon it in *Faretta v. California*, 422 U.S. 806 (1975), when holding that the Sixth Amendment requires that defendants be allowed to represent themselves.
>
> > It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own

> unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him…. Personal liberties are not rooted in the law of averages. *The right to defend is personal.* The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. *It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored* out of "that respect for the individual which is the lifeblood of the law."

Id. at 834 (emphasis supplied) (quoting *Illinois v. Allen,* 397 U.S. 337, 350-351 (1970)). In other words, the right to the assistance of counsel that is guaranteed by the Sixth Amendment is "more than a right to have one's case presented competently and effectively"; it also includes the duty of counsel "to protect the dignity and autonomy of a person on trial by *assisting* **him in making choices that are his to make, not to make choices for him,** although counsel may be better able to decide which tactics will be most effective for the defendant." *Jones*, 463 U.S. at 759 (Brennan, J., dissenting) (italicized emphasis in original, boldface emphasis added).

> In summary, therefore, even though the state trial judge in this case interfered with defense counsel's presentation of a mitigation case, and overreached his authority by infringing upon the relationship between Burton and his attorneys when requiring counsel to call witnesses desired by Burton, but not by counsel—a trial tactical decision normally entrusted to counsel—that error was not of constitutional proportions, because the choice of which witnesses to call, and which not to call, ultimately belongs to the defendant. Counsel could *assist* Burton in making choices that were his to make, but could not *insist* upon making choices for him.
>
> Burton therefore was not deprived, or denied the assistance of counsel by the trial judge; to the contrary, Burton chose not to heed counsel's advice—a choice that was his to make.

Id. at 197a-198a (footnote omitted).

The Eleventh Circuit affirmed, explaining, "Despite Burton's arguments on appeal, the sole issue in this case is whether the ultimate authority to call a witness

at trial belongs to counsel or the client. Wherever the decision-making authority properly rests in this trial scenario, the Supreme Court has not yet spoken on the issue." *Burton*, 700 F.3d at 1269. Here, the trial court determined that this was Burton's decision, and ACCA agreed. The Eleventh Circuit found that it had no authority to grant relief under AEDPA:

> 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*, 422 U.S. 806 (1975); testify on his or her own behalf, *Jones v. Barnes*, 463 U.S. 745 (1983); or take an appeal, *id.*—ultimately belong to the client, it has never had occasion to address the division of decision-making authority in the trial context of calling witnesses.

Id. Considering *Jones v. Barnes*, the Eleventh Circuit determined that this decision was of no help to Burton:

> [*Jones*] does not involve a defendant's desire to call witnesses at trial against the advice of counsel. In fact, it did not involve the calling of witnesses at trial at all. Instead, *Jones* holds that a defendant does not have a constitutional right to compel appointed counsel to present on appeal every non-frivolous argument that the defendant advocates. 463 U.S. at 754. 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.

Id. at 1270 (citation edited). The court also rejected Burton's *Blanco* argument, as *Blanco* was a pre-AEDPA decision, and it did not provide a holding on "the question of whether the decision to call a witness belongs to the lawyer or to the client." *Id.*

As for claim VI.P, while Burton conceded that he wanted to call Brantley and Jones, he still faulted counsel for not raising objections when the trial court allowed the witnesses to testify. Pet. App'x F at 300a. Considering ACCA's opinion and IV.N, the district court held:

> Burton has not shown that the decision of the state trial and appellate courts was contrary to, or an unreasonable application of, clearly established federal law, nor has he demonstrated that the decision was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. Defense counsel clearly informed both Burton and the trial court that he (counsel) advised against calling the co-defendants to testify. Counsel was not ineffective.

Id. at 302a-303a.

Burton raised a version of this issue in his petition for certiorari, and this Court denied cert without opinion. *Burton*, 571 U.S. 903.

B. The Rule 60(b) motion.

In his Rule 60(b) motion, Burton claimed that the district court erred because his citation to *Jones* was analogous to Brenda Andrew's citation to *Payne v. Tennessee*, 501 U.S. 808 (1991), in *Andrew v. White*, 604 U.S. 86 (2025).

Andrew was charged with capital murder for the 2001 shooting death of her husband. When she went to trial, the prosecution offered evidence and testimony smearing her character. She was convicted and sentenced to death. On direct appeal, Andrew argued that the prosecution's introduction of irrelevant evidence about her sex life and clothing violated Oklahoma law and the Due Process Clause. The state appellate court denied relief, deeming any error harmless. Andrew raised the issue in federal habeas, and the district court also denied relief. The Tenth Circuit affirmed because it held that Andrew failed to cite "clearly established federal law governing her claim." Andrew had cited *Payne*, in which this Court said the Due Process Clause "'provides a mechanism for relief' when the introduction of unduly prejudicial evidence 'renders [a] trial fundamentally unfair,'" but the Tenth Circuit deemed this

a "pronouncement," not a holding. *Andrew*, 604 U.S. at 88-91.

This Court disagreed, explaining that "holding" was broader than the court of appeals believed: "When this Court relies on a legal rule or principle to decide a case, that principle is a 'holding' of the Court for purposes of AEDPA." *Id.* at 92. Applying that standard to Andrew's case, the Court found that she "properly identified clearly established federal law" by pointing to *Payne*. *Id.* at 92-93. While *Payne* considered victim impact evidence, not unduly prejudicial evidence against a defendant, the Court found that *Payne* was relevant and explained, "General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court." *Id.* at 94.

C. The district court properly dismissed the Rule 60(b) motion for lack of jurisdiction.

The district court correctly treated Burton's Rule 60(b) motion as a successive—and unauthorized—habeas petition under *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

The *Gonzalez* Court considered the interplay between Rule 60(b) and 28 U.S.C. § 2244(b), which limits second or successive habeas petitions arising from state-court convictions. Under § 2244(b)(1), claims presented in prior habeas petitions are to be dismissed, while new claims must be dismissed unless they satisfy specific criteria: (1) they rely on a new, retroactive rule of constitutional law, (2) their factual predicate could not previously have been discovered through reasonable diligence, or (3) the facts underlying the claims would be sufficient, by a high degree of probability, to establish actual innocence. 28 U.S.C. § 2254(b)(2). Before an inmate files a

successive habeas petition, he "shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." *Id.* § 2254(b)(3)(A).

Rule 60 "applies in habeas corpus proceedings under 28 U.S.C. § 2254 only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules." *Gonzalez*, 545 U.S. at 529 (footnote and citation omitted). A Rule 60(b) motion falls afoul of the § 2244(b) restrictions when it seeks to add a new ground for relief or attacks the federal court's resolution of a claim on the merits. *Id.* at 532. *"When a movant asserts one of those grounds (or asserts that a previous ruling regarding one of those grounds was in error) he is making a habeas corpus claim." Id.* at 532 n.4 (emphasis added). By contrast, a "true" Rule 60(b) motion "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4; *see also Rivers v. Guerrero*, 605 U.S. 443, 453 (2025) ("We have determined that a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) (filed, obviously, after the judgment has issued) counts as a second or successive application if that filing 'attacks the federal court's previous resolution of a claim on the merits' or 'seeks to add a new ground for relief" not addressed by the judgment." (quoting *Gonzalez*, 545 U.S. at 532).

Burton's Rule 60(b) motion argued that the federal courts misapplied the law when they denied his claim, considering *Andrew*. But as the district court explained, "That 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*." Pet. App'x C at 7a. The court continued:

> In its affirmance, the Eleventh Circuit concluded that there was no clearly established law—including *Faretta* and *Jones*—that would entitle Burton to relief for his prejudicial-witness argument. *Burton v. Comm'r, Alabama Dep't of Corr.,* 700 F.3d 1266, 1269–70 (11th Cir. 2012). That is not a denial due to a "failure to exhaust, procedural default, or [a] statute-of-limitations bar," but rather, a denial on the merits of the habeas petition. *See Gonzales,* 545 U.S. at 532 n.4. Accordingly, Burton challenges the merits of the prior court ruling.

Id. at 8a. Thus, the district court correctly concluded that it lacked jurisdiction under § 2244(b) because Burton did not seek precertification from the Eleventh Circuit. United States Circuit Judge Britt Grant denied a COA, Pet. App'x B, and a three-judge panel—Judges Robin Rosenbaum, Jill Pryor, and Grant—denied reconsideration, Pet. App'x A.[3] Burton never attempted to obtain precertification from the Eleventh Circuit, instead insisting that his Rule 60(b) claims are proper.

Burton now argues that because "[t]he district court issued a COA in the first instance" as to his claims, it is indisputable that he "stated a 'valid claim of the denial of a constitutional right.'" Pet. 18. That the district court considered his claim potentially debatable in 2009 (and the Eleventh Circuit ruled against Burton in 2012)

3. Burton makes much of the fact that the Eleventh Circuit prohibits en banc review of denials of COAs in habeas cases. Pet. 14-17 (citing Eleventh Circuit Rule 22-1(c)). Rule 22(b)(2) of the Federal Rules of Civil Procedure notes that a request for COA "may be considered by a circuit judge or judges, as the court prescribes." It makes no rule about rehearing requests for COA denials, nor has Burton pointed to clearly established federal law invalidating Eleventh Circuit Rule 22-1(c). *Hohn v. United States*, 524 U.S. 236 (1998), does not prohibit review only by a panel instead of the court en banc. Burton's single-judge denial *was* "reasonably reviewable," Pet. 16: by a three-judge panel. And as Burton's motion was correctly dismissed for jurisdictional reasons (and meritless), this is a poor vehicle for debating the issue.

has no bearing upon whether his present motion is a "true" Rule 60(b) motion or a merits attack. His assertion that "[t]he crux of the motion was that the court of appeals should have found *Jones* qualified as" clearly established federal law, *id.* at 19, establishes that this was a merits attack. And while Burton claims that his argument is truly with the Eleventh Circuit, as the district court "correctly applied *Andrew*'s holding well before *Andrew* was decided," *id.*, he glosses over the fact that the district court *denied relief* in 2009 as to this claim, though it did grant a COA. Pet. App'x E at 23a. In sum, Burton failed to point to clearly established federal law showing that the trial court violated his constitutional rights by allowing Burton to call two of his codefendants to testify against trial counsel's better judgment.

Burton's Rule 60(b) motion was an unauthorized successive habeas petition in substance, the district court correctly held that it lacked jurisdiction to consider it, and the Eleventh Circuit properly determined that a COA was unwarranted. *See, e.g.*, *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). This Court should deny the petition and stay application.

II. In the alternative, Burton's *Andrew* argument is meritless.

Even if Burton's Rule 60(b) motion were a "true" Rule 60(b) motion, it is still meritless and should not serve as the basis for certiorari or a stay of execution.

Andrew was entitled to relief under *Payne* because the principle that "'the Due 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,'" *Andrew*, 604 U.S. at 92 (quoting *Payne*, 501 U.S. at 825), was central to that case's holding. *Payne* permitted victim impact evidence at trial

because there was a check built into the system against abuses—the Due Process Clause. But this Court has not issued a holding stating whether a defendant or his counsel ultimately has the right to decide whether to call a witness, and the holding in *Jones* does not rest upon that principle. All *Jones* held is that appellate counsel for indigent defendants need not raise every nonfrivolous issue. 463 U.S. at 753-54.

The Court has spoken on various rights of the client and of counsel. *Jones* enumerated several. *See id.* at 751. More recently, the Court stated:

> Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." *Gonzalez v. United States*, 553 U.S. 242, 248 (2008) (internal quotation marks and citations omitted). Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal.

McCoy, 584 U.S. at 422 (citation edited). In *McCoy*, the Court made clear that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id.* at 417. Consider also *Rock v. Arkansas*, 483 U.S. 44 (1987), which discussed the right to testify:

> The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due process of law in a fair adversary process." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)….
>
> The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982),

is a right to testify himself, should he decide it is in his favor to do so.

Id. at 51-52 (citations edited).

In sum, then, the defendant has the right to testify, and he has the right to compel the testimony of material and favorable witnesses for his defense. He even has the right to insist upon his innocence in a capital trial when experienced counsel, in his "reasonable professional judgment[]," *Jones*, 463 U.S. at 754, knows that insistence is a pathway to execution.[4] But what the Court has *not* spoken on is the defendant's right to call witnesses *he believes* will be favorable to his case, even if counsel vehemently disagrees. *Jones* does not extend so far as to mandate this rule, which differentiates this case from *Andrew*. While counsel may certainly "have a better understanding of the procedural choices than the client" and a better grasp of how choices like "the objections to make, the witnesses to call, and the arguments to advance" can affect the outcome, *Gonzalez*, 553 U.S. at 249, there is simply, as of yet, no clearly established federal law answering the question of whether the defendant has the right to insist upon particular witnesses being called in his defense. Under the facts of this case, *Andrew* does not support the relief Burton seeks, and this case, dismissed below for jurisdictional reasons, is not a good vehicle for further elucidating

4. The rule in *McCoy* seems obvious until one considers the underlying facts, which the dissent presents. The evidence against McCoy was "overwhelming": he shot his victims during a 911 call, he was seen fleeing, his abandoned car contained the victims' cordless phone and a receipt for the ammunition he used, surveillance footage showed him purchasing that ammunition on the day of the murders, he was caught states away with the loaded murder weapon on his person, and two of his friends testified that he confessed to murder. *McCoy*, 584 U.S. at 430-41 (Alito, J., dissenting). Experienced trial counsel wanted to confess guilt and concentrate on the penalty phase in order to avoid the death penalty. *Id.* at 431 (Alito, J., dissenting). McCoy, however, "claimed that the victims were killed by the local police and that he had been framed by a farflung conspiracy of state and federal officials, reaching from Louisiana to Idaho. Petitioner believed that even his attorney and the trial judge had joined the plot." *Id.* (Alito, J., dissenting).

the domains of the client and counsel.

III. Burton's delay was unreasonable, and he is not entitled to equitable relief.

A. Burton inexcusably delayed in seeking certiorari and a stay.

Burton knew on October 2, 2025, that the State was seeking his long-overdue execution date. He knew on October 8 that the district court deemed his Rule 60(b) motion an unauthorized successive habeas petition. He knew on December 2 that the Eleventh Circuit had denied a COA (and a stay of execution), and he knew on January 13, 2026, that the court had denied reconsideration—he would find no help there. On January 22, Burton knew that his execution had been authorized, and on February 5, he knew it had been scheduled for March 12.

And what did Burton and his team do? They worked on a public relations campaign, putting up billboards[5] and websites[6] to "Save Sonny Burton's Life." They wrote a clemency petition to Governor Ivey. (Indeed, there was even a film screening about his clemency push in late January in Montgomery.[7]) His counsel also reached out to ADOC to ask that Burton not be autopsied for religious reasons.

5. *E.g.*, Reggie Kyle, *Talladega Billboard Pushing for Clemency, Not Execution*, WBRC (Feb. 5, 2026, 10:57 PM), https://www.wbrc.com/2026/02/06/talladega-billboard-pushing-clemency-not-execution.
6. CHARLES "SONNY" BURTON, https://www.charlessonnyburton.com (last visited Mar. 3, 2026); *see also Stop the Execution of Charles "Sonny" Burton in Alabama*, ACTION NETWORK, https://actionnetwork.org/petitions/stop-the-execution-of-charles-sonny-burton-in-alabama (last visited Mar. 3, 2026).
7. Film Screening, "A Case for Clemency: Life for Sonny Burton," event by Life for Charles "Sonny" Burton (@CharlesSonnyBurton) and Alabama Post-Conviction Relief Project (@APCRP), FACEBOOK (Jan. 28, 2026, 5:30 PM), https://www.facebook.com/events/capri-theatre/film-screening-a-case-for-clemency-life-for-sonny-burton/865166836476457. Alabama Post-Conviction Relief Project is run and staffed by the Federal Defenders for the Middle District of Alabama (Burton's counsel), though it is "a separate nonprofit entity." *Alabama Post Conviction Relief Project*, FED. DEFS. FOR THE MIDDLE DIST. OF ALA., https://alm.fd.org/alabama-post-conviction-relief-project (last visited Mar. 3, 2026).

What Burton did ***not*** do was pursue certiorari until February 27, less than two weeks before his execution. He waited forty-five days after the Eleventh circuit denied reconsideration to file his petition and stay application, unnecessarily thrusting this Court into an emergency posture.

Because "[e]quity strongly disfavors inexcusable delay," *Woods v. Comm'r, Ala. Dep't of Corr.*, 951 F.3d 1288, 1293 (11th Cir. 2020), "last-minute claims arising from long-known facts" can justify "denying equitable relief," *Ramirez v. Collier*, 595 U.S. 411, 434 (2022). That "well-worn principle[] of equity" holds true even "in capital cases," *id.*, and applies equally to preliminary injunctions and stays of executions, *see id.* (preliminary injunction); *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (stay). Undue delay, whether for "a few months," *Wreal, LLC v. Amazon.com*, 840 F. 3d 1244, 1248 (11th Cir. 2016), or "years," *Benisek v. Lamone*, 585 U.S. 155, 160 (2018) (per curiam), is strongly disfavored. The reason is plain: Failure to act with "urgency" suggests that instead of needing an "extraordinary and drastic remedy," *Wreal*, 840 F. 3d at 1247-48, a plaintiff is engaged in "manipulation," *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992).

This Court has held that courts must "apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Hill*, 547 U.S. at 584; *see, e.g.*, *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019) ("Last-minute stays should be the extreme exception, not the norm, and 'the last-minute nature of an application' that 'could have been brought' earlier, or 'an applicant's attempt at

manipulation,' 'may be grounds for denial of a stay.'"); *id.* at 151 ("[F]ederal courts 'can and should' protect settled state judgments from 'undue interference' by invoking their 'equitable powers' to dismiss or curtail suits that are pursued in a 'dilatory' fashion or based on 'speculative' theories."); *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) ("Given the State's significant interest in enforcing its criminal judgments, there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." (citations omitted)).

True, it might be unusual for the Court to render a decision on a cert petition within the two months between the Eleventh Circuit's denial of the COA and Burton's execution, but waiting until the Court has less than two weeks to consider the matter is pure gamesmanship. Burton could have filed sooner. That he did not shows that he is hoping to avoid his execution by running out the clock with the Court.

Moreover, the other equitable factors weigh against Burton. He has been on death row since April 1992 for the death of a man who failed to comply quickly enough with the orders of Burton's partner in crime. Burton's appeals were exhausted in 2013, and it is long past time for him to receive the punishment he is due for his crime. Indeed, Douglas Battle's family has been waiting for justice for nearly three and a half decades. This Court has recognized the real interest that the State and the families of victims have in the timely execution of sentences. *E.g.*, *Hill*, 547 U.S. at 584 ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.") (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)).

"Last-minute stays should be the extreme exception, not the norm," *Bucklew* 587 U.S. at 150, and this case is not exceptional.

B. A stay would undermine the public interest in justice.

Last, a stay or any other injunctive relief that might delay Burton's execution would undermine the powerful interest—shared by the State, the public, and the victims of Burton's crime—in the timely enforcement of his sentence. *Hill,* 547 U.S. at 584. An unpunished murder is an intrinsic and ongoing harm to those interests and to the rule of law. "Only with real finality" can we "move forward knowing the moral judgment will be carried out." *Calderon*, 523 U.S. at 556. "To unsettle these expectations," especially at the eleventh hour, "is to inflict a profound injury to…the State and the victims of crime alike." *Id.*

CONCLUSION

This Court should respect the findings of the lower courts and deny Burton's cert petition and stay application. And because of Burton's dilatory tactics, his stay application should be denied on equitable grounds as well.

Respectfully submitted,

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