(ORDER LIST: 598 U.S.)

MONDAY, APRIL 24, 2023

CERTIORARI -- SUMMARY DISPOSITION

22-256 BOHON, CLETUS W., ET AL. V. FERC, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Axon Enterprise, Inc.* v. *FTC*, 598 U. S. ___ (2023).

ORDERS IN PENDING CASES

22M97 BRADLEY, STANLEY L. V. SHAW, WARDEN

22M98 MANUEL, JACQUELINE R. V. OPM

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

22M99 NEREE, DUFIRSTON V. AMBASSADE D'HAITI

The motion for leave to file a bill of complaint is denied.

22-6975 KIMBRELL, JODY V. BANK OF AMERICA, N.A.

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until May 15, 2023, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI GRANTED

22-324 O'CONNOR-RATCLIFF, M., ET AL. V. GARNIER, CHRISTOPHER, ET UX.

22-611 LINDKE, KEVIN V. FREED, JAMES R.

The petitions for writs of certiorari are granted.

CERTIORARI DENIED

22-539 ANILAO, JULIET, ET AL. V. SPOTA, THOMAS J., ET AL.

22-564 SALAZAR, JUAN C. V. MOLINA, JUAN R.

22-594 RODRIGUEZ, HJALMAR V. BURNSIDE, EDWARD, ET AL.

22-641 DAIMLER TRUCKS NORTH AMERICA LLC V. SUPERIOR COURT OF CA, ET AL.

22-769 WANG, WEIXING V. V. BRANDYWYNE COMMON CONDOMINIUM

22-771 FOLEY BEY, RENè J., ET UX. V. PRATOR, SHERIFF, ET AL.

22-778 MARTINEZ, DANIELLE H., ET AL. V. NEWSOM, GOV. OF CA, ET AL.

22-808 IZEN, JOE A. V. CIR

22-814 TINNERMAN, WILLIAM R. V. UNITED STATES

22-841 WEST, CHRISTOPHER H. V. MAY, WARDEN, ET AL.

22-845 THORNTON, ROBERT V. McDONOUGH, SEC. OF VA

22-903 GOODLEY, JAY V. GREENE, CHARLES M.

22-919 THALER, STEPHEN V. VIDAL, KATHERINE K., ET AL.

22-930 ESET, LLC, ET AL. V. FINJAN LLC

22-947 WILLIAMS, TYLER G. V. UNITED STATES

22-953 CALDERON, PABLO V. UNITED STATES

22-5859 FRACTION, MARCAL V. UNITED STATES

22-5878 KING, WILLIAM D. V. UNITED STATES

22-5958 TOVAR, RAUL V. UNITED STATES

22-6096 EYE, GARY V. UNITED STATES

22-6570 MONTIEL, RICHARD G. V. CHAPPELL, WARDEN

22-6575 MALAGERIO, PAUL M. V. UNITED STATES

22-6578 MOORE, DERRICK T. V. UNITED STATES

22-6579 HOYOS, JAIME V. DAVIS, WARDEN

22-6830 LOUKAS, MICHAEL J. V. SCHROEDER, WARDEN

22-6851 FREEMAN, DAVID V. HAMM, COMM'R, AL DOC

22-6862 YOUNG, BENJAMIN V. ALABAMA

22-6942 BURRELL, KWAME V. CHAPMAN, ACTING WARDEN

22-7001 WATSON, SHENIQUA L. V. VA DEPT. OF AGRICULTURE

22-7002 J. T. V. MARYLAND

22-7007 DOMINGO DIEGO, AXEL V. INDIANA

22-7008 BARKER, HEATH R. V. LUMPKIN, DIR., TX DCJ

22-7009 SMITH, DAVION V. CALIFORNIA

22-7023 OROSCO, MARIA V. USDC ED TX

22-7028 DICKERSON, JOHN L. V. TANCINCO, EMMANUEL, ET AL.

22-7043 MONTGOMERY, JEAN V. SCIALLA ASSOCIATES INC., ET AL.

22-7057 PNIEWSKI, RAYMOND V. ARTIS, ACTING WARDEN

22-7076 PINEDA-VALDEZ, SERVANDO V. UNITED STATES

22-7090 GALLARDO, FRANK V. UNITED STATES

22-7094 GORDON, MICHAEL L. V. UNITED STATES

22-7096 APPELLANT 1, ET AL. V. UNITED STATES

22-7097 JORDAN, MONTA O. V. UNITED STATES

22-7100 NEVAREZ, FELIPE V. UNITED STATES

22-7101 NOLDEN, CHARLES E. V. UNITED STATES

22-7103 STANLEY, GEORGE L. V. UNITED STATES

22-7106 WELLS, BRIAN K. V. UNITED STATES

22-7108 RYAN, ANDREW V. UNITED STATES

22-7112 LI, FUHAI V. UNITED STATES

22-7117 MACAPAGAL, NOEL V. UNITED STATES

22-7121 BARRET, CHRISTOPHER V. UNITED STATES

22-7122 WEST, QUINTEL V. ARTIS, ACTING WARDEN

22-7126 CHANDLER, ANDRE V. UNITED STATES

22-7129 THAYER, THOMAS P. V. UNITED STATES

22-7130 FLETCHER, TIMOTHY V. UNITED STATES

22-7137 GRIGGS, ERIC D. V. UNITED STATES

22-7138 ALI, MUZAMMIL V. UNITED STATES

22-7139 RICHARDSON, BOBBY V. LUNA, WARDEN

22-7142 PLUMP, WILLIAM M. V. UNITED STATES

22-7145 YUSUF, ABDULLAH K. V. UNITED STATES

22-7146 RAZZ, DAREN B. V. UNITED STATES

22-7155 OCEAN-AVENT, KALID K. V. UNITED STATES

22-7156 ROGERS, JAMES A. V. UNITED STATES

22-7171 CARDENA-SOSA, ACZEL V. UNITED STATES

The petitions for writs of certiorari are denied.

21-1550 SUNCOR ENERGY, INC., ET AL. V. BD. COMM'RS BOULDER CTY., ET AL.

The petition for a writ of certiorari is denied. Justice Alito took no part in the consideration or decision of this petition. Justice Kavanaugh would grant the petition for a writ of certiorari.

22-361 BP P.L.C., ET AL. V. MAYOR AND CITY COUNCIL BALTIMORE

22-495 CHEVRON CORP., ET AL. V. SAN MATEO COUNTY, CA, ET AL.

22-523 SUNOCO LP, ET AL. V. HONOLULU, HI, ET AL.

22-524 SHELL OIL PRODUCTS CO., ET AL. V. RHODE ISLAND

The petitions for writs of certiorari are denied. Justice Alito took no part in the consideration or decision of these petitions.

22-581 STEWARD, ACTING DIR., OR DOC V. GABLE, FRANK E.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied. Justice Kavanaugh would grant the petition for a writ of certiorari.

22-622 GAZZOLA, NADINE, ET AL. V. HOCHUL, GOV. OF NY, ET AL.

The petition for a writ of certiorari before judgment is

denied.

22-5894 GIBBS, TERRENCE V. UNITED STATES

22-7092 HARDWICK, LORENZO V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Alito took no part in the consideration or decision of these petitions.

HABEAS CORPUS DENIED

22-7089 IN RE WILLIAM HOPMEIER

22-7162 IN RE ANTHONY DEWAYNE L. TURNER

22-7163 IN RE MARCUS M. BACHMAYER

The petitions for writs of habeas corpus are denied.

22-7109 IN RE FREDDIE A. LAND

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of habeas corpus is dismissed. See Rule 39.8.

22-7144 IN RE DAVID PRIESTER

The petition for a writ of habeas corpus is denied. Justice Alito took no part in the consideration or decision of this petition.

22-7154 IN RE JAMES C. WINDING

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of habeas corpus is dismissed. See Rule 39.8.

MANDAMUS DENIED

22-6788 IN RE KENT WILLIAMS

The petition for a writ of mandamus is denied.

REHEARINGS DENIED

21-8096 FRANTZ, BARBARA V. FRANTZ, PATRICK C.

22-627 WILBORN, HAROLD L. V. MAYORKAS, SEC. OF HOMELAND

22-694 WHITAKER, JERMAINE A. V. WARD, COMM'R, GA DOC

22-5121 FRANTZ, BARBARA M. V. KANSAS, ET AL.

22-5284 FAGANS, MICHAEL D. V. LUMPKIN, DIR., TX DCJ

22-5588 WAKEFIELD, JOHN V. NEW YORK

22-5646 FREEMAN, FRED V. STIRLING, DIR., SC DOC

22-5834 TORRES, JOSE A. V. MITCHELL, SUPT., ET AL.

22-6021 GUO, GEORGE V. TEXAS

22-6499 THORNTON-BEY, DeJUAN B. V. WARDEN, ALLENWOOD USP

22-6512 PERRY, FRANK L. V. DIXON, SEC., FL DOC

The petitions for rehearing are denied.

22-637 IN RE LARRY E. KLAYMAN

The petition for rehearing is denied. Justice Kavanaugh and Justice Jackson took no part in the consideration or decision of this petition.

ATTORNEY DISCIPLINE

D-3108 IN THE MATTER OF DISCIPLINE OF PETER CRANE ANDERSON

Peter Crane Anderson, of Miami, Florida, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3109 IN THE MATTER OF DISCIPLINE OF JACK REVELS TUCKER JORDAN

Jack Revels Tucker Jordan, of North Kansas City, Missouri, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3110 IN THE MATTER OF DISCIPLINE OF JUDY RAYE MOATS

Judy Raye Moats, of Fairfax, Virginia, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

D-3111 IN THE MATTER OF DISCIPLINE OF LANHI HUYNH SALDANA TIER

Lanhi Huynh Saldana Tier, of Newtown, Pennsylvania, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

D-3112 IN THE MATTER OF DISCIPLINE OF CHRISTOPHER ALLEN BOYER

Christopher Allen Boyer, of Palestine, Texas, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3113 IN THE MATTER OF DISCIPLINE OF JUSTIN INFURNA

Justin Infurna, of Orlando, Florida, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3114 IN THE MATTER OF DISCIPLINE OF PATRICK J. NELSON

Patrick J. Nelson, of Kearney, Nebraska, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3115 IN THE MATTER OF DISCIPLINE OF HARRIET A. GILLIAM

Harriet A. Gilliam, of Riverhead, New York, is suspended

from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

D-3116 IN THE MATTER OF DISCIPLINE OF EDUARDO A. FLECHAS

Eduardo A. Flechas, of Pearl, Mississippi, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3117 IN THE MATTER OF DISCIPLINE OF BRIAN MATTHEW LOVE

Brian Matthew Love, of Apex, North Carolina, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

D-3118 IN THE MATTER OF DISCIPLINE OF CLIFFORD BAER SILBIGER

Clifford Baer Silbiger, of Westminster, Maryland, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

SUPREME COURT OF THE UNITED STATES

KEVIN B. BURNS *v.* TONY MAYS, WARDEN

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

No. 22–5891. Decided April 24, 2023

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting from the denial of certiorari.

Petitioner Kevin Burns, a defendant sentenced to death for felony murder, brought a 28 U. S. C. §2254 petition claiming inadequate assistance of counsel at the penalty phase of his trial. Burns asserts that counsel failed to present mitigating evidence tending to show that he did not shoot either of the two victims killed during a robbery in which he participated. Such evidence does not bear on Burns' guilt, since his participation in the underlying robbery suffices to render him guilty of felony murder. Evidence that Burns did not pull the trigger, however, was plainly relevant to the jury's determination whether to sentence him to death. The Sixth Circuit avoided this obvious conclusion only by mischaracterizing Burns' claim as being about counsel's failure to introduce residual doubt evidence (*i.e.*, evidence that Burns was not, in fact, guilty of felony murder). From there, the Sixth Circuit concluded that the claim must fail because this Court has never established a right to introduce residual doubt evidence at sentencing.

Burns argues, and the State does not contest, that the Sixth Circuit's analysis turned on two erroneous legal assumptions and clearly conflicts with several decisions of this Court. Burns asks this Court to take summary action to correct these fundamental legal errors so that his claim may be fairly considered before the State executes him. The

Court, however, declines to intervene. I would summarily vacate the error-laden (and precedential) decision below and remand for further consideration of Burns' claim. I respectfully dissent from the Court's failure to do so.

When Burns was 22 years old, he was part of a group of six young men that confronted and robbed another group of four young men sitting in a car. During the conflict, shots were fired into the car, killing two and severely injuring a third. No definitive narrative emerged regarding who had shot the victims. Prosecutors eventually charged three of the six men, including Burns, with premeditated murder and felony murder. In separate trials, juries convicted Burns' codefendants of felony murder only and sentenced both to life in prison. Burns' trial followed.

The jury acquitted Burns of premeditated murder but convicted him of two counts of felony murder, one for each of the men killed. To convict Burns of felony murder, the jury had to find only that he participated in the robbery; the jury did not need to decide who shot the victims. See Tenn. Code Ann. §§39–11–402(2), 39–13–202(a)(2) (1991). Because his felony-murder convictions made him eligible for a death sentence, §39–13–202(b), however, the jury had to decide at the penalty phase of trial whether to sentence Burns to death or life in prison.

At the penalty phase, capital defendants have a right to present any relevant mitigating evidence, including evidence regarding the "'circumstances of the offense.'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion)). Such evidence may be particularly important for a defendant facing death for felony murder, because a jury's penalty-phase assessment of culpability will often turn on the defendant's particular role and mental state during the offense. See *Tison* v. *Arizona*, 481 U. S. 137, 156–158 (1987).

Here, the State argued, based on testimony from two eyewitnesses, that Burns had shot Damond Dawson, one of the

two men killed. While the jury did not convict Burns of premeditated murder, this evidence was doubtless salient at the penalty phase. For it is self-evident that concerns that Burns killed someone would weigh heavily on the jurors' evaluation of what punishment was warranted. This is especially obvious here, as the only evidence in aggravation that the State introduced was related to the two deaths.

Yet penalty-phase counsel did nothing to challenge the State's narrative on this life-or-death question. This failure was particularly egregious, as Burns, in state postconviction proceedings, demonstrated that counsel could have done so by offering powerful impeachment evidence of the two eyewitnesses and introducing evidence that Burns did not shoot Dawson. One of the eyewitnesses was the person who was shot, but survived. He had earlier testified at the trial of one of the codefendants that it was the codefendant who shot both him and Dawson, saying nothing about Burns. When he instead identified Burns as the shooter at Burns' trial, counsel did not impeach him with his prior testimony, despite being aware of it. The other eyewitness, a neighbor, was prompted by defense counsel's cross-examination to make a courtroom identification of Burns based on his appearance and the Jheri curl hairstyle he had at the time of trial. Defense counsel could have, but did not, call witnesses to testify to a critical fact: While some of the six men had Jheri curls at the time of the crime, Burns, who had very short hair then, did not. Nor did counsel present testimony that Burns looked similar to (and had the same first name as) another member of the group of six, who was actually the one to instigate the conflict, with a key difference being that, unlike Burns, the instigator had a Jheri curl at the time of the crime. In fact, counsel failed to observe that police statements taken from members of the six indicated that it was this other man, and not Burns, who had initially approached the vehicle.

In case there was any doubt about the role the eyewitness

testimony played, the jury's decision should put it to rest. The jury sentenced Burns to death on the count connected to Dawson. It sentenced him to life in prison for the other count related to the victim he was not alleged to have shot. The Tennessee Court of Criminal Appeals (TCCA) affirmed the convictions and death sentence on appeal.

In his state postconviction petition, Burns asserted that his penalty-phase counsel was ineffective for the reasons above. In just one paragraph, the TCCA rejected the claim for lack of prejudice, concluding that Burns "cannot establish that his sentence would have been different." App. to Pet. for Cert. 197. The court reasoned there could be no prejudice because, even if Burns did not shoot Dawson, the record supported an alternative basis for the State's alleged *aggravating* factor "of creating a great risk of death to two or more persons." *Ibid.* That reasoning completely overlooks, however, that Burns had a right to introduce *mitigating* factors. Evidence that he did not shoot Dawson would have been vital in this regard.

Burns then raised his claim in a federal §2254 petition. Applying the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the District Court denied the claim after determining that the TCCA's prejudice determination was entitled to deference. *Id.,* at 114. The District Court, recognizing that reasonable jurists could disagree on this point, granted a certificate of appealability. *Id.,* at 154.

The Sixth Circuit affirmed. 31 F. 4th 497 (2022). Unlike the District Court, the Sixth Circuit did not rely on the TCCA's prejudice decision. Instead, the Sixth Circuit held that Burns' claim failed because he could not show that penalty-phase counsel acted deficiently in the first place.

The Sixth Circuit's deficiency analysis rested on two fundamental errors of law. The first occurred when the Sixth Circuit *sua sponte* recharacterized Burns' claim as being about nothing more than "'residual doubt'" evidence. *Id.*, at 503 (quoting *Oregon* v. *Guzek*, 546 U. S. 517, 525 (2006)).

That term refers to evidence that is "introduce[d] at sentencing" with the purpose of "cast[ing] 'residual doubt' on [the defendant's] guilt of the basic crime of conviction." *Id.*, at 525. The second occurred when the Sixth Circuit concluded that Burns' claim, so understood, "necessarily fails" because this Court has not established a "right to present residual doubt evidence at sentencing." 31 F. 4th, at 503.

The error in the Sixth Circuit's decision leaps off the page. Evidence that Burns did not shoot the victim is not, of course, mere residual doubt evidence. Because Burns was convicted of felony murder, the jury did not have to find that he shot anyone in order to convict him. Thus, evidence that he was not the shooter goes to the circumstances of the felony murder and his level of culpability, rather than guilt. In other words, such evidence concerns "*how*, not *whether*, [Burns] committed the crime," a typical focus of sentencing. *Guzek*, 546 U. S., at 524. This glaring mistake, confusing evidence about the circumstances of the offense with residual doubt evidence, deprived Burns of his last chance to defend his constitutional right to introduce mitigation evidence that could have spared his life. See *Eddings*, 455 U. S., at 110.

Further, even holding fixed the Sixth Circuit's erroneous "residual doubt" characterization, the decision below rests on yet another fundamental error. The Sixth Circuit reasoned that because this Court has not recognized a right to introduce residual doubt evidence at the penalty phase, the failure to do so could not be deficient performance under *Strickland* v. *Washington*, 466 U. S. 668 (1984). This reasoning assumes, incorrectly, that only failures to advance or protect federally recognized rights can be deficient. Because deficiency for purposes of *Strickland* is measured by "an objective standard of reasonableness," *id.*, at 688, federal ineffective-assistance-of-counsel claims can also be based on failures under state law. See, *e.g., Hinton* v. *Ala-*

bama, 571 U. S. 263, 275 (2014) (*per curiam*) (counsel's failure to "understand the resources that state law made available to him" was deficient); *Kimmelman* v. *Morrison*, 477 U. S. 365, 385 (1986) (counsel was deficient for failing to request discovery permitted under state law).

Because the Sixth Circuit overlooked this fact, it never considered whether Tennessee law might guarantee a right to introduce residual doubt evidence at the penalty phase. This is a critical omission because, as Burns made the Sixth Circuit aware, Tennessee allows for introduction of residual doubt evidence at sentencing and such a right was recognized at the time of his trial. See, *e.g., State* v. *Teague*, 897 S. W. 2d 248, 256 (1995) ("Evidence otherwise admissible under the pleadings and applicable rules of evidence, is not rendered inadmissible because it may show that the defendant did not kill the victim, so long as it is probative on the issue of the defendant's punishment").

In his petition for certiorari, Burns asks this Court for summary action to correct the serious legal errors below. The State, tellingly, does not defend the indefensible. Instead, essentially conceding that the Sixth Circuit erred, the State tries to shift attention away from the actual ruling on review by arguing that any action would be "futile" because, on remand, Burns "would not be able to overcome the heavy deference that must be paid to the state court's prejudice findings." Brief in Opposition 2.

Burns argued before the Sixth Circuit, however, that the TCCA itself committed two clear errors of law in its prejudice analysis, such that no AEDPA deference is owed under §2254(d)(1). First, Burns argued that because the TCCA considered only whether evidence that he did not shoot Dawson would have impacted the jury's finding of the statutory aggravating factor, without considering how it would have impacted the jury's assessment of mitigation, its decision is contrary to clearly established law, which also requires asking whether "the available *mitigating evidence*,

taken as a whole, 'might well have influenced the jury's appraisal' of [his] moral culpability." *Wiggins* v. *Smith*, 539 U. S. 510, 538 (2003) (emphasis added). Second, Burns argued that the TCCA applied an overly demanding prejudice standard, ignoring that prejudice requires only "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Rompilla* v. *Beard*, 545 U. S. 374, 390 (2005); Cf. *Vasquez* v. *Bradshaw*, 345 Fed. Appx. 104, 112 (CA6 2009) (no AEDPA deference owed because the state court "actually describe[d] and appl[ied] a different [prejudice] standard"). The Sixth Circuit never considered these arguments because of its erroneous deficiency analysis.

The Court's decision to deny certiorari means that Burns now faces execution despite a very robust possibility that he did not shoot Dawson but that the jurors, acting on incomplete information, sentenced him to death because they thought he had. The Court's failure to act is disheartening because this case reflects the kind of situation where the Court has previously found summary action appropriate: The relevant facts are not in dispute, and the decision below clearly conflicts with settled law of this Court on an important matter. The need for action is great because Burns faces the ultimate and irrevocable penalty of death. With so much at stake, I would vacate the decision below and remand. Because the Court refuses to do so, the indefensible decision below will be the last for Burns. I respectfully dissent.