No. 23-

IN THE
Supreme Court of the United States

TABERON DAVE HONIE,
Petitioner,

v.

ROBERT POWELL, WARDEN,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
FEDERAL PUBLIC DEFENDER
OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA

THERESE M. DAY
ERIC ZUCKERMAN
ASSISTANT FEDERAL PUBLIC DEFENDERS
850 West Adams Street, Ste 201
Phoenix, AZ 85007
(602) 382-2816

JEFFREY T. GREEN*
JACQUELINE G. COOPER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

COLLIN P. WEDEL
SIDLEY AUSTIN LLP
555 West Fifth Street, Ste 4000
Los Angeles, CA 90013
(213) 896-6000

ANKUR SHINGAL
JAMES P. MOONEY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Counsel for Petitioner

September 22, 2023 *Counsel of Record

CAPITAL CASE

QUESTION PRESENTED

After misadvising Petitioner Taberon Honie to waive his right to capital sentencing by a jury, Mr. Honie's counsel later erroneously told him that it was too late to withdraw his waiver and, on that basis, refused his client's request to do so. Under this Court's precedent and the law of at least three circuits, the proper way to assess prejudice from counsel's indisputably deficient performance is to employ a process-based prejudice standard that evaluates whether Mr. Honie would have chosen a jury for his sentencing—which, on the record here, he would have done.

Departing from those precedents, a divided Tenth Circuit upheld Utah's application of a substantive-outcome-based prejudice standard—as opposed to a process-based prejudice test. The Tenth Circuit joined three other circuits to widen a 3-4 split.

The question presented is:

When a capital defendant on federal habeas review challenges as ineffective his counsel's performance as it relates to the defendant's waiver of a state statutory right to a capital sentencing jury, is the relevant prejudice inquiry whether there is a reasonable probability that the defendant would have chosen to proceed with a jury absent counsel's error, or must the defendant prove that the outcome of his sentencing would have been different had he been afforded a jury of his peers?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Taberon Dave Honie, a prisoner incarcerated at the Utah State Correctional Facility in Salt Lake City, Utah.

Respondent is Robert Powell, Warden of the Utah State Prison.

There are no corporate parties involved in this case.

RELATED PROCEEDINGS

This case arises from the following proceedings in the Utah state courts, the United States District Court for the District of Utah, and the United States Court of Appeals for the Tenth Circuit:

Honie v. *Powell*, No. 19-4158, 58 F.4th 1173 (10th Cir. Jan. 26, 2023)

Honie v. *Crowther*, No. 2:07-CV-628 JAR, 2019 WL 2450930 (D. Utah June 12, 2019)

Honie v. *State*, No. 20110620, 342 P.3d 182 (Utah May 30, 2014)

Honie v. *State*, No. 030500157 (Utah 5th D. Apr. 24, 2012)

State v. *Honie*, No. 990497, 57 P.3d 977 (Utah. Jan. 11, 2002)

State v. *Honie*, No. 981500662 (Utah 5th D. May 24, 1999)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit opinion, 58 F.4th 1173, is reproduced at Pet. App. 1a-74a. The district court opinion, 2019 WL 2450930, is reproduced at Pet. App. 75a-137a. The Utah Supreme Court opinion, 342 P.3d 182, is reproduced at Pet. App. 138a-168a.

JURISDICTION

The Tenth Circuit entered judgment on January 26, 2023, Pet. App. 1a, and denied rehearing on April 26, 2023, Pet. App. 176a. On July 13, 2023, Justice Gorsuch extended the time for filing this petition until September 22, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced at Pet. App. 177a-183a.

INTRODUCTION

This Court has "recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the [accused's] case," including whether to "waive a jury." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (noting that other fundamental decisions within a defendant's purview include whether to plead guilty, testify, or appeal). *Jones* reinforces the principle that a criminal proceeding's fairness

cannot be measured only by the verdict or the punishment. This same principle underlies a defendant's right to make choices others may find ill-advised, such as representing oneself or rejecting plea offers despite overwhelming evidence of guilt. See *McCoy* v. *Louisiana*¸ 138 S. Ct. 1500, 1507-08 (2018) ("[A]n accused may insist upon representing herself—however counterproductive that course may be."); *Faretta* v. *California*, 422 U.S. 806, 834 (1975) (same). Due process demands respect for defendants' autonomy. Cf. *McKaskle* v. *Wiggins*, 465 U.S. 168, 178 (1984) ("[T]he right to appear *pro se* exists to affirm the accused's individual dignity and autonomy.").

The gravity of this freedom is at its apex in capital cases, as here. After misadvising Petitioner Taberon Honie to waive his right to sentencing by a jury, Mr. Honie's counsel then compounded that error by wrongly telling him that it was too late to withdraw his waiver and, on that basis, refused his client's request to do so. Under this Court's precedent and the law of at least three circuits, the proper way to assess prejudice from counsel's indisputably deficient performance is to evaluate whether Mr. Honie would have chosen a jury for his sentencing had he not been misadvised—which, on the record here, he would have done. The Tenth Circuit, however, ruled that the Utah Supreme Court properly required Mr. Honie to meet a substantive-outcome-based standard, *i.e.*, to show that his ultimate sentence would have been different—which, in a death penalty case, is a virtually insurmountable hurdle. In doing so, the Tenth Circuit joined three other circuits, thereby widening a 3-4 circuit split.

STATEMENT OF THE CASE

I. BACKGROUND: MR. HONIE'S CONVICTION, DEATH SENTENCE, AND SUBSEQUENT STATE PROCEEDINGS

Approximately two weeks before his murder trial, Mr. Honie, on advice of his counsel, waived his right to be sentenced by a jury. Pet. App. 194a-198a. About one week later, after learning aspects of sentencing procedure that his trial counsel failed to explain to him before his jury waiver—including the unanimity requirement for a jury death sentence as opposed to sentencing by a judge—Mr. Honie informed his trial counsel that he wished to withdraw his waiver and proceed to sentencing by a jury. Pet. App. 187a. Mr. Honie's counsel, despite the instruction from his client, refused to petition the court to withdraw Mr. Honie's sentencing jury waiver, misinforming Mr. Honie that it was "too late" to withdraw the waiver. *Id*.

In fact, there was still approximately one week remaining even before Mr. Honie's *guilt-phase* trial was set to commence. Moreover, the sentencing jury would have been the same as the guilt-phase jury, Utah Code Ann. § 76-3-207(1)(c)(i) (1998) (Pet. App. 181a), so Mr. Honie's request would have changed little administratively. Finally, during the hearing regarding the initial waiver, both the court and the prosecution strongly affirmed Mr. Honie's right to decide whether to waive the sentencing jury. The court emphasized that the waiver was Mr. Honie's choice because his life was "on the line," Pet. App. 198a, and the prosecution pledged to respect his decision as "an act of fairness" and "a precaution for an appeal," Pet. App. 193a.

Mr. Honie was subsequently convicted of aggravated murder by a jury and sentenced to death by the judge.

The Utah Supreme Court affirmed both his conviction and sentence on direct appeal. Mr. Honie then sought post-conviction relief. As relevant here, Mr. Honie claimed that his counsel was ineffective because counsel (1) failed to properly advise him regarding the sentencing process and the consequences of a jury sentencing waiver; and (2) failed to withdraw his jury sentencing waiver when requested to do so. The Utah Supreme Court affirmed the post-conviction court's summary judgment as to all claims. Pet. App. 139a. The Utah Supreme Court rejected Mr. Honie's ineffective assistance claim despite assuming as true that Mr. Honie "attempt[ed] to withdraw his waiver." Pet. App. 162a-163a. Pertinent here, the Utah Supreme Court concluded that Mr. Honie failed to show that the "outcome of his sentencing would have been different had he opted for jury sentencing." Pet. App. 163a.

II. PROCEEDINGS BELOW.

Mr. Honie filed a petition for habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the District of Utah. Pet. App. 75a-137a. He again claimed ineffective assistance of counsel. The district court denied relief, ruling that Honie did not show the Utah Supreme Court's application of the substantive-outcome-based prejudice test contradicted clearly established federal law. Pet. App. 110a-112a. Mr. Honie appealed.

After addressing preliminary arguments that are not at issue here, the Tenth Circuit affirmed in a split decision. A majority of the Tenth Circuit panel held that Mr. Honie had failed to meet the applicable

standard announced in *Strickland* v. *Washington*, 466 U.S. 668 (1984), which it misconstrued as requiring a showing of substantive-outcome-based prejudice in all cases.

The Tenth Circuit majority—like the district court—assumed, there being no evidence to the contrary, that Mr. Honie's counsel performed deficiently when he failed to move to withdraw Mr. Honie's sentencing jury waiver. Pet. App. 28a n.6. The majority then proceeded to the prejudice prong. It began by discussing *Hill* v. *Lockhart*, 474 U.S. 52 (1985), *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), and *Lafler* v. *Cooper*, 566 U.S. 156 (2012), and held that "none of those cases" established "that the process-based prejudice standard applies to waivers of jury sentencing." Pet. App. 40a. In arriving at that conclusion, the majority ignored the principles and rationale of each of those cases, reducing each's teachings to its narrowest application. See *id*. ("As seen, [*Hill*'s] holding is a narrow one about pleas."); Pet. App. 41a ("As seen, [*Flores-Ortega*'s] holding[] narrowly appl[ies] to appeals."); *id*. ("As seen, [*Lafler*'s] holding is a narrow one about declined plea offers.").

Employing its limited reading of each case, the Tenth Circuit majority concluded that "[n]othing in the holdings addresses a waiver of a state-statutory right to jury sentencing in a capital case." *Id*. The majority reasoned that Mr. Honie's "theory" for clearly established law—that the "process-based prejudice standard applies whenever counsel's deficient performance results in [a] forfeiture of the decision to exercise a fundamental right that is reserved to the defendant, such as the right to jury sentencing in a capital case"—went "far beyond the holdings in these three cases." Pet. App. 42a (cleaned up). Based on

this analysis, the majority concluded that because the Supreme Court has never "held that the process-based prejudice standard governs jury-sentencing waivers in capital cases," the state court's application of the substantive-outcome-based prejudice standard could not be an unreasonable application of law. Pet. App. 48a.

Judge Lucero dissented. He opined that *Hill*, *Flores-Ortega*, and *Lafler* apply *Strickland*'s principle that "when counsel's deficient performance deprives a criminal defendant of a right that only a defendant personally can waive, the proper prejudice inquiry is if, but for counsel's errors, the defendant would have exercised the right at issue." Pet. App. 49a. He warned that the majority's adoption of the substantive-outcome-based standard was "unreasonable, unfaithful to clear Supreme Court jurisprudence, and unfair," Pet. App. 61a, because the majority mischaracterized Mr. Honie's arguments as *extending* clearly established law (which AEDPA forbids), rather than *applying* already-existing law to a new factual circumstance the legal rule "already encompasse[d]." Pet. App. 61a-62a. Judge Lucero also concluded that the state court decision on the prejudice standard was not entitled to AEDPA deference because, during its analysis of the performance prong, the state court failed "to analyze trial counsel's pre-waiver conduct under *Strickland* . . . contrary to clearly established law." Pet. App. 64a & n.6. Applying the proper process-based prejudice standard, Judge Lucero concluded that the state court's holding was contrary to clearly established law and therefore not entitled to AEDPA deference, and that Mr. Honie had established that he was entitled to habeas relief.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW MISAPPREHENDS AND MISAPPLIES THIS COURT'S PRECEDENT IN *STRICKLAND*, AS INTERPRETED IN *HILL*, *FLORES-ORTEGA*, AND *LAFLER*.

This Court's precedents clearly establish that a process-based test—*i.e.*, whether but for counsel's error, there is a reasonable probability that a defendant would have exercised the right at issue—applies to jury waivers at the sentencing stage (and therefore applies to this case).

A. The *Strickland* Framework, as Interpreted in *Hill*, *Flores-Ortega*, and *Lafler*.

This Court's line of cases in *Hill*, *Flores-Ortega*, and *Lafler* applies "the Supreme Court's command in *Strickland* . . . that the prejudice inquiry in an ineffective assistance case must be tied to the *proceeding* in which counsel's alleged error occurred." Pet. App. 50a (citing *Strickland*, 466 U.S. at 694). In *Hill*, the Court assessed a petitioner's claim that his counsel "misinformed him as to his parole eligibility date" if he accepted the government's plea offer. 474 U.S. at 54-56. Rather than asking whether the *outcome of the entire case* would have been different absent counsel's deficient performance, *i.e.*, whether the defendant would have been found not guilty at trial, *Hill* stated that "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. Notably, and contrary to the Tenth Circuit's mistaken reasoning here, this Court in *Hill* understood that its process-based standard was consonant with *Strickland's* prejudice prong. *Id.* at 57 ("Although our decision in *Strickland v. Washington*

dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding, and was premised in part on the similarity between such a proceeding and the usual criminal trial, the same two-part standard seems to us applicable to ineffective-assistance claims arising out of the plea process. Certainly our justifications for imposing the 'prejudice' requirement in *Strickland v. Washington* are also relevant in the context of guilty pleas.").

Flores-Ortega, far from announcing a new rule, applied the established process-based rule to an analogous context: counsel's failure to file a notice of appeal. "[D]rawing on [the *Strickland*] line of cases," the *Flores-Ortega* Court held "that when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." 528 U.S. at 473, 484. In short, relying on *Strickland*, *Flores-Ortega* held that a petitioner need only show "a reasonable probability" that "but for counsel's deficient conduct, he would have appealed"; no showing as to the ultimate outcome of the case was required. *Id.* at 484, 486.

The *Flores-Ortega* Court further explained that it would be "unfair" to make a defendant "demonstrate that his hypothetical appeal might have had merit" to show prejudice under *Strickland*. *Id.* at 485-86. This conclusion, the Court explained, reflects the principle that "[t]hose whose right to an appeal has been frustrated [by ineffective assistance of counsel] should be treated exactly like any other appellant[]." *Id.* at 485 (quoting *Rodriquez* v. *United States*, 395 U.S. 327, 330 (1969)). Put differently, those bringing *Strickland* claims regarding thwarted appeals should not have to

prove more than defendants with effective counsel—whose appellate rights do not depend on showing that their appeals may succeed. *Id.*; see also *Rodriquez*, 395 U.S. at 330 ("Those whose right to appeal has been frustrated [by counsel] should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings. Accordingly, we hold that the courts below erred in rejecting petitioner's application for relief because of his failure to specify the points he would raise were his right to appeal reinstated.").

Flores-Ortega also went to lengths to establish that its holding did not extend the law: "this prejudice standard breaks no new ground, for it mirrors the prejudice inquiry applied in *Hill*." *Id*. at 485.[1] The Court explained that in both cases, "counsel's advice . . . might have caused the defendant to forfeit a judicial proceeding to which he was otherwise entitled," be it a trial or appeal. *Id.* at 485. Both cases, therefore, were "applications of the *Strickland* test." *Id.* The Court explained that it was following a "pattern" the *Strickland* line "established": "presuming prejudice with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered [a] proceeding

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[1] The Tenth Circuit majority dismissed this "no new ground" language by claiming that all that *Flores-Ortega* determined was that there was no legal issue under *Teague* v. *Lane*, 489 U.S. 288 (1989). See Pet. App. 42a. But this interpretation is untenable because *Flores-Ortega* did not discuss *Teague* when explaining its holding. See *Flores-Ortega*, 528 U.S. at 475 (citing *Teague* only in the background section when summarizing a magistrate judge's ruling on the applicability of a Ninth Circuit decision).

. . . entirely nonexistent." *Id.* at 484. Thus, the Court—consistent with its jurisprudence under AEDPA, discussed below—*applied Strickland*'s process-based standard to a case in a different procedural posture and with a different factual background.

The process-based prejudice analysis—already clearly established by *Hill* and *Flores-Ortega*—appeared again in *Lafler*. The *Lafler* Court considered a claim that the petitioner, who was ultimately convicted at trial, had rejected a plea offer based on counsel's deficient recommendation. 566 U.S. at 160, 163-64. When announcing the rule it was applying, the Court explained: "here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance." *Id.* at 169. This framework reflects a fundamental principle that transcends the plea context: "defendants cannot be presumed to make critical decisions without [effective] counsel's advice." *Id.* at 165.

Recognizing its consistent focus on whether counsel interfered with a defendant's critical decision, this Court has emphasized that neither *Lafler* nor its companion case, *Missouri* v. *Frye*, 566 U.S. 134, 147 (2012),[2] modified the prejudice analysis set forth in *Hill*. Rather, these cases simply illustrate how to show process-based prejudice in the "context[s] in which [they] arose." *Frye*, 566 U.S. at 148 ("This ap-

[2] *Frye* applied the same test as *Lafler* when defense counsel allegedly let a plea offer lapse (as opposed to causing the defendant to reject it). 566 U.S. at 147.

plication of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill*"); *United States* v. *Jae Lee*, 582 U.S. 357, 365 n.1 (2017) (same). In sum, in addition to employing *Strickland*'s process-based prejudice analysis numerous times, this Court in *Hill*, *Flores-Ortega*, and *Lafler* (as well as *Frye*) applied it to a variety of different factual and procedural circumstances.

B. A Misapplication of AEDPA Led the Tenth Circuit Majority to Misconstrue *Hill*, *Flores-Ortega*, and *Lafler*.

Once AEDPA entered the analysis, the Tenth Circuit majority's reasoning faltered despite the clearly established law already discussed. Consistent with Judge Lucero's dissent, the Tenth Circuit needed only to *apply* the Supreme Court's jurisprudence to Mr. Honie's case, which is controlled by the precedent discussed above because it involves deficient counsel causing a defendant to forfeit a particular procedure—here, sentencing by a jury.[3] Stated plainly, the law does not require Mr. Honie to clear an extra merit-based hurdle to access that process just because his lawyer wrongly refused to withdraw his waiver. *Flores-Ortega*, 528 U.S. at 484-86 (holding that a defendant did not have to provide "potentially meritorious grounds for appeal," and instead only needed to "demonstrate that, but for counsel's deficient performance, he would have appealed"). Yet that is exactly

[3] Under Utah law, Mr. Honie did not need prosecutorial or judicial consent to withdraw his waiver of the sentencing jury. Utah Code Ann. § 76-3-207(1)(c)(i) (1998) (Pet. App. 181a) (requiring such consent only to waive a capital sentencing jury in the first place).

what the Tenth Circuit majority—erroneously—held AEDPA required.

According to the Tenth Circuit majority, AEDPA prohibits it from "teas[ing] out general principles from cases to fashion the needed clearly established law." Pet. App. 41a. Indeed, on the basis of AEDPA, the majority cabined each of this Court's cases to their narrowest possible applications: *Hill* is "about pleas"; *Flores-Ortega* is about "appeals"; and *Lafler* is "about declined plea offers." Pet. App. 40a-41a. Similarly, the Tenth Circuit majority characterized the facts and posture of Mr. Honie's case as thinly as possible. It emphasized that his "situation[]" involved counsel's refusal to withdraw a waiver and argued that Mr. Honie did not forfeit a procedure—sentencing—just because counsel frustrated his right to choose who would decide his fate. Pet. App. 43a. At no point did the Tenth Circuit explain why these details changed the applicable prejudice standard.

The Tenth Circuit's attempt to distinguish Mr. Honie's case because he received a sentencing proceeding is particularly untenable in light of *Lafler*'s companion case, *Frye* (decided the same day in 2012). There, the Court considered an apples-to-apples comparison: the defendant's guilty plea and the prior, lapsed offer he would have accepted but for counsel's ineffectiveness. Applying the same test as *Lafler*, the Court explained that when a defendant who pleaded guilty "claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer . . . [the prejudice test asks] whether he would have accepted the offer to plead pursuant to the terms earlier proposed." 566 U.S. at 147-48. The fact that a defendant received a plea deal in the end does not prevent him from establishing prejudice

based on the lost plea. *Id.* So too here: the fact that Mr. Honie received a sentencing proceeding does not prevent him from establishing prejudice because counsel's error denied him his chosen sentencer.

More pointedly, the Tenth Circuit misapplied AEDPA. That statute is not so unyielding. This Court has held that AEDPA does not require cases to have "identical facts" or arise in the exact same procedural posture for an earlier case to provide clearly established law for a later one. See *Marshall* v. *Rodgers*, 569 U.S. 58, 62 (2013) (per curiam); *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) ("AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.' Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" (citations omitted)); accord *Smith* v. *Titus*, 141 S. Ct. 982, 989 n.8 (2021) (Sotomayor, J., dissenting from denial of certiorari) ("With respect to AEDPA's unreasonable-application prong, the Court has likewise cautioned lower federal courts against limiting the scope of 'clearly established Federal law' to factually identical circumstances."). Instead, "[t]he statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Panetti*, 551 U.S. at 953.

The Tenth Circuit majority unduly cabined *Hill*, *Flores-Ortega*, and *Lafler* by misconstruing AEDPA as requiring exact circumstantial overlap. Pet. App. 46a ("Until the Court issues a holding extending process-based prejudice to jury-sentencing waivers, we can't say that Utah's applying *Strickland*'s substantive-outcome prejudice standard was contrary to

or an unreasonable application of the Supreme Court's ineffective-assistance-of-counsel cases.").

The Tenth Circuit's misinterpretation of AEDPA prevented it from recognizing that *Hill*, *Flores-Ortega*, and *Lafler*'s teachings control because counsel's deficient performance caused Mr. Honie to forgo a distinct procedure, Utah jury sentencing, which, unlike judicial sentencing, required a *unanimous* decision by twelve people to impose the death penalty. Utah Code Ann. § 76-3-207(4)(a) (1998) (Pet. App. 182a) (subject to inapplicable exception for those convicted of capital offenses that occurred before April 27, 1992). Counsel cost Mr. Honie "benefits he would have received in the ordinary course but for counsel's ineffective assistance," *Lafler*, 566 U.S. at 169, and this plain application of the process-based "prejudice standard breaks no new ground," *Flores-Ortega*, 528 U.S. at 485.

II. THE TENTH CIRCUIT'S DECISION EXACERBATES A CIRCUIT SPLIT.

The Tenth Circuit's decision also conflicts with decisions of the Third, Seventh, and Eighth Circuits on the proper prejudice standard for *Strickland* claims concerning jury waivers, further reinforcing the need for this Court's review. See S. Ct. R. 10(a).

1. The Tenth Circuit's opinion clashes directly with the Seventh Circuit's opinion in *Hall* v. *Washington*. In *Hall*, the Seventh Circuit was confronted with the same legal issue as here: assessing the correct prejudice standard in a case governed by AEDPA where the habeas petitioner alleged his counsel's ineffectiveness caused him to waive his right to a capital sentencing jury. 106 F.3d 742, 748-49, 752-53 (7th

Cir. 1997).[4] After concluding that the petitioner met *Strickland*'s deficient performance requirement—which the Tenth Circuit assumed to have been met here, too, Pet. App. 28a n.6—and that the petitioner had separately shown substantive-outcome-based prejudice, the Seventh Circuit applied the process-based prejudice standard to conclude that the petitioner had shown prejudice for an additional reason:

> The [trial] court . . . refused his request to revoke his waiver on the curious ground that it had discharged the earlier jury (which had never been used at the guilt phase). *Because this indicates that the decisionmaker itself would have been different had counsel performed adequately, we conclude that the prejudice required by* Strickland *has also been shown here.*

Id. at 753 (emphasis added).

In other words, the Seventh Circuit held that, even under AEDPA, the process-based standard applied to a defendant's waiver of a sentencing jury, and meeting that standard was enough to establish prejudice. As noted, the Seventh Circuit also applied a substantive-outcome-based prejudice test in this capital sentencing context. *Hall*, 106 F.3d at 749, 751-52. The court held that the petitioner received ineffective assistance at his capital sentencing hearing because his attorneys did not develop and present adequate mitigating evidence, and their deficient performance substantively impacted the sentence. *Id.* at 746-47, 751-

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[4] Unlike Mr. Honie, the petitioner in *Hall* was found guilty by a judge, *Hall*, 106 F.3d at 744, but his decision to waive the guilt-phase jury was not at issue in the Seventh Circuit appeal.

52. The Seventh Circuit could have stopped its prejudice analysis there—but, significantly, chose not to.

Hall held that because the record "indicates that the [sentencing] decisionmaker itself would have been different [*i.e.*, a jury] had counsel performed adequately, . . . the prejudice required by *Strickland* has *also* been shown." *Id.* at 753 (emphasis added). This was an independent prejudice finding, along with the holding that there was a reasonable chance the sentence might have been different absent counsels' ineffective performance. *Id.* at 752-53. Just as it discussed defense counsels' failure to build a penalty-phase case, the Seventh Circuit documented counsels' failure to properly advise their client about capital sentencing and the role of a sentencing jury. *Id.* at 745-46. The court emphasized that "Hall and his lawyers talked for a mere 40 seconds, during which time they told Hall simply that he had a right to a jury at sentencing," without explaining that state law required "the vote of only one juror to ensure that a defendant will be spared [the death] penalty." *Id.* at 746. Soon after, another Seventh Circuit opinion confirmed that *Hall* included an independent process-based prejudice ruling. *St. Pierre* v. *Cowan*, 217 F.3d 939, 951 (7th Cir. 2000) (summarizing *Hall* as finding ineffective assistance of counsel because the petitioner's attorneys may have "misled" him "about the consequences of [jury] unanimity" before he waived "his right to a capital sentencing jury").

2. The Eighth Circuit applied the same standard as the Seventh Circuit, though less explicitly, in another AEDPA case. In *Nelson* v. *Hvass*, the Eighth Circuit assessed an ineffective assistance of counsel claim concerning a non-capital habeas petitioner's waiver of a guilt-phase jury. 392 F.3d 320, 321 (8th Cir. 2004).

Nelson claimed that his counsel was ineffective because counsel told him that waiving the jury would ensure a sentence in the presumptive U.S. Sentencing Guidelines range. *Id.* at 323. Stated differently, Nelson waived his right to a guilt-phase jury because he believed that he would receive a better sentence. *Id.* That is on all fours with the situation here, where Mr. Honie made the same determination with respect to his sentencing jury. In both cases, the impact of the waiver on sentencing was of central importance. But, in *Nelson*, the Eighth Circuit correctly applied the process-based prejudice standard, unlike the Tenth Circuit in this case.

"Nelson contend[ed] that he would not have waived his right to a jury trial had he known that such a waiver did not guarantee him a presumptive guidelines sentence." *Id.* In framing the prejudice inquiry, the Eighth Circuit considered whether the petitioner "would have insisted on a jury trial" but for counsel's alleged misstatements about the jury waiver's impact on the petitioner's "sentencing exposure." *Id.* at 324. The Eighth Circuit ruled that Minnesota courts reasonably found that Nelson would not have insisted on a jury trial—regardless of counsel's error—because his bench trial agreement "secured the dismissal of a first-degree conspiracy charge and protected him from a [much higher] presumptive sentence," providing "ample incentive for him to waive a jury." *Id.* The Eighth Circuit also explained the state courts reasonably determined that "Nelson did not base his decision to waive a jury trial on his attorney's misstatements" in the first place. *Id.* [5]

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[5] Similar to the Seventh Circuit, the Eighth Circuit cited *Strickland* for the proposition that prejudice requires a showing

As such, like the Seventh Circuit, the Eighth Circuit recognized a *Strickland* prejudice standard focusing on process rather than sentencing outcome in the context of waiving a jury based on sentencing considerations.

3. The Third Circuit applied the process-based prejudice test in a case involving a waiver of a guilt-phase jury in favor of a bench trial. *Vickers* v. *Superintendent Graterford SCI*, 858 F.3d 841, 845-46, 857 (3d Cir. 2017). Of particular note here, the court held that: "when *Hill*, *Flores-Ortega*, and *Lafler* are read together, there is no question that where a defendant claims ineffective assistance based on a pre-trial process that caused him to forfeit a constitutional right, the proper prejudice inquiry is whether the defendant can demonstrate a reasonable probability that, but for counsel's ineffectiveness, he would have opted to exercise that right." *Id.* at 857. Although *Vickers* is less similar to this matter than the Seventh and Eighth Circuit's decisions—the *Vickers* court did not apply AEDPA deference because the state court there did not apply *Strickland* to the petitioner's ineffectiveness claim, *id.* at 849—the Third Circuit's application of the process-based prejudice analysis conflicts with the Tenth Circuit's opinion here.

4. On the Tenth Circuit's side of the circuit split, three other courts of appeals have applied a substantive-outcome-based prejudice standard to ineffective

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that, but for counsel's ineffectiveness, "the result of the proceeding would have been different." *Nelson*, 392 F.3d at 323 (citing *Strickland*, 466 U.S. at 694). The Eighth Circuit also cited *Hill* for this proposition, *id.* (citing *Hill*, 474 U.S. at 58-59), and the court's subsequent discussion demonstrated its focus on whether counsel's errors caused the petitioner to waive the jury.

assistance of counsel claims regarding sentencing jury waivers—and therefore have set up a 3-4 circuit split. See *Jells* v. *Mitchell*, 538 F.3d 478, 509-11 (6th Cir. 2008) (post-AEDPA; holding that no prejudice was shown because there was no evidence that "at least one member of the jury might not have sentenced [the defendant] to death"); *Correll* v. *Thompson*, 63 F.3d 1279, 1284, 1292 (4th Cir. 1995) (pre-AEDPA; court had "no doubt that had the case been presented to a jury the same result would have obtained"); *Green* v. *Lynaugh*, 868 F.2d 176, 177-78 (5th Cir. 1989) (per curiam) (pre-AEDPA; "[D]efendant has failed to show that his attorney's errors led to a finding of guilt before the trial judge"; attorney "believed that the trial judge would certainly be more lenient than a jury at the sentencing phase"). But see *Loden* v. *McCarty*, 778 F.3d 484, 500 (5th Cir. 2015) (a state court did not unreasonably apply clearly established federal law by applying the process-based prejudice standard to an ineffective assistance claim concerning counsel's recommendation to waive a sentencing jury).

The stark divide between the circuits underscores the need for this Court to grant certiorari. Defendants raising identical constitutional claims on federal habeas review should not be subject to disparate legal standards based on the vagary of where their petition was filed.

III. THIS CASE PROVIDES A STRONG VEHICLE FOR RESOLVING THE IMPORTANT QUESTION PRESENTED.

This case provides a strong vehicle to address the question underlying the Tenth Circuit's departure from this Court's precedents. The factual record is straightforward, as the lower federal courts assumed

that counsel acted deficiently, leaving no collateral issues to cloud the legal question presented. Further, the Tenth Circuit's mistake widens a pre-existing circuit split and robs defendants of their autonomy to make important decisions in their own cases—a principle that this Court has recognized time and again. See, *e.g., McCoy*, 138 S. Ct. at 1508 ("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. . . . These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.").

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JON M. SANDS
FEDERAL PUBLIC DEFENDER
OFFICE OF THE FEDERAL
PUBLIC DEFENDER FOR THE
DISTRICT OF ARIZONA

THERESE M. DAY
ERIC ZUCKERMAN
ASSISTANT FEDERAL
PUBLIC DEFENDERS
850 West Adams Street, Ste 201
Phoenix, AZ 85007
(602) 382-2816

JEFFREY T. GREEN*
JACQUELINE G. COOPER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jgreen@sidley.com

COLLIN P. WEDEL
SIDLEY AUSTIN LLP
555 West Fifth Street, Ste 4000
Los Angeles, CA 90013
(213) 896-6000

ANKUR SHINGAL
JAMES P. MOONEY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

Counsel for Petitioner

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