No. 23-5660

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

BRIEF OF AMICI CURIAE ORGANIZATIONS AND LEGAL SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are law professors with expertise in criminal justice and the issues presented in the petition and not-for-profit organizations focused on criminal justice, civil rights, and human rights. The law professors signing this brief do so in their individual capacities and not on behalf of their institutions; institutional affiliations are provided solely for identification purposes.

The Center for Constitutional Rights ("CCR") is a national, not-for-profit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the U.S. Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases. CCR has represented numerous incarcerated people in state and federal custody across the country challenging the fact and conditions of their confinement. As such, CCR is deeply familiar with the life or death stakes of ensuring defendants in criminal proceedings are empowered to decide whether to be sentenced by a judge or jury.

Avery Gilbert is Clinical Lecturer in Law and Director of the Civil Rights Advocacy Clinic at Yale

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[1] The parties' counsels of record received timely notice of amici's intent to file this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Law School where she teaches at the intersection of access to justice and administrative procedure.

Bernard E. Harcourt is the Isidor and Seville Sulzbacher Professor of Law and Professor of Political Science at Columbia University, where he teaches and writes about capital punishment jurisprudence, criminal law, and criminal procedure. He has taught at Harvard Law School, NYU Law School, and the University of Chicago Law School.

Erica Hashimoto is the Scott K. Ginsburg Professor of Law and Appellate Advocacy at Georgetown Law. She has written on the autonomy interests of criminal defendants and her work on the issue was cited by this Court in *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

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Laurie L. Levenson is Professor of Law and David W. Burcham Chair in Ethical Advocacy at Loyola Law School, Los Angeles, where she teaches criminal law, criminal procedure and ethics. Professor Levenson is the founding director of Loyola's Project for the Innocent. Before joining Loyola's faculty, she served as Chief of Appeals for the U.S. Attorney's Office, Central District of California.

The Libertas Institute is a Utah-based 501(c)(3) non-profit "think tank" and educational organization. Our mission is to change hearts, minds, and laws to build a freer society by creating and implementing innovative policy reforms and exceptional educational resources. Founded in 2011, Libertas Institute has produced dozens of policy papers and projects on the topic of criminal justice that have helped lead to many legislative policy reforms to improve due process and the justice system at the state level in Utah.

David B. Owens is an Assistant Professor of Law at the University of Washington School of Law, a Staff Attorney at the Exoneration Project, a post-conviction criminal defense organization providing *pro bono* representation to the wrongfully convicted, and partner at civil-rights law firm Loevy & Loevy. Owens's research and practice focuses on fundamental constitutional rights and available remedies in criminal and civil fora and his criminal practice has involved raising post-conviction claims of ineffective assistance of counsel, including on issues of fundamental client decisions, as well as representing criminal defendants at trial where they must be advised of their fundamental rights to make certain decisions, not subject to counsel's strategic determination.

Alison Siegler is a Clinical Professor of Law and the Founding Director of the Federal Criminal Justice Clinic at the University of Chicago Law School. She teaches about ineffective assistance of counsel doctrine in her Criminal Procedure II course. She has written several amicus briefs to the Supreme Court, including

the Professors' Brief in *United States v. Davila*. She is an elected member of the American Law Institute.

The Rutherford Institute is a non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

Joseph A. Trigilio is Associate Clinical Professor of Law and Judy and Steve Page Executive Director, Loyola Project for the Innocent. He previously served as Supervising Deputy Federal Public Defender for capital and non-capital inmates represented by the Federal Public Defender's Office for the Central District of California. Professor Trigilio teaches wrongful conviction and habeas corpus litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Counsel's deficient performance deprived Taberon Dave Honie of his ultimate authority to decide whether to have a jury sentence him. Mr. Honie's petition ably

sets out the glaring split in the courts below on this foundational and important issue—whether the appropriate standard for demonstrating prejudice from that deficient performance is: (1) the process-based *Strickland* standard this Court explained in *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985); or (2) an outcome-based standard. It also shows the related disagreement among circuit courts, flowing from their reading of this Court's decisions, about how to apply the AEDPA standard in cases like this one.

Amici curiae write separately to emphasize three points demonstrating that the Tenth Circuit's cramped view of this Court's decisions is a flawed interpretation on a matter of great import. First, this Court's precedent makes clear the fundamental nature of Mr. Honie's right to decide whether to have a jury determine his sentence. *See Jones v. Barnes*, 463 U.S. 745 (1983) (recognizing the fundamental decisions over which defendants maintain ultimate authority—whether to plead guilty, waive a jury, testify, or take an appeal). This Court has exclusively applied *Hill*'s process-based prejudice standard in cases involving the deprivation of decision-making authority under *Barnes*; it has never applied the outcome-based standard to such claims.

Second, the history of a defendant's autonomy interest in making key decisions, including whether to invoke the protection of a jury, demonstrates the importance of this issue. As this Court has recognized, the "colonists and the Framers as well as their English ancestors, always conceived of the right to counsel as

an 'assistance' for the accused." *Faretta v. California*, 422 U.S. 806, 832 (1970). Mr. Honie's counsel acted not as an assistant but instead as a master, thereby depriving Mr. Honie of his fundamental right to choose whether to have a jury decide his fate. The deprivation here is particularly problematic from a historical perspective because the colonists and the Framers witnessed the critical importance of juries. Indeed, the King's efforts to deprive colonists of juries helped fuel the Revolutionary War. The Framers thus ensured that the jury right in criminal cases was protected in both the Constitution and in the Bill of Rights. Given that historical context, this case presents a question of exceptional importance for this Court.

Finally, counsel's decision to override Mr. Honie's request for a jury sentencing entirely deprived Mr. Honie of a proceeding to which he was entitled. This Court has recognized that the *Strickland* line of cases has established a "pattern" of "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 . . . entirely non-existent." *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). Because this Court's holdings have clearly established that *Hill*'s process-based prejudice standard applies to Mr. Honie's case, this Court should grant certiorari to resolve this important question.

ARGUMENT

I. Mr. Honie is Entitled to a Process-Based Prejudice Standard Because He Had the Ultimate Authority to Decide Whether to Have a Jury Determine His Sentence.

This Court has repeatedly held that the *Strickland* framework applies differently to decisions over which a defendant has ultimate authority. *See*, *e.g.*, *Hill*, 474 U.S. at 57-58. Every case in which this Court has applied a process-based prejudice standard under *Strickland* implicates one of the fundamental decisions identified in *Barnes*. *See id.*; *Lafler v. Cooper*, 566 U.S. 156, 164 (2012); *Missouri v. Frye*, 566 U.S. 134, 147 (2012); *Flores-Ortega*, 528 U.S. at 483. By contrast, this Court has applied an outcome-based prejudice standard only to strategic decisions entrusted to lawyers.

The connection between the fundamental *Barnes* decisions and the process-based *Strickland* standard makes sense. *Barnes* defines the most fundamental decisions regarding one's defense—the only ones that belong exclusively to a defendant. *See Barnes*, 463 U.S. at 751. When a lawyer unilaterally overrides a defendant's ultimate authority to make such fundamental decisions, deficient performance must be presumed. *See Flores-Ortega*, 528 U.S. at 477. Such a defendant is also entitled to a process-based prejudice standard because an outcome-based standard cannot rectify a lawyer's evisceration of a defendant's ultimate authority under *Barnes*. *See id.* at 483.

The harm Mr. Honie's lawyer caused happened at the moment Mr. Honie was deprived of his ultimate authority. Only a process-based standard can remedy that harm. *See*, *e.g.*, *Hill*, 474 U.S. at 57-58.

A. *Barnes* defines the most fundamental decisions: those that belong exclusively to a defendant.

Because defendants have ultimate authority over decisions enumerated in *Barnes*, counsels' errors implicating those fundamental decisions demand close judicial scrutiny. *See*, *e.g.*, *Flores-Ortega*, 528 U.S. at 483. In particular, where a lawyer unilaterally ignores or overrides a defendant's expressed wishes regarding a fundamental *Barnes* decision, deficient performance must be presumed. *Id.*

Strickland's outcome-based prejudice standard likewise applies only to strategic decisions entrusted to lawyers. *Compare, e.g.*, *Porter v. McCollum*, 558 U.S. 30 (2009) (applying outcome-based standard to counsel's failure to present evidence at sentencing of defendant's war records), *with Flores-Ortega*, 528 U.S. at 483 (applying process-based standard to counsel's failure to file a notice of appeal at defendant's explicit request). Although a lawyer's strategic decisions often implicate a defendant's constitutional rights or constitutionally-based interests, counsel nevertheless has the authority to decide how to best protect that defendant's rights. *See Wainwright v. Sykes*, 433 U.S. 72, 93 (Burger, C.J., concurring) (1977); *New York v. Hill*, 528

U.S. 110, 114-15 (2000) (explaining that decisions such as what arguments to pursue or evidentiary objections to raise are in the lawyer's province). *Strickland*'s highly deferential outcome-based prejudice standard for strategic decisions reflects precisely this practical reality. *See Strickland v. Washington*, 466 U.S. 668, 688-89 (1984) (declining to adopt a particular set of detailed rules for attorney conduct because such rules would "restrict the wide latitude counsel must have in making tactical decisions").

Fundamental decisions enumerated in *Barnes* are distinct from strategic decisions entrusted to attorneys. *See Sykes*, 433 U.S. at 93 n.1 (Burger, C.J., concurring). They are the only decisions regarding one's defense that rest exclusively with a defendant. *Id.*; *see Barnes*, 463 U.S. at 751. The right to effective assistance of counsel flows from a defendant's personal right to his own defense: counsel is the vehicle through which a defendant realizes that personal right. *See United States v. Cronic*, 466 U.S. 658, 658-60 (1984). The lawyer, as an *assistant* to the defendant, cannot frustrate the very fundamental legal principle his authority stems from: that a defendant must be allowed to make fundamental choices about the proper way to protect his liberty. *See*, *e.g.*, Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1158-60 (2010) (explaining that fundamental *Barnes* decisions implicate a defendant's autonomy interest). Therefore, a lawyer's unilateral decision to ignore or override a client's express wishes regarding a *Barnes* decision

"cannot be considered a strategic decision." *Flores-Ortega*, 528 U.S. at 477.

The fundamental character of *Barnes* decisions is evidenced in this Court's careful scrutiny whenever counsel's error implicates one of these decisions. Specifically, this Court presumes deficient performance when a lawyer has failed to perform a task necessary to execute a client's wishes regarding a *Barnes* decision.[2] *See*, *e.g.*, *Flores-Ortega*, 528 U.S. at 483; *Garza v. Idaho*, 139 S. Ct. 738 (2019). So too where a lawyer either withholds important information necessary for a defendant to make a fundamental *Barnes* decision, *see Padilla v. Kentucky*, 559 U.S. 356 (2010), or misleads or misinforms a defendant about legal consequences flowing from a *Barnes* decision. *See Hill*, 474 U.S. at 56; *Lee v. United States*, 582 U.S. 357, 368-71 (2017). By enshrining a defendant's ultimate authority regarding the most fundamental decisions of his defense, this Court has made clear that *Strickland* applies differently to strategic decisions "where [a] defendant had to look to his lawyer for vindication of constitutionally based interest," and those that belong solely to a defendant. *See Sykes*, 433 U.S. at 94 (Brennan, J., concurring); *New York v. Hill*, 528 U.S. at 114-15.

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[2] To be sure, where a client expresses no view on a *Barnes* decision, a lawyer can exercise reasoned professional judgment and make a strategic decision. *See Florida v. Nixon*, 543 U.S. 175, 181 (2004) (holding that counsel need not have obtained client's explicit consent to concede guilt where client remained silent when conferred).

B. This Court's process-based prejudice standard applies when counsel usurps a defendant's ultimate authority to make fundamental decisions regarding his defense.

The distinction between strategic decisions entrusted to counsel and fundamental decisions reserved for defendants requires a differential application of *Strickland* prejudice. An outcome-based prejudice standard rightly applies where counsel is the mechanism through which a defendant realizes his constitutional rights. *See Strickland*, 466 U.S. at 688-89. On the other hand, a defendant is entitled to a process-based prejudice standard where a lawyer deprives him of the ultimate authority over decisions that rest in the defendant's hands. For those violations, this Court has consistently used a process-based prejudice standard because counsel's arrogation of a defendant's ultimate authority *is* the harm. *Hill*, 474 U.S. at 57-58. Only a process-based prejudice standard, not an outcome-based one, can rectify such harm. *Hill*, 474 U.S. at 57-58; *Flores-Ortega*, 528 U.S. at 483; *Lafler*, 566 U.S. at 164; *Frye*, 566 U.S. at 147.

Hill applied a process-based prejudice standard when a lawyer misadvised his client as to his potential sentence before he entered a guilty plea. 474 U.S. at 57-58. The Court's prejudice inquiry focused on whether there was a "reasonable probability" that the defendant would have gone to trial absent counsel's errors. *Id.* at 59. *Flores-Ortega* applied that same process-based standard where counsel deprived the

defendant of the decision whether to appeal. 528 U.S. at 483; *see also Lafler*, 566 U.S. at 164 (applying process-based prejudice standard where counsel overrode the defendant's ultimate authority to decide whether to plead guilty instead of going to trial); *Frye*, 566 U.S. at 147 (same).

In these cases—each involving deficient performance that prevented a defendant from making or effectuating an informed *Barnes* decision—this Court rejected an outcome-based prejudice requirement that a defendant demonstrate a more favorable outcome of the proceeding but for counsel's deficiency. *See Hill*, 474 U.S. at 58-60 (refusing to mechanically apply *Strickland* to require a showing of a positive trial outcome had defendant gone to trial); *Flores-Ortega*, 528 U.S. at 485 (declining to impose requirement that defendant show merits of appeal); *Lafler*, 566 U.S. at 164 (rejecting argument that conviction at an otherwise fair or reliable trial forecloses finding of *Strickland* prejudice). In these circumstances, *Strickland* prejudice instead turns on a reasonable probability that a defendant would have availed himself of the *Barnes* proceeding at issue.

Under this Court's clearly established precedent, that same process-based prejudice standard applies here. Mr. Honie's lawyer ignored his explicit request for jury sentencing even though the ultimate authority to decide whether to waive a jury belonged exclusively to Mr. Honie. *See Barnes*, 463 U.S. at 751. The harm Mr. Honie suffered, as in *Hill*, was the usurpation of his ultimate authority to decide whether to waive the

protections of a jury. Only a process-based prejudice standard captures this harm. Under that standard, Mr. Honie's ultimate authority will be restored so long as he proves a reasonable probability that but for counsel's error, he would have chosen to have a jury, rather than a judge, sentence him. The fundamental importance of Mr. Honie's decision to invoke his right to jury sentencing in a capital proceeding—where his life hangs in the balance—compels a process-based prejudice standard.

II. The Historical Significance of a Defendant's Autonomy to Make Fundamental Decisions About the Jury Underscores the Importance of Mr. Honie's Claim.

Interpreting the fundamental nature of a *Barnes* right and how the importance of that right affects the application of *Strickland* is necessarily informed by the history of the right at issue. *See*, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 477-78 (2000) (chronicling the historical importance of juries); *Crawford v. Washington*, 541 U.S. 36, 47-50 (2004) (drawing on history to determine the meaning of the Confrontation Clause). A defendant's right to control the most fundamental decisions in his case—rather than cede those decisions to counsel—runs throughout our history. *See* Hashimoto, *supra*, at 1163-69 (2010). That is particularly true when it comes to decisions about the right to a jury, which also has a rich historical pedigree. A criminal defendant's right to have his case heard by a jury of his peers is a guarantee of the law that originated in

the common law of England. Imported from English common law to colonial America, the right was leveraged by the colonies in their fight for independence from the Crown. That right belonged emphatically to criminal defendants when the Framers enshrined it in the Constitution. U.S. CONST. amend. VI. This history further underscores the importance of the issue presented in this case: a defendant's fundamental right to choose whether to entrust a jury with his fate.

A. Defendant's autonomy and the right to trial by jury throughout our country's colonial roots, battle for independence, and founding.

Beginning shortly after the thirteenth century, trial by jury had replaced other English methods of proof such as trial by compurgation, ordeal, or battle as the primary method of proof for criminal cases. *Singer v. United States*, 380 U.S. 24, 27 (1965) (citing SIR WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 326 (S.B. Chrimes ed., 7th ed. 1956); EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 52 (5th ed. 1938)). By the end of the seventeenth century, juries served the important role of representing the values of their communities, often mitigating the harshness of the law or political interests of judges. *See* Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 8-10 (1989). Blackstone wrote that if "the impartial administration of justice [be] entirely entrusted to the magistracy . . . their decisions . . . will

have frequently an involuntary bias[.]" 3 WILLIAM BLACKSTONE, COMMENTARIES *379. The right to trial by jury was considered "the glory of the English law," *id.*, and "the best method of trial[ ] that is possible," 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *33. The right to a jury rested with the defendant rather than counsel throughout this period. Indeed, defendants charged with felonies other than treason were not permitted to appear with counsel. *See* Hashimoto, *supra*, at 1164-65. Even when defense counsel began to appear with more frequency in England, counsel's role was limited to assisting with legal arguments and cross examination; counsel was not permitted to address a jury or raise a defense. *Id.* at 1165. As a result, defendants in England necessarily controlled their own defenses. *Id.*

The adversarial system—with lawyers representing the prosecution and sometimes defendants—developed more quickly in the colonies than in England, and many state charters and constitutions began to recognize a right to be represented by counsel. *Id.* at 1166. But the colonists also mistrusted lawyers, and throughout the colonial period and post-Revolution, self-representation was the norm. *Id.* Even when defense counsel appeared, they played a similarly limited role as in England. *Id.* at 1167. Colonists also brought with them the English tradition of jury trials and considered them to be "the inherent and invaluable right of every British subject. . . ." DECLARATION OF RIGHTS (1765), *in* 43 THE HARVARD CLASSICS 148 (Charles W. Eliot ed., 1910). The colonists believed trial by jury

was designed to protect against "a spirit of oppression and tyranny on the part of rulers." *See* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 527 (2d ed. 1851). As political differences between the colonies and Britain metastasized into conflict, the right to trial by jury garnered even more enthusiastic support. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871 (1994). The support of colonists spiked as pre-revolution juries "exonerated those who resisted English colonial policy" and "harassed those who enforced it."[3] *Id.* at 871-74.

The entire formative period of this country demonstrates the importance of the right to juries. It was the only unanimously recognized right among the twelve colonies with written constitutions. Alschuler & Deiss, *supra*, at 870. The First Continental Congress asserted the right to trial by jury in their Declaration of Rights of 1774. *Id.* The Declaration of Independence accused the British Monarch of subjecting the colonies to a "jurisdiction foreign to [their] constitution, and unacknowledged by [their] laws" by "depriving [the colonies] . . . of the benefit of trial by jury." THE DECLARATION OF INDEPENDENCE (U.S. 1776).

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[3] The colonists celebrated the outcome of the seditious libel trial of Peter Zenger as a quintessential example of the protective role of juries. Alschuler & Deiss, *supra*, at 871. Contrary to the law as explained by the judge, a jury acquitted Zenger of seditious libel charges arising from his published criticism of the royal Governor of New York. *Id.* at 872-73.

Following the Revolutionary War, debates about how to structure the new government were contentious, but two ideas were unchallenged. First, if the newly liberated colonists "agree[d] in nothing else," they "concur[red] at least in the value they set upon the trial by jury." *See* THE FEDERALIST NO. 83 (Alexander Hamilton). And second, the right to counsel was intended to assist—rather than to supplant—a defendant's authority to make fundamental decisions about the case. *See* Hashimoto, *supra*, at 1165; *cf. Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring) (emphasis original) ("I have no doubt that the Framers of our Constitution, who were suspicious enough of governmental power—including judicial power—that they insisted upon a citizen's right to be judged by an independent jury of private citizens, would not have found acceptable the compulsory assignment *by the government* to plead a defendant's case.").

Juries were so uniformly revered at the founding that the jury trial is the only affirmative right to appear both in the body of the United States Constitution and the Bill of Rights. U.S. CONST. art. III, amend. VI. Understood as "the people's right," the right to trial by jury was viewed as a means for the public to participate in the criminal justice system to control the discretion of judges and curtail their authority. Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 408 (2009); *see also* Alschuler & Deiss, *supra*, at 876-77. And the history makes clear that the right to a jury belonged to the defendant, not counsel.

Hashimoto, *supra*, at 1168-69 ("[A]t the time the Sixth Amendment was debated and ratified, counsel truly was an assistant rather than a master.").

B. The Civil War and ratification of the Fourteenth Amendment.

In the years following the ratification of the Bill of Rights, the government rarely infringed upon a defendant's autonomy to assert the rights granted directly to them by the Sixth Amendment, *id.* at 1149, and nothing between the founding and the Civil War diminished the fundamental importance of the right to trial by jury. Even during the Civil War, this Court held that a United States civilian citizen could not be tried by a military tribunal because of the Sixth Amendment's promise of trial by jury. *Ex parte Milligan*, 71 U.S. 2, 122-24 (1866). The right remained "a vital principle, underlying the whole administration of criminal justice." *Id.* Defendants also retained the authority to assert that right. *See* Hashimoto, *supra*, at 1149. Throughout the nineteenth century, defendants' ability to assert rights such as the right to a jury trial was far reaching. *See id.* Eventually this Court determined that the Sixth Amendment's grant to the accused of the jury trial right was so "fundamental to the American scheme of justice" that the Fourteenth Amendment required its application to the States. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

C. That historical tradition informs this Court's protection of a defendant's right to choose a jury.

Because a defendant's right to trial by jury is one of the most significant and fundamental rights in our nation's history, this Court has consistently recognized that the defendant retains ultimate authority to invoke his jury right. *See supra* Part I.A; *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (recognizing fundamental nature of jury decision); *cf. id.* (Alito, J., dissenting) (noting that "no matter what counsel thinks best, a defendant has the right to insist on a jury trial and to take the stand and testify in his own defense"). The Court has also continued to zealously guard that guarantee, especially in the sentencing context. *See Ring v. Arizona*, 536 U.S. 584, 611-12 (2002) (Scalia, J., concurring) (emphasizing historical importance). For example, in *Blakely v. Washington*, this Court struck down a state sentencing procedure because it violated "the very reason the Framers put a jury-trial guarantee in the Constitution," which was "that they were unwilling to trust government to mark out the role of the jury." 542 U.S. 296, 308 (2004); *see also Apprendi*, 530 U.S. at 497. This history exposes the Tenth Circuit's sharp departure from this Court's long-established recognition of a defendant's autonomy to exercise the right to a jury.

III. Mr. Honie Was Deprived of an Entire Jury Proceeding Covered by *Barnes*.

This Court has held in no uncertain terms that the process-based standard applies where counsel's deficient performance deprives a defendant of an entire judicial proceeding—be it a trial, a guilty plea, or an appeal. *See*, *e.g.*, *Flores-Ortega*, 528 U.S. at 485; *Hill*, 474 U.S. at 57-58 (applying process-based standard to deprivation of trial). Counsel cannot override a defendant's decision to avail himself of a *Barnes* proceeding. *See Flores-Ortega*, 528 U.S. at 477, 485. The complete deprivation of a judicial proceeding that the defendant is entitled to and has chosen is an egregious violation of the right of effective assistance of counsel. *See Flores-Ortega*, 528 U.S. at 483. A process-based prejudice standard must apply in such circumstances because the core underlying assumption of the outcome-based standard—that a judicial proceeding actually took place—no longer applies. *See id.* Mr. Honie was deprived of an entire jury sentencing proceeding guaranteed under Utah law when his lawyer refused to execute his wishes in requesting a jury during the sentencing stage. Under this Court's clearly established rule, Mr. Honie's ineffective assistance of counsel claim is entitled to the process-based prejudice standard.

A finding of *Strickland* prejudice "turns on the magnitude of the deprivation of the right to assistance of counsel." *Flores-Ortega*, 528 U.S. at 482. The outcome-based prejudice standard is rooted in the presumption that a judicial proceeding is fair and reliable. *Strickland*, 466 U.S. at 686. To prevail on an ineffective

assistance of counsel claim, a defendant ordinarily must overcome this presumption by showing that the outcome of the proceeding would have been different but for counsel's deficient performance. *Id.* at 694.

The complete deprivation of a *Barnes* proceeding destroys that presumption. *See Flores-Ortega*, 528 U.S. at 483. *Flores-Ortega* made clear that a defendant deprived of a *Barnes* proceeding does not claim that the deficient performance of counsel rendered the judicial proceeding constitutionally unfair. *Id.* Instead, counsel's usurpation deprived the defendant of an entire judicial proceeding "which [he] wanted at the time and to which he had a right." *Id.* Without a judicial proceeding to begin with, no presumption of reliability and fairness could attach, and a defendant no longer bears the burden to overcome such presumption. *Id.* at 485 (quoting *Smith v. Robbins*, 528 U.S. 259, 286 (2000) ("Put simply, we cannot accord any 'presumption of reliability,' to judicial proceedings that never took place.")).

In such circumstances, this Court has repeatedly declined to require a defendant to demonstrate an otherwise more favorable outcome under the *Strickland* prejudice prong. *Hill*, 474 U.S. at 57-58; *Flores-Ortega*, 528 U.S. at 483. This is because the complete deprivation of a judicial proceeding taints the fundamental fairness and reliability of the entire criminal case, even more so than the complete denial of counsel. *See Flores-Ortega*, 528 U.S. at 483. In *Cronic*, this Court held that the complete denial of counsel during a critical stage of a judicial proceeding mandates a

presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." 466 U.S. at 659. Because the complete denial of a judicial proceeding is an "even more serious" violation of the right to effective assistance of counsel, a defendant must be afforded a presumption of prejudice. *Flores-Ortega*, 528 U.S. at 483. Specifically, the prejudice requirement must be process-based, *i.e.*, a defendant need only demonstrate a reasonable probability that but for counsel's ineffective assistance, he would have opted for the *Barnes* proceeding he was entitled to. *Hill*, 474 U.S. at 57-58; *Flores-Ortega*, 528 U.S. at 483; *Lafler*, 566 U.S. at 164; *Frye*, 566 U.S. at 147.

Applying the rationale in *Flores-Ortega* and *Hill*, a defendant whose request for a jury proceeding was denied by his counsel has similarly been deprived of an entire proceeding. This Court has distinguished decisions made during the course of a proceeding that takes place from the complete denial of an entire proceeding. For example, it is not per se unconstitutional if counsel decides to waive certain non-frivolous issues on appeal as a matter of reasonable professional judgment. *See Barnes*, 463 U.S. at 549-51. By contrast, where a defendant has explicitly expressed a wish to appeal, his counsel is barred from abandoning the appeal altogether. *See Flores-Ortega*, 528 U.S. at 485; *Anders v. California*, 386 U.S. 738, 744 (1967). Mr. Honie told counsel that he wanted a jury during his sentencing stage; those instructions were overridden by his counsel. Mr. Honie was not merely denied a particular procedure or a substantive claim within a jury

sentencing. He was altogether denied the right to have the jury sentence him.

An outcome-based prejudice standard is inapposite because this Court cannot afford a presumption of fairness and reliability to a jury sentencing that never took place. *Flores-Ortega*, 528 U.S. at 483. Hence, under clearly established laws of this Court, Mr. Honie is entitled to a process-based prejudice standard requiring him to demonstrate a reasonable probability that, but for counsel's deficient performance, he would have availed himself of the jury sentencing proceeding.

CONCLUSION

This Court has been abundantly clear that deprivations of *Barnes* decisions are treated differently under *Strickland*. That is certainly true of deficient performance when counsel overrides a client's decision. It is equally true when this Court evaluates prejudice. The Court has consistently applied *Hill*'s process-based prejudice standard when it has encountered a *Strickland* claim implicating *Barnes*. And it has never imposed the outcome-based standard—which applies to strategic decisions of counsel—to such a claim. That alone demonstrates the clearly established nature of Mr. Honie's right to a process-based standard for his *Strickland* claim.

In addition, our history highlights the importance of a defendant's right to choose whether to waive a jury. That history necessarily informs the protection

afforded under *Strickland* and the reasons that the process-based standard applies in this case. It also demonstrates the importance of the question presented here. Mr. Honie's counsel—far from being the assistant that the Framers anticipated the Sixth Amendment would protect—deprived Mr. Honie of a fundamental decision that rested solely in his hands. That would have been anathema to the Framers.

Finally, *Flores-Ortega* clearly established that Mr. Honie was entitled to a process-based prejudice standard because his lawyer's usurpation of his expressed wish deprived him of his right to have a jury sentence him and decide whether he lives or dies. Mr. Honie's claim compels a process-based prejudice standard. This Court should grant the petition for certiorari on this important question.

Respectfully submitted,

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