No. 23-5660

IN THE

Supreme Court of the United States

TABERONE DAVE HONIE, *Petitioner,*

vs.

ROBERT POWELL, WARDEN, *Respondent.*

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

After a jury found Taberone Honie guilty of aggravated murder, Honie waived his statutory right to jury sentencing based on advice of counsel and the judge sentenced him to death. In state postconviction and habeas challenges, Honie claimed ineffective assistance of counsel regarding counsel's jury-waiver advice. In *Strickland v. Washington*, this Court announced a general two-element test for analyzing ineffective-assistance-of-counsel claims: the defendant must show both that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." 466 U.S. 668, 687 (1984). To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In his federal habeas petition, Honie argued that rather than applying *Strickland*'s outcome-based prejudice standard, the Utah Supreme Court should have applied a process-based prejudice standard—that, but for counsel's errors, Honie would have opted for jury sentencing rather than judge sentencing. The Court has applied a process-based prejudice standard in limited circumstances including waiver of trial (*Hill v. Lockhart*, 474 U.S. 52 (1985)), waiver of appeal (*Roe v. Flores-Ortega*, 528 U.S. 470 (2000)), and waiver of plea offer (*Lafler v. Cooper*, 566 U.S. 156 (2012)). The Court has not applied the process-based prejudice standard to waiver of jury sentencing.

The Antiterrorism and Effective Death Penalty Act (AEDPA) prohibits habeas relief on an exhausted claim unless the state court issued "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). AEDPA "requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." *Williams v. Taylor*, 529 U.S. 362, 380 (2000). A state court decision is "contrary to" clearly established federal law if it applies a rule contradicting a holding of the Supreme Court or reaches a result different from Supreme Court precedent on "materially indistinguishable" facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003).

The question presented is:

Did the Tenth Circuit correctly deny habeas relief to Petitioner on claims that trial counsel incompetently advised him to waive a capital sentencing jury under *Strickland*'s outcome-based prejudice standard in the absence of clearly established precedent from this Court that process-based prejudice applies to waiver of jury sentencing?

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JURISDICTION

The Tenth Circuit entered its judgment on January 26, 2023, and denied Honie's rehearing petition on April 26, 2023. Pet. App. at 1a, 176a. Justice Gorsuch granted Honie a 30-day extension of time to file his petition, which Honie then timely filed on September 22, 2023. This Court has jurisdiction over the petition under 28 U.S.C. section 1254(1).

INTRODUCTION

Over twenty-five years ago, Taberone Dave Honie broke into Claudia Benn's home, beat her, bit her, cut her throat to the backbone with a butcher knife, and vaginally and anally raped her with the same knife. He then prepared to anally rape her with his penis, but decided against it when he saw she was dead. Claudia's three small granddaughters were in the home during the murder. All had blood on them, and four-year-old Dakota was covered in blood from head to foot. Honie, with hands still bloody from the murder, digitally penetrated Dakota's vagina. These facts are not in dispute.

After a jury found Honie guilty of aggravated murder, making him eligible for the death penalty, his trial counsel advised him he might fare better if he waived his statutory right to jury sentencing so the judge could sentence him instead. The judge had expressed some hesitation about imposing a death sentence, and counsel hoped that a trained jurist would take a more dispassionate view of the facts than the jurors who had already seen the State's evidence of this heinous crime and convicted Honie of capital murder. Honie waived jury sentencing and the judge sentenced him to

death. In state postconviction review, Honie claimed that he told his trial attorney to withdraw his jury waiver a week before sentencing. But, according to Honie, counsel told him it was too late.

The Utah Supreme Court determined that Honie had not proved prejudice under *Strickland v. Washington*, because it was not reasonably likely that the outcome of the proceeding would have been different, i.e., that a jury would have sentenced him differently than the judge. The federal district court and the Tenth Circuit both held the Utah court's adjudication was neither contrary to, nor an unreasonable application of, clearly established federal law under 28 U.S.C. section 2254(d)(1).

Honie's petition asks whether any holding of this Court "clearly establishes" that: (1) the Utah court applied the wrong test for prejudice; and (2) the correct one was a modified test under *Hill v. Lockhart*—whether Honie was reasonably likely to have elected jury sentencing. The Court has *never* addressed this specific question, so the Utah court's application of *Strickland*'s general prejudice test could not be contrary to any holding from this Court.

Further, this case is a poor vehicle for Honie's proposed extension of *Hill*'s prejudice test not only because section 2254(d)(1) review does not permit novel extensions of federal law, but also because Honie shows no genuine circuit split on the real issue—whether a state court is *required* under the Sixth Amendment as interpreted by this Court to apply a *Hill*-like test over *Strickland*'s familiar outcome-based test in the context of jury sentencing waivers. And, contrary to the Tenth

Circuit's opinion, Honie did not give the Utah Supreme Court a fair chance to consider his proposed rule and thus failed to exhaust his prejudice argument. Furthermore, as the district court ruled, Honie's bare statement that he would have elected jury sentencing falls woefully short of proving prejudice under his own proposed test. Finally, Honie cannot prove that counsel's alleged advice that it was "too late" to withdraw the waiver a week before sentencing constituted deficient performance, and it will therefore never matter in Honie's case what the correct prejudice standard is.

Honie's petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background

Over twenty-five years ago, Honie smashed his way into Claudia's home, beat her, bit her, slashed her throat four times, and stabbed her multiple times in and around her anus and vagina. Pet. App. at 139a-141a. He prepared to rape her anally but decided against it when he realized that she had died. *Id.* at 140a. Claudia's three granddaughters, aged twenty-two months to four years, were in her house during the murder, and they all had blood on them. *Id.* at 139a-140a. Four-year-old Dakota was covered from head to toe in blood. *Id.* at 140a. Honie had digitally penetrated Dakota's vagina after he murdered Claudia. *Id.* at 139a-141a. When police arrived on the scene, Honie confessed to the murder, and he kept confessing the next day. *Id.* at 140a-141a.

A jury convicted Honie of first-degree murder for burglarizing, sexually assaulting, object raping, forcibly sodomizing, and killing Claudia Benn. *Id.* at 141a. On counsel's advice, Honie waived his Utah statutory right to jury sentencing in favor of sentencing by the judge. *Id.* at 8a-10a, 141a. Honie extensively affirmed in writing and in court that he understood what he was giving up. *Id.*

Before the wavier, the judge said he was not philosophically opposed to the death penalty, and he would impose it if the facts and circumstances so warranted. *Id.* at 8a-9a, 161a-162a. But he said that imposing a death sentence was "the last thing a judge would want to do." *Id.*

At the penalty phase, the State relied on the crime circumstances; Honie's criminal history, primarily a prior violent assault on Claudia's daughter; evidence of how the murder had affected the granddaughters who were in Claudia's home that night; and evidence of how Claudia's loss affected her tribal community. *Id.* at 141a-142a.

Honie put on evidence about his family and personal background, including his limited criminal history, counseling and attempts to curb his substance abuse, and an attempted rape by a trusted male figure in his life. *Id.* at 11a, 78a-79a, 141a-142a. His case also focused on his intoxication and young age of 22 when he committed the crime, and his remorse following it. *Id.* He also presented extensive evidence from a forensic psychologist who testified that (1) Honie's absence of brain damage and intelligence meant he presented a low risk for future violence, and (2) his violence coincided with intoxication, and he would not have access to liquor in prison. *Id.*

The judge sentenced Honie to death. *Id.* at 142a. The Utah Supreme Court affirmed Honie's conviction and death sentence. *Id.*

B. State Post-Conviction Review

In Honie's state postconviction case he challenged, among other things, his trial counsel's advice to waive the sentencing jury. *Id.* at 145a, 160a-161a. He submitted an affidavit alleging he harbored numerous factual and legal misunderstandings about the jury waiver. *Id.* at 184a-188a. He further attested that after he waived the jury, a "jailhouse lawyer" told him that he had made a mistake because he needed only one holdout juror to get a life sentence. *Id.* at 187a. Honie said that about one week after getting the inmate's input, he asked trial counsel to withdraw the waiver, but trial counsel told him it was too late. *Id.* Honie asserted, "If I had understood the differences between a judge determination and a jury determination, I would have gone with the jury in the penalty phase and not waived the jury." *Id.* at 187a-188a. He presented no other evidence to support that assertion.

The state courts denied Honie postconviction relief on this and all his remaining claims. *Id.* at 12a-14a, 138a-168a. On deficient performance, the Utah Supreme Court held that given the crime's circumstances and the trial judge's statement that imposing a death sentence was "the last thing a judge would want to do," it "was not unreasonable for trial counsel to conclude…that Mr. Honie would fare better at sentencing with a judge than with a jury." *Id.* at 161a-162a. The state court further held that Honie's waiver was knowing and voluntary. *Id.* at 162a. And without deciding whether Honie's bare statement that counsel refused to withdraw

the waiver as requested amounted to deficient performance, the court held that Honie could not show prejudice. *Id.* at 162a-163a.

On prejudice, Honie's opening brief to the Utah Supreme Court made no mention of a prejudice standard different from *Strickland* and did not cite *Hill v. Lockhart*, 474 U.S. 52 (1985), *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), or *Lafler v. Cooper*, 566 U.S. 156 (2012). *Id.* at 19a-20a; Resp. App. at 81-86. Instead, Honie focused his argument against the state district court's determination that he had not proved prejudice because his jury sentencing waiver was knowing and voluntary. Resp. App. at 81-86. At the tail end of his prejudice analysis, Honie argued that he was "prejudiced because he was not informed of his right to be sentenced by a jury free from bias and prejudice. Because of this, he waived jury sentencing in favor of the judge who counsel told him would likely impose a life sentence." *Id.* at 86. Honie concluded that "[o]nce he had time to reflect on his decision he told counsel he wanted to withdraw his jury waiver but counsel told him it was too late, even though it was not." *Id.*

The State's brief, in turn, argued: "On appeal, Honie argues *only* that the district court erred and refers to his arguments that he had a constitutional right to jury sentencing." Resp. App. at 346 (emphasis added). Pointing to an omission in Honie's analysis, the State responded that his "argument necessarily *assumes* that merely showing that counsel's advice caused him to forfeit a sentencing jury meets his burden to prove *Strickland* prejudice." *Id.* (emphasis added). The State went on to argue that *Strickland* generally requires "proving that counsel's mistake

undermines confidence in the outcome of the proceeding," and it observed that Honie had cited "no authority to show that waiving a sentencing jury falls outside the normal *Strickland* prejudice requirement." *Id.* In a footnote, the State cited *Hill* as one of "two situations where courts have applied a prejudice showing even remotely similar to the one Honie assumes should suffice." *Id.* at 347 n.29.

Honie's reply brief argued for the first time he could establish prejudice by showing that, "but for trial counsel's error, he would not have waived his right to a jury determination of his sentence." Resp. App. at 667. This was where he first cited *Hill*. *Id.* But he did not cite *Flores-Ortega* or *Lafler*. *See generally id.*

The Utah Supreme Court did not address Honie's prejudice argument based on *Hill*. The court applied the *Strickland* prejudice standard—the only standard Honie mentioned before he filed his reply—and held that he had not proved a reasonable probability that he would have fared better in front of a jury. Pet. App. at 163a.

C. Federal habeas corpus review

Honie filed a fourteen-claim federal petition for habeas corpus. *Id.* at 14a. He again claimed his trial counsel ineffectively advised him about waiving a jury and refused to withdraw his waiver. *Id.* He argued under *Hill* that he had only to prove that he would not have waived the jury but for counsel's advice and statement that it was too late to withdraw the waiver. *Id.* But he again did not cite *Flores-Ortega* or *Lafler*. *See* Honie's Pet. Writ Habeas Corpus at 117, May 18, 2015; Honie's Amend. Pet. Writ Habeas Corpus at 124, Feb. 12, 2018; Honie's Reply to St.'s Resp. Amend.

Pet. Writ Habeas Corpus at 55, May 7, 2018.

The district court denied the petition. Pet. App. at 75a-137a. It first ruled that the state court's ruling on deficient performance did not contradict or unreasonably apply clearly established federal law. *Id.* at 100a-103a.

On prejudice, the court ruled that Honie had "not demonstrated that the state court contradicted or unreasonably applied clearly established Supreme Court precedent" when it applied the *Strickland* standard rather than the *Hill* standard. *Id.* at 110a. This was because "*Hill* was decided in the context of counsel's advice to plead guilty," but "a guilty plea and a waiver of jury trial are not a set of facts that are 'materially indistinguishable.'" *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)).

The court further held that even under a *Hill*-type prejudice test, Honie failed to meet his burden to prove that it would have been "'rational under the circumstances'" for him to go before the sentencing jury as opposed to the judge. *Id.* at 112a-113a (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)). Honie's bare assertion that he would not have waived the sentencing jury but for his counsel's alleged incompetence was insufficient under that test. *Id.* He had presented "no argument in support of how he was actually prejudiced as a result of trial counsel's failure to move to withdraw his waiver." *Id.* at 113a. And the "circumstances of Honie's crime weighed heavily in favor of imposing a death sentence." *Id.* His sentencing waiver was knowing and voluntary, and the Supreme Court had not addressed whether a state court must exercise its discretion to allow a defendant to

withdraw a knowing and intelligent waiver of a sentencing jury. *Id.* at 113a-114a.

The district court denied Honie a certificate of appealability on all claims. *Id.* at 137a.

Judge Murphy of the Tenth Circuit denied Honie a COA on any claim. *Id.* at 15a. But Judge Lucero granted Honie a COA on a single, narrow issue: whether *Hill*, rather than *Strickland*, clearly established the applicable prejudice standard for jury-waiver ineffectiveness claims. *Id.*

The Tenth Circuit affirmed. It first *sua sponte* expanded the COA to include whether Honie's trial counsel performed deficiently under *Strickland*, despite Honie not briefing deficient performance or moving for expansion to include it. *Id.* at 17a-18a. The court did so because it would have otherwise lacked Article III jurisdiction to hear the appeal in the absence of a deficient performance question on appeal. *Id.*

The court of appeals then rejected the State's argument that Honie failed to exhaust his *Hill*-based prejudice argument by not giving the Utah courts a fair opportunity to rule on it in the first instance. *Id.* at 19a-22a. The court could "make out the substance" of Honie's process-based prejudice test in his opening brief to the Utah court. *Id.* Without acknowledging the real substance of Honie's prejudice argument—that his waiver was not knowing and voluntary—the court of appeals framed his Utah Supreme Court argument to have been that "absent counsel's deficient performance, he wouldn't have waived jury sentencing." *Id.* at 20a-21a. And, it reasoned, that "argument mirrors *Hill*'s prejudice standard." *Id.* at 21a.

The court found that the "State understood [Honie's argument] that way too."

Id. It based that conclusion on the State's briefing that Honie had silently assumed—without actually arguing or providing citations to authority—"that merely showing that counsel's advice caused him to forfeit a sentencing jury meets his burden to prove *Strickland* prejudice." *Id.* at 21a (citing Resp. App. at 346). Apparently relying on the State's footnote citing *Hill* as a potential case with a prejudice test "remotely similar to the one Honie assume[d] should suffice," Resp. App. at 347 n.29, the court jumped to the conclusion that the State "devoted two pages of its brief to explain why *Strickland*'s prejudice standard should apply instead of *Hill*'s," Pet. App. 21a. The court thus concluded that Honie had exhausted his *Hill*-prejudice argument by fairly presenting the "substance" of it to the state court. *Id.* at 21a-22a.

Next, the Tenth Circuit held that Honie had not overcome section 2254(d)(1)'s double deference owed to the Utah court's conclusions that (1) trial counsel did not deficiently advise Honie about his statutory right to jury sentencing, and (2) the waiver was knowing and voluntary. *Id.* at 24a-29a.

Finally, without deciding whether trial counsel was deficient in allegedly declining to withdraw the jury waiver, the Tenth Circuit held that no precedent from this Court clearly established that *Hill*'s prejudice test governed Honie's ineffectiveness claim. *Id.* at 39a-48a. In recognition of the strictures of section 2254(d)(1), the court observed that it was "not free to extend Supreme Court holdings as if on direct appeal." *Id.* at 35a. That was because "AEDPA's tightly turned screws" limited its review. *Id.* (citing *White v. Woodall*, 572 U.S. 415, 417 (2014)). Judge Lucero dissented.

Honie now seeks this Court's review, arguing that he need only show a reasonable likelihood that he would have elected a jury to sentence him, not that the sentencing outcome would have been different. Pet. Cert. at 14-20.

ARGUMENT

I. No holding from this Court clearly required the Utah court to apply a modified prejudice test under *Hill v. Lockhart* to Honie's claim that counsel ineffectively advised him about waiving a sentencing jury.

Honie argues that the Tenth Circuit misconstrued 28 U.S.C. section 2254(d)(1) by holding that *Hill*, *Flores-Ortega*, and *Lafler* did not provide clearly established precedent dictating a process-based prejudice analysis for Honie's claim that his trial counsel incompetently advised him about waiving a sentencing jury. Pet. Cert. at 11-14. The Court should deny review because none of its precedents clearly required the Utah Supreme Court to apply a modified *Hill* prejudice test over *Strickland*'s familiar outcome-based test.

In *Strickland*, the Court established the standard test applicable to most claims of ineffective assistance: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. The test asks whether counsel's "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. In *Strickland* itself, the Court considered whether, absent attorney error, the sentencing jury would have voted for something less than death. *Id.* at 695.

In *Hill*, the Court modified the test in cases where counsel's errors resulted in a plea that forwent trial altogether. 474 U.S. at 59. *Hill* departed from the consideration in *Strickland*—whether the defendant received "a fair trial…whose result is reliable"—to require "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Id.* The Utah court applied the general *Strickland* standard, ruling that Honie failed to show a reasonable probability that the outcome of sentencing would have been any different had he opted for jury sentencing. Pet. App. at 163a.

Federal habeas review must heavily defer to that state court determination. The Antiterrorism and Effective Death Penalty Act (AEDPA) prohibits habeas relief on an exhausted claim unless the state court issued "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "A legal principle is 'clearly established'…only when it is embodied in a holding of this Court." *Thaler v. Haynes*, 559 U.S. 43 (2010). The Court looks for "'the governing legal principle or principles [it] set forth…at the time the state court renders its decision.'" *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)). A state court decision is "'contrary to'" clearly established federal law if it applies a rule contradicting a holding from this Court or reaches a result different from Supreme Court precedent on "'materially indistinguishable'" facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003) (quoting *Williams*, 529 U.S. at 405-06).

If "the circumstances of a case are only 'similar to' [this Court's] precedents, then the state court's decision is not 'contrary to' the holdings in those cases." *Woods v. Donald*, 575 U.S. 312, 317 (2015) (per curiam) (citing *Carey v. Musladin*, 549 U.S. 70, 76-77 & n.2 (2006)). Thus, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White*, 572 U.S. at 426 (quoting *Yarborough*, 541 U.S. at 666). "It is not enough that the state-court decision offends lower federal court precedents." *Brown v. Davenport*, 596 U.S. 118, 136 (2022) (citation omitted). The proper question is whether this Court's cases have confronted "'the specific question presented by this case'"; otherwise, "the state court's decision could not be 'contrary to' any holding from this Court." *Donald*, 575 U.S. at 317 (quoting *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam)).

Honie does not show that the Utah Supreme Court contradicted a holding of this Court when it applied *Strickland*'s general test for prejudice. Honie's trio of cases—*Hill*, *Flores-Ortega*, and *Lafler*—did not, individually or collectively, confront the specific question presented by this case: how *Strickland*'s prejudice test must apply when a criminal defendant claims his trial counsel deficiently advised him to waive a sentencing jury. And contrary to Honie's reading, none of them purported to create a general process-based prejudice test to apply whenever a "particular procedure" is waived. *See* Pet. Cert. at 11. Instead, these cases extended *Strickland* prejudice only as far as necessitated by their respective procedures—guilty pleas, appeals, and declined plea offers.

Hill's test required "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. *Flores-Ortega* required "a reasonable probability that, but for counsel's deficient failure to consult with [the defendant] about an appeal, he would have timely appealed." 528 U.S. at 484. *Lafler* required (1) "a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)," (2) "that the court would have accepted its terms," and (3) "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." 566 U.S. at 164. None of these holdings clearly establish the rule that Honie wants applied in the context of jury-sentencing waivers.

That is because none of them confronted a set of facts "materially indistinguishable" from Honie's. *Williams*, 529 U.S. at 405-06; *Vincent*, 538 U.S. at 640. Nowhere in Honie's cert petition does he attempt to demonstrate why the facts in his case are materially indistinguishable from these cases. Because he cannot. Honie's set of facts—waiver of jury sentencing—is not similar to, much less "materially indistinguishable" from, guilty pleas, appeals, and forfeited plea bargains. This is simply not a case where the state court applied the same facts yet arrived at a different result. Honie nevertheless argues that AEDPA does not require identical facts or procedural postures before a legal rule must be applied. Pet. Cert. at 13. The proposition is true as far as it goes, but it doesn't go far enough to bring

Honie's case clearly within *Hill*'s orbit. This Court has established the outer perimeter: the facts have to be "materially indistinguishable." *Williams*, 529 U.S. at 405-06; *Vincent*, 538 U.S. at 640. Honie's are not.

Yet he seeks the very thing the Tenth Circuit was prohibited from doing—reversing the Utah court based on an extension of the *Hill*-prejudice standard to an entirely different set of facts. And even the commonality that Honie tries to cobble together from his trio of cases—forfeiture of a particular proceeding—does not work here. Those cases addressed whole *proceedings* the defendant forfeited. Honie did not waive an entire proceeding but selected *sentencing proceedings* by judge rather than jury.

Indeed, in *Hill/Flores-Ortega/Lafler* contexts, counsel's advice determines defendant's fate. When a defendant pleads guilty, for example, he has agreed to be convicted. Likewise, when counsel gives bad advice that results in giving up a plea, the defendant loses the opportunity for an assured more favorable guilt outcome. And when counsel fails to file a notice of appeal, the defendant's conviction automatically becomes final. Not so here. When Honie waived the sentencing jury, he did not agree to an assured death sentence. He chose only to have the judge determine his sentence. Where mere circumstantial similarity does not survive section 2254(d)(1)'s litmus, *Donald*, 575 U.S. at 317, any passing resemblance between jury waivers and guilty pleas, appeals, or forfeited plea offers cannot fare better.

And the court of appeals correctly observed that none in the trio of cases had to defer to a state court's adjudication of a *Strickland* prejudice claim under section

2254(d)(1) of AEDPA. Pet. App. at 35a. *Hill* and *Flores-Ortega* were direct appeals from federal convictions. And while *Lafler* was an AEDPA case, the federal court was not constrained under 2254(d)(1) because the state court failed to apply *Strickland* altogether. *Lafler*, 566 U.S. at 173. Section 2254(d)(1) review is not the proper forum for announcing that a modified-*Strickland* prejudice test must be applied to new stages of the criminal process. *See White*, 572 U.S. at 426 ("if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision,") (cleaned up).

Honie argues that the court of appeals reduced *Hill*, *Flores-Ortega*, and *Lafler* to their "narrowest possible applications." Pet. at 12. But it is Honie, not the court of appeals, who has inverted the lens on these holdings, "elid[ing] the distinction[s]" inherent to their respective procedures to frame this Court's precedents at "a high level of generality." *See Nevada v. Jackson*, 569 U.S. 505, 512 (2013). He can't identify clearly established federal law that way. *See id.*[1]

[1] The Tenth Circuit's caselaw required it to construe this Court's rulings narrowly under section 2254(d)(1). *See Fairchild v. Trammell*, 784 F.3d 702, 710 (10th Cir. 2015) ("Federal courts may not extract clearly established law from the general legal principles developed in factually distinct contexts, and Supreme Court holdings must be construed narrowly and consist only of something akin to on-point holdings." (citation and internal quotation marks omitted)).

II. Deferential review, lack of a genuine circuit split, Honie's failure to exhaust, and his failure to satisfy his own proposed prejudice test make this case a poor vehicle for assessing whether to adopt the test.

As discussed, section 2254(d)(1) review is an improper forum for adopting new rules of constitutional law. Beyond that, Honie's case presents a poor vehicle for review because he does not show a genuine circuit split on whether *Hill*, *Flores-Ortega*, and *Lafler* clearly establish the prejudice test that must apply to ineffective assistance claims in the jury-waiver context. His case also serves as a poor vehicle for considering whether to adopt his proposed prejudice test because, contrary to the Tenth Circuit's ruling, he did not fairly present it to the Utah courts for consideration and thus failed to exhaust the claim. And granting review and adopting the prejudice test Honie proposes would not change the outcome of this case because he is not able to satisfy that test.

A. Honie identifies no genuine circuit split.

Honie cites opinions from the Third, Seventh, and Eighth Circuits to argue that *Hill* governs the prejudice test for jury-waiver ineffectiveness claims. Pet. Cert. at 14-19. But none of them directly confront the question Honie's petition presents: whether clearly established federal law requires such a test.

His best case, the Seventh Circuit's *Hall v. Washington*, does not answer this question. *See* Pet. Cert. at 14-16. *Hall* granted federal habeas relief based on trial counsel's utter lack of attention to their client and to readily available mitigation evidence at the sentencing phase. 106 F.3d 742, 749-51 (7th Cir. 1997). Hall's attorneys spoke with him for less than a minute about the implications of waiving a

sentencing jury and said only that he had a right to jury sentencing. *Id.* at 746. They did not mention that it would take only one juror to spare him the death penalty. *Id.* At the sentencing hearing, Hall asked the court to withdraw his waiver because he learned from a different lawyer for the first time that a jury had to be unanimous on a death sentence and only one holdout juror was required to spare him that fate. *Id.* The court refused Hall's request. *Id.* Hall's attorney did not consult with him at all between conviction and sentencing nor did they respond to individuals coming forward with proposed mitigation evidence, including testimony that Hall saved their lives. *Id.* at 746-47. And during closing argument, counsel failed "to offer any reason other than blatant disregard of Illinois law for sparing Hall's life." *Id.* at 749.

An early AEDPA case, *Hall* reviewed the state court's adjudication of *Strickland* claims *de novo* based on this Court's pre-AEDPA *Thompson v. Keohane* opinion. *Id.* at 748 (citing *Keohane*, 516 U.S. 99 (1995)). This level of "independent review" mandated by *Keohane* was superseded by AEDPA's requirement that habeas relief not be granted unless the state court's legal decision "involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Without the benefit of this Court's subsequent clarification of the tidal shift AEDPA imposed on federal habeas review, *Hall* reasoned that section 2254(d) created merely a "more subtle" question under an otherwise *de novo* review standard. 106 F.3d at 748. *Hall* therefore did not actually weather the crucible of section 2254(d)(1) like Honie's case.

The Seventh Circuit held Hall's trial counsel performed deficiently in two ways: (1) they did not contact Hall between his conviction and sentence or present any mitigation witness; and (2) they failed "to offer any reason other than blatant disregard of Illinois law for sparing Hall's life." *Id.* at 749. *Hall* recited the general *Strickland* test for prejudice: only "where a reasonable probability exists that, but for counsel's substandard performance, the sentencer 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Id.* at 751-52 (quoting *Strickland*, 466 U.S. at 695). It then held that trial counsel's failure to present mitigation evidence, coupled with counsel's closing argument, prejudiced Hall because his proposed mitigation witnesses would likely have tipped the scales. The court went on to address the state postconviction court's finding, rendered by the same judge who presided at trial, that the proposed mitigation witnesses would not have changed its mind. *Id.* at 752. The Seventh Circuit determined this finding was unreasonable under section 2254(d)(2) because, among other things, it was "predicated on the assumption that the judge himself would have been the decisionmaker at sentencing if counsel had been competent." *Id.*

Hall's determination that the "decisionmaker itself would have been different had counsel performed adequately" was folded into its overall prejudice analysis. *Id.* *Hall* did not go so far as to say that that determination alone, divested of its holding that but for counsel's performance Hall would likely have received a sentence short of death, would have been enough for federal habeas relief. *Hall* never cited *Hill*, nor held that *Strickland* clearly established that the prejudice test for jury sentencing

waivers was a reasonable likelihood of choosing a different sentencer. The only holding it cited for prejudice was *Strickland*'s familiar test for capital sentencing: whether it was reasonably likely the sentencer "would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death." *Id.* at 752-53. In the end, *Hall*'s approach to section 2254(d)(1) deference was too untempered and its analysis of the jury waiver issue too underdeveloped to make it stand in direct conflict with the Tenth Circuit's opinion here.

Honie's other two cases fare even worse. *Nelson v. Hvass*'s holding that a state court did not violate clearly established federal law by applying a *Hill*-like prejudice test to a defendant's jury waiver is a far cry from holding that clearly established federal law *required* that test. 392 F.3d 320, 324 (8th Cir. 2004). And the jury trial waiver there was part of an agreement that looked a lot like a plea deal. The defendant agreed to waive a trial by jury in exchange for dismissal of a first-degree felony drug charge and a bench trial on stipulated facts. *Id.* at 321. Applying *Hill* prejudice under those circumstances arguably makes more sense than applying it to a jury sentencing waiver where no plea-like conditions attach. Finally, *Vickers v. Superintendent Graterford SCI* was not at all constrained by section 2254(d)(1) because the state court had "failed to apply *Strickland* altogether," leaving the Third Circuit to apply its own prejudice analysis *de novo*. 858 F.3d 841, 849-50 (3rd Cir. 2017).[2]

[2] The Fifth Circuit has also held that a state court did not violate clearly

In short, no circuit opinion conflicts with the Tenth Circuit's here. None echoes Honie's proposition that clearly established federal law *requires* a state court to apply *Hill*'s prejudice standard when alleged attorney incompetence leads a defendant to waive jury sentencing and go before a judge. None of Honie's proffered cases were genuinely constrained, as the federal courts were here, by section 2254(d)(1)'s deference to a state court's outcome-focused analysis.

B. This case presents a poor vehicle for review of Honie's prejudice argument because he didn't give the Utah courts a fair opportunity to rule on it.

Federal courts may not grant a habeas petition unless the petitioner first "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To exhaust his *Hill* claim, Honie had to fairly present it to the Utah Supreme Court. *Id.*; *Picard v. Connor*, 404 U.S. 270, 275 (1971). A petitioner fairly presents a federal habeas claim to the state courts only by asserting both the factual and legal basis for the claim. *Picard,* 404 U.S. at 276 (holding that petitioner's challenge to the legality of the indictment was neither the "substantial equivalent" of nor entailed the same "ultimate question for disposition" as his equal protection claim even though it relied upon the same factual basis, and, thus, that the state courts had no *sua sponte* duty to consider whether that factual basis resulted in an equal

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established federal law by applying the *Hill* prejudice test. *Loden v. McCarty*, 778 F.3d 484, 488 (5th Cir. 2015). But, again, such a holding does not mean that clearly established federal law *mandated* that test.

protection violation). And a petitioner cannot meet the fair presentation requirement by presenting the claim "in a procedural context in which its merits will not be considered," even if the state court has discretion to disregard the procedural flaw. *Castille v. Peoples,* 489 U.S. 346*,* 351 (1989) (citation omitted). Finally, if Honie "failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred the claims are considered exhausted and procedurally defaulted for purposes of federal habeas relief." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

The Tenth Circuit erred in determining that Honie properly presented his *Hill*-prejudice argument to the Utah court. *See* Pet. App. at 19a-22a. It disregarded *Castille*'s principle that fair presentation means following a state's procedural rules to ensure the merits of an argument can be considered. In Utah, "issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court." *Allen v. Friel*, 194 P.3d 903, 907 (Utah 2008) (quotations and citation omitted). Honie failed to follow this state rule because he waited until his reply brief to argue that but for counsel's alleged deficient performance, he would have elected the sentencing jury as opposed to the judge.

Contrary to the Tenth Circuit's opinion, Honie *never* made this argument in his opening brief. Instead, his prejudice argument there centered entirely on his alleged misunderstanding of aspects of jury sentencing to assert that his waiver was

not knowing or voluntary. Resp. App. at 81-86. He never mentioned a prejudice standard different from *Strickland* and did not cite *Hill*, *Flores-Ortega*, or *Lafler*. *Id.*

And, contrary to the court of appeals' analysis, his stray comments at the tail-end of his challenge to the validity of the waiver cannot fairly be interpreted as an independent prejudice argument akin to *Hill*'s test. Instead, his prejudice argument there was still that "he was not informed of his right to be sentenced by a jury free from bias and prejudice." Resp. App. at 86. His two-sentence follow-up to that assertion—alleging that he waived jury sentencing as a result and that counsel later incorrectly told him it was "too late" to withdraw the waiver—cannot be fairly read as an independent prejudice argument. *See id.* Rather, these sentences were presented as part and parcel with his challenge to the voluntariness of his waiver. Not only did Honie omit an argument that but for counsel's performance there was a reasonable probability he would have elected a jury; he never said that he would have opted for jury sentencing at all. *See id.* And to the extent his brief can be read as implying that he would have opted for a jury, it amounts to a purely factual claim lacking any legal authority to make it relevant. Under *Picard*, Honie had to marshal both facts *and* law. 404 U.S. at 276. In short, the arguments in Honie's opening brief were neither the "substantial equivalent" of nor entailed the same "ultimate question for disposition" as his prejudice argument here. *See id.*

Honie waited until his reply brief to argue that "but for trial counsel's error, he would have not waived his right to a jury determination of sentence." Resp. App. at 667. And only there did he argue that *Hill*, not *Strickland*, prejudice applied to jury-

waiver ineffective-assistance claims. *Id.* at 666-67. Even then, he did not cite *Flores-Ortega* or *Lafler* for the proposition that they had extended *Hill* to that context, even though both had been decided well before he filed his opening brief. *See generally id.*

The court of appeals improperly read the State's brief as understanding Honie to be making a *Hill*-like prejudice argument in his opening brief. *See* Pet. App. at 21a. Quite the opposite. The State's brief identified the "only" prejudice argument Honie made—"that the district court erred [because] he had a constitutional right to jury sentencing." Resp. App. at 346. True, the State pointed out an *assumption* in Honie's argument—"that merely showing that counsel's advice caused him to forfeit a sentencing jury meets his burden to prove *Strickland* prejudice." *Id.* But a silent assumption can never amount to fair presentation.

Nor was it correct to read the State's footnote citation to *Hill* as proof that the State understood it as governing Honie's claim. *See* Pet. App. at 21a. The State cited *Hill* as one of two potential cases "that applied a prejudice showing *even remotely similar* to the one Honie assumes should suffice." Resp. App. at 347 n.29 (emphasis added). The State's scrupulous briefing thus illustrates that the closest Honie came to presenting a *Hill*-type argument was a silent assumption that, at best, remotely approximated *Hill*. That wasn't close enough for purposes of exhaustion. And no one can reasonably dispute that Honie never argued prejudice to the state courts under *Hill*, *Flores-Ortega*, and *Lafler*.

Withholding the independent prejudice argument and citation to *Hill* until the reply brief did not exhaust the claim by presenting it to the Utah court in a

procedurally proper way. *Castille,* 489 U.S. at 351. It was presumably for this reason that the Utah court did not address Honie's *Hill* argument, and instead applied the only prejudice standard properly presented—the *Strickland* standard—and found that Honie had not proved a reasonable probability that he would have fared better in front of a jury. Pet. App. at 161a, 163a; *see Howell v. Mississippi*, 543 U.S. 440, 441 (2005) (federal issue was not raised in state court "which unsurprisingly did not address it"). Neither the State nor the Utah court was required to engage in the kind of divination performed by the Tenth Circuit to "make out the substance" of a *Hill* prejudice argument; indeed, the exhaustion requirement is supposed to be "serious and meaningful." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992), *superseded on other grounds* by 28 U.S.C. § 2254(e)(2).

By withholding his *Hill*-prejudice argument until his reply brief, and by not presenting the *Lafler/Flores-Ortega* argument at all, he did not fairly present the claim in state court. And Honie may not now present the claim in state court because it is time- and procedurally-barred. Utah Code Ann. § 78B-9-106 (barring claims that could have been presented in previous petitions and that were not brought within the statute of limitations).

Honie's *Hill*-prejudice claim is therefore procedurally defaulted, and the Court must disregard it. *Coleman*, 501 U.S. at 735 n.1.

C. Honie cannot prove prejudice under the standard he asks this Court to adopt.

As the district court ruled, Honie has not proved prejudice even under his suggested standard. Pet. App. at 112a-113a. Under the *Hill* test that Honie prefers,

he would have to show that it "would have been rational under the circumstances" for him to elect jury sentencing over sentencing by the judge. *See Padilla*, 559 U.S. at 372. Honie's proffer in state post-conviction proceedings amounted to a mere allegation that he would have chosen a jury instead of a judge. Pet. App. at 187a-188a. That is legally insufficient even under *Hill*, which requires a defendant to "*show* that there is a reasonable probability that, but for counsel's errors, he would…have *insisted* on going to trial." *Hill,* 474 U.S. at 59 (emphasis added).

And *Hill* observed that courts applying its standard will often review the strength of the state's case as the best evidence of whether the defendant in fact would have changed his plea and insisted on going to trial. *Id.* at 59-60. The State had a very strong penalty-phase case against Honie, including the gruesome circumstances of the crime, Honie's prior violent assault against Claudia's daughter, the murder's effect on the three grandchildren who were in Claudia's home that night, and the loss Claudia's tribal community experienced. And that penalty phase evidence would have been presented to the very same jury that had just convicted him after hearing and finding beyond a reasonable doubt the horrific facts of the murder.

At bottom, Honie has not shown that it would have advantaged him to insist that a lay jury rather than a law-trained judge decide whether a man who beat, butchered, and raped his victim with a knife, and who sexually assaulted her four-year-old granddaughter should get a death sentence. This is particularly so where, as here, the judge expressed his sentiment that imposing a death sentence is the last

thing a judge wants to do. Honie's bare allegation that he would have chosen a jury anyway is legally insufficient to prove prejudice even under *Hill*.

D. Honie never has and cannot now prove that his trial counsel's representation was constitutionally deficient.

Honie does not challenge the federal courts' rulings that fairminded jurists could agree that (1) his trial counsel did not deficiently advise him to waive a sentencing jury, and (2) his waiver of the sentencing jury was knowing and voluntary. *See* Pet. App. at 27a-29a, 100a-108a. And certiorari review would be unwarranted here for the independent reason that even if he were to prevail on his *Hill* prejudice argument, he could not prove that his counsel's alleged advice that it was "too late" to withdraw the waiver was constitutionally deficient.

Even accepting Honie's unsupported allegation as true, he cannot prove that his trial counsel's advice was objectively unreasonable. Regarding the performance element, courts "must indulge a strong presumption that counsel's conduct" fell "within the wide range of reasonable professional assistance" and make "every effort…to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. After all, there are "countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*

This "strong presumption" of adequate assistance requires courts "not simply to give [trial counsel] the benefit of the doubt," but also to "affirmatively entertain the range of possible reasons [trial] counsel may have had for proceeding as they did."

Cullen v. Pinholster, 563 U.S. 170, 196 (2011) (cleaned up). At the end of the day then, counsel's representation is deficient only if "no competent attorney" would have proceeded as counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011); *accord Dunn v. Reeves*, 141 S.Ct. 2405, 2410 (2021). And while this standard is "by no means insurmountable," it is "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). "Only" defendants who can prove they were "denied a fair trial by the *gross incompetence* of their attorneys…will be entitled to retrial[.]" *Id.* (emphasis added).

In the state courts, Honie asserted that his counsel incorrectly advised him that it was "too late" to withdraw the plea because, according to Honie, it was not too late. Resp. App. at 86. Honie's unsupported statement that it was not too late is insufficient to overcome the "strong presumption" that counsel properly advised him. By his own account, Honie told his counsel he had changed his mind one week or less before his capital trial was scheduled to begin. *Strickland* mandates a presumption that Honie's counsel had good reason to believe that the judge would not change course and gear back up for death-qualifying a jury that late in the day. Honie has presented the lower courts and this Court nothing to overcome that presumption.[3]

Furthermore, whether it was in fact too late does not end the inquiry. All courts reviewing Honie's waiver have determined that he made it knowingly and

[3] The state courts decided this issue on prejudice under a summary judgment standard, so Honie's self-serving affidavit is the only evidence that counsel told him this. The facts have never been developed or adjudicated.

voluntarily. That means he knew the difference between a sentencing by jury and a sentencing by judge. Contrary to Honie's theory, a capital defendant's right to a sentencing jury in Utah is statutory, not constitutional. Indeed, this Court has long recognized that there is no freestanding Sixth Amendment right to sentencing by jury. *Spaziano v. Florida*, 468 U.S. 447, 457-65 (1984); *see also Libretti v. United States*, 516 U.S. 29, 49 (1995) ("[O]ur cases have made abundantly clear that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed."). Objectively reasonable counsel, understanding that it would likely be too late to withdraw the waiver and that it was strategically preferable to go before a neutral magistrate as opposed to the same jury that made Honie death-eligible, could reasonably decline to request withdrawal of the statutory waiver.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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