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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent downplays a vitally important circuit split. According to the Tenth Circuit, the only way for a habeas petitioner to establish prejudice after counsel thwarted his choice of a capital sentencing jury is to demonstrate a probability that the jury would have spared his life. In contrast, courts such as the Seventh Circuit hold that prejudice can depend on a process-based inquiry, asking whether "the decisionmaker itself would have been different had counsel performed adequately." This split means that habeas petitioners will face different legal standards depending on where they are incarcerated.

The brief in opposition underscores the need for review with its troubling attack on the autonomy of criminal defendants. In respondent's view, no clearly established law prevents defense counsel from simply "declin[ing]" his client's instruction to withdraw a jury waiver if counsel simply decides not to do so, whether because of neglect or disagreement. BIO 29. Respondent suggests such a refusal is unreviewable, arguing that *Strickland* "mandates" blind faith in a lawyer's unwillingness to even *ask* the judge if it is too late to select a jury when the capital client's life is at stake—despite the client's explicit request to do so. *Id.* at 28. But this Court's precedents forbid counsel from interfering with critical decisions reserved to the defendant. Respondent's crabbed reading of those precedents and self-serving definitions of defense counsel's authority confirm that review of the decision below is warranted.

Respondent's arguments are rife with legal and factual errors. As a legal matter, respondent mischaracterizes AEDPA and disregards that a general standard can provide clearly established law outside

the exact situation in which it arose. This inaccuracy informs respondent's misreading of the caselaw establishing the process-based prejudice standard, a rule that applies especially when, as here, counsel denies a defendant an entire proceeding to which the defendant is entitled.

On the facts, respondent sidesteps the record that led both lower federal courts to assume counsel performed deficiently, and ignores petitioner's undisputed attempt to withdraw the waiver based on new information his lawyer failed to provide him. Respondent also attempts to defend Mr. Honie's trial counsel's claim that it was "too late" to withdraw the sentencing jury waiver. But petitioner's request for withdrawal came *before* the guilt phase had even started, and both the trial court and the prosecution had pledged to respect petitioner's choice in open court in light of its importance.

Missing from the brief in opposition is any meaningful response to the core reason justifying certiorari here—namely, to resolve a split that threatens to vitiate the time-honored principle that criminal defendants control their own cases.

ARGUMENT

I. THERE IS A CIRCUIT SPLIT THAT REQUIRES THIS COURT'S INTERVENTION.

Respondent fails to refute the circuit split that the Tenth Circuit exacerbated. Respondent contends that when the Seventh Circuit decided *Hall* v. *Washington,* 106 F.3d 742, 753 (7th Cir. 1997), the AEDPA standard was not yet clear. BIO 18. His sole support for this assertion is the Seventh Circuit's reference to one pre-AEDPA case when explaining the statute's "new standards," along with the court's (accurate)

remark that AEDPA asks "the more subtle question of whether the state court 'unreasonably' applied clearly established federal law." *Hall*, 106 F.3d at 748. These details fall far short of negating the circuit split. A subsequent body of law denying habeas claims does nothing to change *Hall*'s accurate recitation of the AEDPA standard (from its text, no less) or otherwise constitute negative treatment of *Hall*.

Moreover, in AEDPA cases in the Third and Eighth Circuits, district courts have cited the discussions of the process-based prejudice standard in *Vickers* v. *Superintendent Graterford SCI,* 858 F.3d 841 (3d Cir. 2017), and *Nelson* v. *Hvass*, 392 F.3d 320 (8th Cir. 2004). See, e.g., *Jette* v. *Glunt*, No. 12-cv-02379-PD, 2020 WL 8475322, at *23 (E.D. Pa. Aug. 10, 2020), *report & recommendation adopted*, 2021 WL 129643, at *4 (E.D. Pa. Jan. 13, 2021) ("Applying the standard laid out in *Vickers*, Mr. Jette has not established prejudice because he has not shown that but for trial counsel's alleged deficient advice, he would have exercised his right to a jury trial."); *Phillips* v. *Wallace*, No. 4:04cv1483 TCM, 2014 WL 4649860, at *18 (E.D. Mo. Sept. 16, 2014) (citing *Nelson*'s ruling, 392 F.3d at 324, that the "petitioner had failed to establish that, but for his counsel's alleged ineffectiveness, he would have insisted on a jury trial"). These opinions plainly contradict the lower court rulings in this case.

Respondent thus cannot wish away the reality that defendants raising the same constitutional claims on federal habeas review will be subject to different legal standards depending on the vagary of where they are incarcerated. See also Pet. 18-19 (collecting cases from the three circuits agreeing with the Tenth Circuit).

Respondent's arguments on the merits fare no better. He tries to distinguish *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) on the ground that, in those cases, "counsel's advice determine[d] [the] defendant's fate," whereas waiving the sentencing jury did not guarantee Mr. Honie the death penalty. BIO 15. Neither *Hill*, *Flores-Ortega*, nor *Lafler* supports that proposition. Ineffective advice to reject a plea and go to trial as in *Lafler*, for example, by no means seals a defendant's fate. Respondent's focus on results belies the crux of the matter as the Court has defined it: namely, counsel's actions deprive a defendant of a critical *choice*. See *Lafler*, 566 U.S. at 165 ("[D]efendants cannot be presumed to make critical decisions without [effective] counsel's advice."). This Court specifically declined "to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." *Id.* at 169 (quoting *Kimmelman* v. *Morrison*, 477 U.S. 365, 380 (1986)). Respondent argues vigorously that a penalty phase jury is not such a critical choice, but when proceedings involve the death penalty, characterizing that choice as "non-critical" is a mislabeling in the extreme.

Respondent's argument also conflicts with *Missouri* v. *Frye*, 566 U.S. 134 (2012), *Lafler*'s companion case. There, the Court compared the defendant's plea agreement and the earlier, better offer counsel allowed to lapse. Accepting either proposal would have sealed the defendant's fate in the sense respondent means because both required a guilty plea. Thus, counsel's advice did not "determine[] [the] defendant's fate" in that way. Yet the Court applied the same process-based prejudice test as *Lafler*, explaining 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."[1] 566 U.S. at 147-48. The standard did not depend on counsel causing the defendant to "agree[] to be convicted," contra BIO 15. Here, the fact that Mr. Honie did not agree to a death sentence does not preclude him from establishing prejudice when counsel denied him his chosen sentencer.

II. Respondent Mischaracterizes AEDPA.

"[A] decision by a state court is 'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in [this Court's] cases' **or** if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.'" *Price* v. *Vincent*, 538 U.S. 634, 640 (2003) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 405-406 (2000) (emphasis added)). Respondent articulates that test correctly at first, BIO 12, but then repeatedly drops the prong of the test following "or," *id.* at 14-15. He defends the incorrect proposition that AEDPA is satisfied *only* if the petitioner identifies a prior case with materially indistinguishable facts. See, e.g., *id.* at 14.

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[1] *Frye* also disposes of the argument that "Honie did not waive an entire proceeding but selected *sentencing proceedings* by judge rather than jury," BIO 15. The fact that the *Frye* defendant received a plea deal in the end did not prevent him from establishing prejudice, and Mr. Honie's judicial sentencing is just as irrelevant. Pet. 12-13.

Respondent's preferred test is not the one required by law. "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.'" *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) (citations omitted). This is because general legal standards can supply clearly established law. *Marshall* v. *Rodgers*, 569 U.S. 58, 62 (2013) (per curiam). The correct understanding of AEDPA confirms the Tenth Circuit and Utah Supreme Court's errors.

III. The Tenth Circuit and the Utah Supreme Court Defied Precedent Clearly Establishing a Process-Based Prejudice Test When Counsel Interferes with Fundamental Decisions Reserved to the Defendant.

The Tenth Circuit and Utah Supreme Court applied a substantive-outcome-based prejudice rule that contradicts the governing law set forth in this Court's process-based prejudice cases. See *Vincent*, 538 U.S. at 640. Further, the facts are *materially* indistinguishable, see *id.*, because, like in *Hill*, *Flores-Ortega*, and *Lafler*, counsel interfered with a critical decision reserved to the defendant. See *Flores-Ortega*, 528 U.S. at 477, 485; Br. for Erica Hashimoto et al. as Amici Curiae Supporting Petitioner 5, 7-13.

Flores-Ortega made the process-based prejudice standard's general applicability especially clear. When applying *Hill*—a case about a plea wrongly accepted based on deficient legal advice—to a case about counsel's failure to appeal, the Court explained that the "prejudice standard breaks no new ground."

528 U.S. at 485. In each case, "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.* Both cases applied "the *Strickland* test." *Id.* Indeed, *Flores-Ortega* followed 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 . . . entirely nonexistent." *Id.* at 484. Mr. Honie's case falls squarely within that pattern and similarly would "break[] no new ground." *Id.* at 485.

IV. This Case Is a Strong Vehicle for Resolving the Circuit Split and Vindicating Defendants' Autonomy.

This case provides a strong vehicle to address the vital question presented. Both lower federal courts assumed that counsel performed ineffectively, Pet. App. 28a n.6, so no collateral matters obfuscate the legal issue. Further, the Tenth Circuit's mistake expands a circuit split and denies defendants the freedom to make important decisions in their own cases—a principle with a long, venerable history. Br. of Hashimoto et al. 13-19. Against this backdrop, respondent's protestations collapse.

1. Respondent tries to resurrect a non-issue: procedural default. BIO 21-25. The Tenth Circuit saw through this argument. Pet. App. 18a-24a. As that court recognized, and contrary to respondent's telling, a habeas petitioner need not cite "book and verse on the federal constitution" to preserve a contention. *Picard* v. *Connor*, 404 U.S. 270, 278 (1971) (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958)); Pet. App. 19a. The question is whether the petitioner presented "the substance" of his claim to the

state courts. *Picard*, 404 U.S. at 278. Mr. Honie adequately presented the process-based prejudice argument in his Utah Supreme Court opening brief by contending that he waived the sentencing jury "[b]ecause of" his counsel's failure to adequately inform him "of his right to be sentenced by a jury free from bias and prejudice." Pet. App. 20a; Resp. App. 086. Mr. Honie also explained 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." Resp. App. 086. Mr. Honie did not define this prejudice claim based on the jury potentially imposing a life sentence instead of death. And the argument was clear enough that it inspired the state to respond by trying to distinguish *Hill*. Resp. App. 347 n.29.

2. Respondent claims Mr. Honie offered only a "bare allegation" that he would have chosen to be sentenced by a jury of his peers. BIO 27. Not so. As Mr. Honie explained in an undisputed affidavit, he tried to withdraw the waiver because he learned about aspects of jury sentencing his lawyer had failed to explain, including the fact that one holdout juror could block the unanimity Utah requires for a jury to impose the death penalty. Pet. App. 187a-188a. At the time of the initial waiver, Mr. Honie's counsel had not even adequately explained aggravating or mitigating factors or how the sentencing process would work. Pet. App. 187a. It is "hardly a stretch" that this improved understanding of the benefits of jury sentencing gave Mr. Honie a rational reason to withdraw the waiver. Pet. App. 71a-72a (Lucero, J., dissenting in relevant part).

3. Respondent further suggests that someone in Mr. Honie's position could reasonably prefer judicial

sentencing given the nature of Mr. Honie's crime. BIO 26-27. Whether that is true or not, it is irrelevant because it does not refute Mr. Honie's valid and undisputed[2] explanation for trying to make a different choice, a decision he had the right to make and one he would have made absent counsel's interference.

4. Finally, when trying to defend counsel's performance, respondent veers into overstatements that only serve to highlight the need for review. In respondent's words, "[o]bjectively reasonable counsel, understanding that it would *likely* be too late[3] to withdraw the waiver and that it was strategically preferable to go before a neutral magistrate . . . could reasonably *decline* to request withdrawal of the statutory waiver." BIO 29 (emphasis added). Respondent goes so far as to insinuate that such a decision is effectively unreviewable because "*Strickland* mandates a presumption that Honie's counsel had good reason to believe that the judge would not change course"—and thus

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[2] Respondent provides no authority for conflating the knowingness and voluntariness of Mr. Honie's initial waiver with comprehensive knowledge of "the difference between a sentencing by jury and a sentencing by judge," BIO 28-29. This assertion is legally incorrect. See *Iowa* v. *Tovar*, 541 U.S. 77, 88 (2004) (explaining there is no "formula or script" that must be read to make a defendant's waiver (of counsel, in that case) knowing).

[3] In fact, there was still about one week left before Mr. Honie's guilt-phase trial, Pet. App. 187a, 189a, 194a-198a, and 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). Moreover, during the hearing about the initial waiver, the court and the prosecution affirmed Mr. Honie's right to decide whether to have a sentencing jury. Pet. App. 192a-193a, 198a; Pet. 3.

that it was appropriate not to even ask. *Id.* at 28. But, at bottom, this decision was not counsel's to make.

Respondent's assertion flouts the maxim that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, [such] as to whether to plead guilty," testify, appeal, or "waive a jury." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). As *Flores-Ortega* made explicit, implementing a fundamental decision reserved to the defendant is "a purely ministerial task," not "a strategic decision" left to the lawyer. 528 U.S. at 477 (citing *Barnes* passage listing defendants' critical decisions, 463 U.S. at 751). Counsel must respect "the defendant's wishes." *Id.*

It should not be overlooked that respondent assaults defendants' autonomy in the context in which it matters most: capital sentencing. When state law lets defendants decide whether to put their lives in the hands of a judge or a jury of their peers, as Utah's does, Utah Code Ann. § 76-3-207(1)(c)(i) (1998, 2023), counsel may not usurp that choice.[4]

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[4] Any waiver of this right must comport with Fourteenth Amendment Due Process and Equal Protection principles. See *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). Moreover, because this right relates to a capital sentencing procedure, the Eighth Amendment requirement for reliability in capital cases is also implicated. See *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976) (finding that when a defendant's life is at stake, a court must be "particularly sensitive to insure that every safeguard is observed"); see also *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) (explaining that capital proceedings must aspire to a heightened standard of reliability because "execution is the most irremediable and unfathomable of penalties; . . . death is different").

CONCLUSION

For the foregoing reasons, and those stated in the petition, the Court should grant certiorari.

Respectfully submitted,

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