No.

IN THE
# Supreme Court of the United States

KENNATH ARTEZ HENDERSON,
*Petitioner,*

*v.*

TONY MAYS,
*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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****CAPITAL CASE****

## QUESTIONS PRESENTED

I.

In *Rose v. Mitchell*, 443 U.S. 545 (1979), this Court unequivocally prohibited racial discrimination in the selection of the foreperson for a Tennessee grand jury, recognizing that such discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Id.* at 556. Since that decision, the State of Tennessee has refused to implement this Court's mandate by declaring *Rose* and subsequent decisions "greatly exaggerated." *State v. Bondurant*, 4 S.W.3d 662, 674 (Tenn. 1999).

When Mr. Henderson sought to apply this Court's decisions in this case, the Tennessee court found that, because the state does not recognize *Rose* and its progeny, Mr. Henderson did not meet the requirements for raising previously unavailable constitutional rights under state law. Paradoxically, the state court also asserted—without invoking, let alone relying on any state procedural rule—that he should have raised his claim earlier, despite Tennessee's historical (and on-going) refusal to follow *Rose*. Simultaneously, the state court vitiated the independence of any putative state procedural bar by addressing the federal merits of the claim and holding that this Court's precedent has no merit. Nonetheless, the District Court below refused to review the merits of the claim pursuant to the procedural default doctrine, a decision that Mr. Henderson was not permitted to seek appellate review.

These facts present the following questions:

1. Consistent with the Supremacy Clause, may a state refuse to follow this Court's holdings and permit indictment for a capital crime by a grand jury whose composition results from systematic exclusion of women and non-white persons?

2. Are federal courts precluded from reviewing the merits of a substantial federal constitutional claim when a state court failed to expressly invoke or rely on a state procedural rule as the basis of its

decision and, instead, issued a ruling that is intertwined with the federal constitutional question?

II.

In *Hill v. Lockhart*, 474 U.S. 52 (1985), this Court held that the standard for adjudicating ineffective assistance of counsel claims involving a guilty plea is the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). Instead of applying *Strickland* to Mr. Henderson's claim, the Tennessee court applied a more stringent standard, manufactured by the First Circuit in *United States v. Ortiz Oliveras*, 717 F.2d 1 (1st Cir. 1983), two years before this Court's decision in *Hill*, but subsequently adopted by the Tenth Circuit in *Hatch v. Oklahoma*, 58 F.3d 1447 (10th Cir. 1995), and *Hoxsie v. Kerby*, 108 F.3d 1239 (10th Cir. 1997), which requires a petitioner prove that trial counsel's advice was "completely unreasonable not merely wrong, so that it bears no relationship to a possible defense strategy." *Hoxsie*, 108 F.3d at 1246; *Hatch*, 58 F.3d at 1459. Below, the Sixth Circuit found that the Tennessee court's application of the *Hoxie-Hatch* standard instead of this Court's *Strickland* test was not contrary to *Hill*. The First, Sixth, and Tenth Circuit Courts of Appeals are the only circuit courts to use the *Hoxie-Hatch* standard, though its use is spreading among district courts of other circuits.

Considering these facts, the following question is presented:

3. May a federal court ignore the express holding in *Hill v. Lockhart* that this Court's *Strickland* standard governs ineffective assistance of counsel claims involving a guilty plea and instead require that a petitioner prove that counsel's advice "bears no relationship to a possible defense strategy" to prevail on a Sixth Amendment claim?

## LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, petitioner-appellant below, is Kennath Henderson, a Tennessee citizen who is presently incarcerated and sentenced to death.

Respondent, respondent-appellee below, is Tony Mays, former Warden of Riverbend Maximum Security Institution, where Mr. Henderson is presently incarcerated..[1]

[1] Warden Mays retired in May 2023. He is replaced by Warden Zac Pounds.

## LIST OF PROCEEDINGS

1. *Henderson v. Mays,* No. 12-5028; 14-5911 (6th Cir. July 3, 2023) (order denying petition for rehearing and rehearing en banc).
2. *Henderson v. Mays,* 12-5028; 14-5911, 2023 WL 3347496 (6th Cir. 2023) (unreported) (affirming denial of federal habeas corpus).
3. *Henderson v. Mays,* No. 12-5028; 14-5911 (6th Cir. April 14, 2015) (order denying, in relevant part, a certificate of appealability for Mr. Henderson's grand jury discrimination claim).
4. *Henderson v. Mays,* No. 06-2050-STA-tmp (W.D. Tenn. May 8, 2014) (order issued denying relief on claims to which *Martinez* remand applied)
5. *Henderson v. Mays,* No. 06-2050-STA-tmp (W.D. Tenn. October 11, 2011) (order determining the merits of claims)
6. *Henderson v. Mays,* No. 06-2050-STA-tmp (W.D. Tenn. March 30, 2011 (order granting summary judgment on procedural grounds)
7. *Henderson v. State,* No. W2008-01927-CCA-R28 (Tenn. Crim. App. Dec. 9, 2008) perm. app. denied, (Tenn. April 27, 2009)) (motion to reopen, affirming denial of relief)
8. *Kennath Henderson v. State,* No. 4465 (Circuit Court for Fayette County, Tennessee, Jan. 24, 2008) (order denying motion to reopen post-conviction).
9. *Henderson v. State,* No. W2003-01545-CCA-R3PD, 2005 WL 1541855, at *1 (Tenn. Crim. App. June 28, 2005), perm. app. denied, (Tenn. Dec. 5, 2005)) (affirming denial of post-conviction relief).
10. *Kennath Henderson v. State,* No. 4465 (Circuit Court for Fayette County, Tennessee, May 22, 2003) (order denying petition for post-conviction relief).

11. *State v. Henderson,* 24 S.W.3d 307 (Tenn. 2000) (affirming judgment)

12. *Tennessee v. Kennath Henderson,* No. 4465, (Circuit Court for Fayette County, Tennessee, July 6, 13, 1998) (judgment of guilt and sentence).

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## INTRODUCTION

The State of Tennessee, like other jurisdictions, entrusts the appointment of the foreperson of a grand jury to the "judge of the court authorized by law to charge and receive the report of the grand jury." Tenn. R. Crim. P. 6(g)(1), (g)(4)(D) [2]; *see also Rose v. Mitchell*, 443 U.S. 545, 548 n.2 (1979) (describing previous Tennessee statute that provided the foreperson "shall be the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof"). Under Tennessee law in effect prior to *Rose* and still in effect today, the foreperson is a thirteenth voting member of the grand jury—able to ensure the twelve votes necessary for indictment by overruling one other grand juror. Tenn. R. Crim. P. 6(g)(4)(D).

The grand jury that indicted Kennath Henderson was composed in a discriminatory manner. The trial court systematically excluded women and non-white persons from the role of grand jury foreperson and ensured that a white man would always have the power to veto one other grand juror's vote; only white men have ever been selected to serve as a grand jury foreperson in Fayette County. Indeed, since at least 1990—when record keeping began—continuing with the current foreman, Fayette County judges have never selected a woman or a person of

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[2] *See e.g.*, Ohio Rev. Code Ann. § 2939.02 (West 2023) (providing "[t]he judge of the court of common pleas may select any person who satisfies the qualifications of a juror and whose name is not included in the annual jury list to preside as foreperson of the grand jury, in which event the grand jury shall consist of the foreperson so selected and fourteen additional grand jurors selected from the annual jury list."); Okla. Stat. Ann. tit. 22, § 323 (West 2023) ("From the persons summoned to serve as grand jurors, and appearing, the court must appoint a foreman."); Va. Code Ann. § 19.2-197 (West 2023) (same).

color as foreperson of the grand jury. The discrimination inherent in this exclusion is stark: Not only were women about half of the Fayette County population, until the 1980 census, but Fayette County was also one of a handful of majority-minority counties in Tennessee.[3] From the 1980s until Mr. Henderson's indictment in 1998, demographics in the county shifted with the percentage of the Black population decreasing to thirty-seven percent of the total.[4] As this Court has found, the systematic discrimination in the selection of a grand jury foreperson "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose*, 443 U.S. at 556.[5]

Mr. Henderson presented this claim in the state courts, which refused to address the merits of the claim because it is not recognized under state law.[6] App. G

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3 https://tennesseeencyclopedia.net/entries/fayette-county (last visited Nov. 30, 2023).

4 Fayette County, TN population by year, race, & more | USAFacts (last visited Nov. 30, 2023).

5 The disenfranchisement and displacement of the Black majority by the white minority drew the attention of the Justice Department to Fayette County in the 1960s. Robert Hamburger, Our Portion of Hell, Fayette County, TN: An Oral History of the Struggle for Civil Rights (1973) (recounting eye-witness/participant accounts of Black sharecroppers who were evicted by white landowners, built a "tent city" on the land of Shepard Towles—the only Black landowner in the county, and there resided for two winters—despite the Ku Klux Klan's blockade and acts of terrorism); *see also* Tent City: Stories of Civil Rights in Fayette County, Tennessee, available at https://www.memphis.edu/tentcity/movement/index.php (last visited Nov. 30, 2023).

6 Mr. Henderson included the claim in his motion to reopen his state post-conviction proceeding pursuant to Tennessee Code Annotated § 40-30-117. Under that provision, a Tennessee petitioner is entitled to reopen post-conviction proceedings when a "claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." Mr. Henderson supported his motion to reopen with the Tennessee courts' refusal to apply the settled federal constitutional law of *Rose* and *Hobby v. United States,* 468 U.S.339 (1984).

at A-347. In denying relief, the Tennessee Court of Appeal cited to the Tennessee Supreme Court's 1999 holding in *State v. Bondurant*, 4 S.W.3d 662 (Tenn. 1999), wherein the Tennessee Supreme Court held that challenges to the selection of the grand jury foreperson are relevant only as to reviewing the composition of the grand jury as a whole, because the "role of the grand jury foreperson in Tennessee is ministerial and administrative." Relying on *Bondurant*, the state court held that the Tennessee's Supreme Court's refusal to recognize such a claim was controlling:

> Although uniquely presented by the Petitioner, a petitioner may not thwart the plain language and intent of section 40-30-117, Tennessee Code Annotated, by requesting that the court rule differently than the Tennessee Supreme Court. A motion to reopen is not an avenue in which a petitioner may raise claims and/or challenges that should have and could have been made in previous proceedings. The opportunity to raise said claims was available to the Petitioner; he failed to present such challenges at the appropriate time. For the reasons contained herein, we conclude that the Petitioner has failed to allege a ground under which a petition for post-conviction relief may be reopened.

App. G at A-348 (citing *State v. Bondurant*, 4 S.W.3d 662 (Tenn. 1999); *see also* App. G at A-350 (denying permission to appeal).

Without receiving briefing on the question, the District Court denied Mr. Henderson's claim on the grounds of procedural default. App. F at A-328. The District Court and the Sixth Circuit both denied a certificate of appealability (COA) on the claim. App. D at A-102; App. C at A-040-43. Because both the application of the default doctrine and the substantive merits of Mr. Henderson's claim were debatable among reasonable jurists, Mr. Henderson was entitled to adjudication of his claim. *See, e.g., Woodfox v. Cain*, 772 F.3d 358 (5th Cir. 2014) (habeas relief granted based upon discriminatory selection of grand jury foreperson).

In addition to refusing to permit Mr. Henderson the opportunity to appeal the discriminatory grand jury claim, the Sixth Circuit improperly ignored this Court's

established law regarding ineffective assistance of counsel claims. In so doing, the Sixth Circuit—joining the First and the Tenth circuits—imposed heightened requirements in defiance to this Court's clear, established precedent, thus exacerbating a circuit split. In *Hill v. Lockhart*, this Court held that the *Strickland* two-prong inquiry applies to ineffective assistance of counsel claims in cases in which a petitioner has pleaded guilty. *Hill*, 474 U.S. at 56. Despite this clear instruction, the First and Tenth Circuit—and now the Sixth—have, instead, applied a standard requiring a petitioner to prove that trial counsel's advice was "completely unreasonable not merely wrong, so that it bears no relationship to a possible defense strategy." *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997); *Hatch v. Oklahoma*, 58 F.3d 1447, 1459 (10th Cir. 1995); *United States v. Ortiz Oliveras*, 717 F.2d 1 (1st Cir. 1983).[7] The Tennessee state courts found that Mr. Henderson failed to satisfy the *Hoxie-Hatch* standard, a finding that was contrary to this Court's clearly established precedent and should have relieved the federal courts of section 2254(d) deference to the state court adjudication. App. I at A-378 (quoting *Hatch*). The Sixth Circuit, however, held that the Tennessee court's use of *Hoxie-Hatch* "was not necessarily a misstatement of the law, and certainly was not clearly 'contrary to' *Strickland* as required by § 2254(d)(1)," citing a separate panel's use of the *Hoxie-Hatch* standard. App. B at A-025-26 (citing *Moore v. Mitchell*, 708 F.3d 760, 786 (6th Cir. 2013)). The Sixth Circuit's tacit approval of *Hoxie-Hatch* furthers the circuit split

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[7] Although the First Circuit was the first to use this standard prior to this Court's decision in *Hill*, it subsequently has applied it in only one other case. *Riviezzo v. United States*, 960 F.2d 143 (1st Cir. 1992).

created by the Tenth Circuit's continued use of the inappropriately stringent standard.

## OPINIONS AND ORDERS BELOW

The opinion of the Sixth Circuit Court of Appeals (App. B at A-002-39) is not reported but may be found at 2023 WL 3347496 (6th Cir. 2023). The opinions of the District Court (App. D at A-043-102; App. E at A-104-99; App. F at A-200-344) are also not reported.[8] The opinion of the Tennessee Court of Criminal Appeals ("TCCA") (App. I at A-354-87), is unpublished but may be found at 2005 WL 1541855, at *1 (Tenn. Crim. App. June 28, 2005). The opinion of the state trial court denying Mr. Henderson's petition for post-conviction relief (App. J at A-388-92), is not reported. The opinion of the TCCA on Mr. Henderson's motion to reopen post-conviction proceedings (App. G at A-345-49) is unpublished as is the Tennessee Supreme Court's denial of his application for permission to appeal. *Id.* at A-350. The opinions of the trial court on that motion are likewise unpublished. App. H at A-351-53.

## JURISDICTION

The Sixth Circuit entered the opinion and judgment denying habeas relief on May 10, 2023. App. B. The court of appeals denied a timely petition for rehearing on July 3, 2023. App. A. On September 29, 2023, Justice Kavanaugh extended the time within which to file a petition for writ of certiorari to and including November 30, 2023.

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[8] The District Court issued three orders. On March 30, 2011, the court issued an order regarding the Warden's motion for summary judgment on procedural grounds (App. F), and on October 11, 2011, the court issued an order determining the merits of several remaining claims (App. E). After the Sixth Circuit remanded Mr. Henderson's case for consideration under *Martinez v. Ryan*, 566 U.S. 1 (2012), and the District Court issued a third order on May 8, 2014. App. D.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The equal protection and due process clauses of the Fourteenth Amendment provide:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On May 13, 1997, the grand jury of Fayette County, Tennessee indicted Kennath Henderson with several crimes. Thereafter, on July 6, 1998, Kennath Henderson pleaded guilty to first-degree premeditated murder, two counts of aggravated kidnaping, attempted especially aggravated kidnaping, aggravated robbery, aggravated assault, and felonious escape. App. L, at A-406. On the advice

of counsel, Mr. Henderson waived his right to be sentenced by a jury and the trial court sentenced him to death. *Id.* His convictions and sentences were affirmed on appeal. App. K at A-393-405.

Mr. Henderson filed for post-conviction relief in the Fayette County trial court (in front of the same judge who sentenced him to death) on February 12, 2001. The trial judge thereafter denied post-conviction relief, a decision that was affirmed on appeal. App. J at 388-92; App. I at A-354-87.

Subsequently, Mr. Henderson filed a petition for a writ of habeas corpus in the United States District Court. The District Court found several claims, including the grand jury claim, barred by the procedural default doctrine and ordered the parties to file additional briefs on the merits of other claims. App. F at A-328. On October 11, 2011, the District Court denied Mr. Henderson's petition but granted a Certificate of Appealability (COA) on his claims regarding his incompetence during the trial proceedings and denial of his right to effective assistance of counsel at sentencing. App. E at A-197-99.

On April 20, 2012, Mr. Henderson filed a Motion to Remand in light of *Martinez v. Ryan*, 566 U.S. 1 (2012), which the Sixth Circuit granted on July 2, 2012. On May 8, 2014, the District Court denied Mr. Henderson's claims, dismissed the case, and reaffirmed the grant of a COA on the sentencing ineffective assistance of counsel and incompetence claims. App. D at A-101-03.

Mr. Henderson thereafter filed a timely Notice of Appeal and moved the Sixth Circuit to expand the Certificate of Appealability. App. M at A-408-43. On April 1, 2015, the Sixth Circuit certified two additional issues for appeal: (1) whether trial counsel were ineffective when they advised him to plead guilty and waive jury

sentencing without conducting a constitutionally adequate mitigation investigation; and (2) whether trial counsel was ineffective for failing to use expert services effectively. App. C at A-043. The Sixth Circuit denied a COA regarding Mr. Henderson's claim raising gender and racial discrimination in the selection of the grand jury. *Id.*

In the lower courts, counsel for Mr. Henderson presented undisputed evidence that he is severely brain damaged and mentally ill. This evidence included that he was born with low brain volume and that as a child he suffered a traumatic brain injury that permanently further compromised his cognitive abilities and his control over his behavior. R. 129-5, PageID#4708-11. Compounding these neurological deficits, Mr. Henderson later developed bipolar disorder, a mental condition that affects many in his paternal family. R. 129-4, PageID#4697. At the time Mr. Henderson committed his crime, his rapid-cycling bipolar disorder impaired his thoughts, caused him to dissociate, and thwarted his ability to reason. *Id.*

Counsel also submitted evidence that trial counsel would have readily learned of Mr. Henderson's mental illness and brain damage had they merely reviewed the discovery materials provided by the prosecution or conducted more than a token mitigation investigation. R. 23-2, PageID#2627; R. 23-13, PageID#3394; R. 129-3, PageID#4693; R. 23-1, PageID#2088-91. Trial counsel, however, did not review discovery or interview Mr. Henderson's paternal family. *See* R.23-1, PageID#2088-91. In fact, counsel did not even bother to learn the identity of Mr. Henderson's father. R.129-3, PageID#4693.

On the eve of trial, counsel realized he had not conducted a sufficient investigation to uncover mitigating evidence to counterbalance the aggravating

factors inherent in the offense and sought a continuance. R.20-2, PageID#483. During the hearing on the motion, the defense mitigation investigator admitted that her limited efforts had found no mitigation evidence, and the judge reprimanded her for her inadequate investigation saying that he personally knew that Mr. Henderson's family was rife with mental illness. R. 68-3, PageID#4010. After lambasting the inadequate mitigation development, the judge granted the continuance motion, affording counsel additional time to conduct an investigation. R. 20-2, PageID#484.

Counsel inexplicably decided to forgo any further investigation before making critical strategic decisions. Instead, only hours after being granted a continuance, counsel convinced Mr. Henderson to plead guilty immediately. As a result, the same day the court ascertained that the defense had not conducted an adequate investigation, Mr. Henderson entered a guilty plea to capital murder, based on counsel's advice. R. 20-3, PageID#996-99. At the time counsel gave that advice, he knew that he had not conducted a thorough investigation:

> At the time I advised Henderson [to plead guilty and waive juror sentencing], we did not have mitigation proof sufficient to legally outweigh the aggravating circumstances.

R. 129-3, PageID#4692. Compounding this uninformed guilt-phase decision-making, counsel spurned the opportunity to investigate potential mitigation, and, instead, acquiesced to an expedited sentencing proceeding without a jury. At the sentencing proceeding conducted only a week after the plea—and without conducting the investigation that counsel sought in the continuance motion and the court had determined was necessary—counsel presented the trial judge with the meager mitigation that had been developed. As a result of the deficient investigation, counsel

was able to present only elementary school certificates of Mr. Henderson's participation in a spelling bee and of being a "Good Helper" and falsely portrayed Mr. Henderson as the product of an "intact family" who, for reasons unknown, had somehow lost his way. R. 20-5, PageID#344-46. Counsel did not know about and therefore did not address Mr. Henderson's serious mental illness, low brain volume, or brain damage.

Counsel's "strategy" was not based on legal analysis or investigation, but rather was the product of wishful thinking that the judge would blithely ignore the law:

> Had I been aware [the mitigation investigator] told the court that we did not have any mitigation, I would not have advised Mr. Henderson to waive jury trial and sentencing by a jury. This advice was based on my knowledge of Judge Blackwood's publicly expressed disdain for the death penalty.
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> . . .
>
> [M]y strategy was to put the case in front of Judge Blackwood and trust he would follow his conscience rather than the law.

R. 129-3, PageID#4692. Of course, Tennessee law trumped counsel's wishful thinking that the judge's personal opinion regarding the death penalty would benefit his client: Whether the judge personally opposed the death penalty could not affect the sentence as there is no discretion under the law to choose between life and death when aggravating circumstances outweighed the mitigating circumstances. The judge was required to follow the law, not his own personal beliefs.

Tennessee courts rejected Mr. Henderson's claims of ineffective assistance of counsel by applying the more stringent *Hoxie-Hatch* test adopted by the Tenth Circuit. Rather than determining whether trial counsel's representation was prejudicially deficient, as required by *Strickland*, the state court denied the claim

because Mr. Henderson failed to prove that counsel's advice to waive a jury for sentencing was "completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy." App. I at A-378, *see also, id.* at A-379. (reiterating the *Hatch* standard). The District Court thereafter found that relief was barred by 28 U.S.C. §2254(d)(2); the Sixth Circuit affirmed, citing a separate Sixth Circuit opinion accepting the *Hoxie-Hatch* standard. App. B at A-025 (citing *Moore v. Mitchell*, 708 F.3d 760, 786 (6th Cir. 2013)).

## REASONS FOR GRANTING THE WRIT

### I. Certiorari is warranted to ensure consistent application of this Court's well-established jurisprudence prohibiting racial discrimination in grand jury proceedings.

In *Rose*, this Court held racial discrimination in the selection of grand jurors and grand jury forepersons unconstitutional, recognizing that "discrimination on the basis of race in the selection of members of a grand jury. . . strikes at the fundamental values of our judicial system" because the grand jury is a central component of the criminal justice process. 443 U.S. at 556. In *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998), this Court reaffirmed the grand jury's critical position in the criminal justice system:

> The grand jury, like the petit jury, "acts as a vital check against the wrongful exercise of power by the State and its prosecutors." It controls not only the initial decision to indict, but also significant decisions such as how many counts to charge and whether to charge a greater or lesser offense, including the important decision to charge a capital crime. The integrity of these decisions depends on the integrity of the process used to select the grand jurors. If that process is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions.

*Id.* at 399 (cleaned up) (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991), and *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986)).

In the decades since *Rose* and *Campbell*, the Tennessee Supreme Court has defied this Court by refusing to apply the clear holdings of *Rose* and *Campbell* to claims of grand juror foreperson discrimination. The Tennessee Supreme Court expressly refused to follow this Court's precedent in 1999 in *State v. Bondurant*, 4 S.W.3d 662 (Tenn. 1999). In *Bondurant*, the Tennessee court dismissed this Court's findings regarding the powers of the Tennessee grand jury foreperson at issue in *Hobby v. United States*, 468 U.S. 339 (1984), as "greatly exaggerated." *Bondurant*, 4

S.W.3d at 874 (citing *State v. Jefferson*, 769 S.W.2d 875 (Tenn. Crim. App. 1988)).[9] Having denigrated this Court's well-established jurisprudence, the Tennessee Supreme Court then asserted that the role of the grand jury foreperson is purely "ministerial" and, held that, to establish a prima facie equal protection claim, Tennessee defendants must offer proof that racial discrimination tainted the entire grand jury. *Bondurant*, 4 S.W.3d at 674. The holding in *Bondurant* is directly

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[9] *Bondurant* cited with approval two Tennessee Court of Criminal Appeals opinions that conclude that *Hobby* "greatly exaggerated" the role of the foreperson:

> In Tennessee, the foreman is the spokesperson for the grand jury and has the same voting power as any other grand jury member. *Bolen v. State*, 544 S.W.2d 918, 920 (Tenn.Crim.App.1976). Not only does the foreman not have the power to veto an indictment, his authority, within this context, is no greater than any other member of the grand jury venire. *State v. Collins*, 65 Tenn. 151, 153–54 (1873); *See also Applewhite v. State*, 597 S.W.2d 328 (Tenn.Crim.App.1979); *Bird v. State*, 103 Tenn. 343, 52 S.W. 1076 (1899); *State v. Chambless*, 682 S.W.2d 227 (Tenn.Crim.App.1984). The above holding is bolstered by the observation of this Court in *State v. Chambless* that the Supreme Court in [*Hobby v. United States*, 468 U.S. 339, 104 S. Ct. 3093, 82 L.Ed.2d 260 (1984) ] "greatly exaggerated" the powers of the Tennessee grand jury foreman.

*Bondurant*, 4 S.W.3d at 674 (citing *State v. Chambless*, 682 S.W.2d 227, 230 (Tenn. Crim. App. 1984)). Neither the Tennessee Supreme Court nor the lower state courts explain what this Court "exaggerated," particularly given that this Court in *Hobby v. United States* revisited the issue and correctly explained the role that the foreperson has in grand jury proceedings:

> The foreman selection process in *Rose* therefore determined not only who would serve as presiding officer, but also who would serve as the 13th voting member of the grand jury. The result of discrimination in foreman selection under the Tennessee system was that 1 of the 13 grand jurors had been selected as a voting member in an impermissible fashion.

468 U.S. 339, 348 (1984) (citing Tenn. R. Crim. P. 6(g) (1992)).

contrary to the role of the foreperson authorized by Rule 6(g) of the Tennessee Rules of Criminal Procedure and recognized by this Court in *Rose*, *Campbell*, and *Hobby*.

The foreman of the grand jury that indicted Mr. Henderson was chosen in accordance with Tennessee Rules of Criminal Procedure, Rule 6(g). That Rule accorded—and continues to accord—unfettered discretion to trial court judges in the selection of the grand jury "foreman." Rule 6 provides that "[t]he judge of the court authorized by law to charge the grand jury and to receive the report of that body shall appoint the foremen of the grand juries in the counties of their respective jurisdictions." 11 (substantively identical). Moreover, in addition to the power to vote for issuance of an indictment, Rule 6(g) confers significant duties on the foreman:

> It shall be the duty of such foreman of grand juries to assist and cooperate with the district attorney in ferreting out crime, to the end that the laws may be faithfully enforced; and such foremen are directed out of term to advise the district attorney general with respect to law violations and to furnish him names of witnesses, whom the district attorney general may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or the district attorney general may order the issuance of subpoenas for witnesses to go before the grand jury. **The foreman may vote with the grand jury and his vote shall count toward the twelve necessary for the return of an indictment.**

Tenn. R. Crim. P. 6(g) (1992) (emphasis added); *see also* Tenn. R. Crim. P. 6(g)(4) (2023) (providing same duties and powers).

As a result of Tennessee's steadfast and willful refusal to apply this Court's decisions, there is no state tribunal that will resolve a claim for the violation of the protection that this Court recognized *Rose*. Following *Bondurant*, Tennessee courts consistently have rejected *every* claim raising the racially discriminatory appointments of grand jury forepersons in violation of this Court's decisions, either

because the voting foreperson is "ministerial and administrative," or the defendant failed to challenge the "racial composition of the entire grand jury.".[10]

In light of this Court's clear decisions, Mr. Henderson should have been permitted to appeal his claim of grand jury foreperson discrimination because a state court may not indiscriminately refuse to hear a federal constitutional claim. U.S. Const., Art. VI. State courts are "charge[d] with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure," *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 367 (1990), and "entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color

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[10] *See, e.g., Guerrero v. Donahue*, No. 1:14-CV-00151, 2019 WL 7838558, at *17 (M.D. Tenn. Aug. 23, 2019), report and recommendation adopted, 2020 WL 553728 (M.D. Tenn. Feb. 4, 2020) (requiring petition to establish the composition of the grand jury as a whole was discriminatory or systematically excluded minority or other cognizable groups pursuant to *Bondurant*); *Jordan v. State*, No. W2015-00698-CCA-R3-PD, 2016 WL 6078573, at *64 (Tenn. Crim. App. Oct. 14, 2016) (denying post-conviction because the petitioner failed to present any evidence establishing the composition of the grand jury as a whole or the systematic exclusion of minorities or other cognizable groups); *Morris v. Westbrooks*, No. 07-1084-JDB-EGB, 2017 WL 11637496, at *17 (W.D. Tenn. Mar. 13, 2017) (denying grand jury foreperson claim because, *inter alia*, Mr. Morris presented "no information about the composition of the grand jury as a whole"); *Robinson v. State*, No. W2011-00967-CCA-R3-PD, 2013 WL 1149761, at *95 (Tenn. Crim. App. Mar. 20, 2013) (finding no evidence presented at the post-conviction hearing establishing that women had been systematically excluded from the role of grand jury foreperson in Shelby County and relief precluded by *Bondurant*); *Porterfield v. Bell*, No. M2006-02082-CCA-R3HC, 2007 WL 2702781, at *3 (Tenn. Crim. App. Sept. 17, 2007) ("If we were inclined to accept the petitioner's claim as true, *State v. Bondurant*, 4 S.W.3d 662, 674 (Tenn. 1999), instructs us that a claim involving discrimination in the selection of grand jury forepersons does not establish a prima facie claim because the proof must show that the discrimination tainted the entire grand jury."); *Franks v. State*, No. W2005-001148-CCA-R3PD, 2006 WL 1132035, at *4 (Tenn. Crim. App. Apr. 27, 2006) (denying relief despite claim that the grand jury foreman for Hardin County was the same white male from 1972-1998 because, "defendants must offer proof that racial discrimination tainted the entire grand jury.") (quoting *Bondurant*); *Mitchell v. State*, No. W1999-01097-CCA-R3-PC, 2000 WL 354378, at *7 (Tenn. Crim. App. Apr. 6, 2000) (citing *Bondurant* to deny relief because the petitioner offered no evidence regarding the racial composition of entire the grand jury).

of state law." *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (citing *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 506–07 (1982)).

Reasonable jurists could also debate whether Mr. Henderson's claim of discrimination in the appointment of the foreperson was procedurally barred from review as determined by the District Court. Mr. Henderson presented this claim in a motion to reopen post-conviction proceedings, citing the fundamental federal constitutional rights recognized in *Rose* and *Campbell* and maintaining that "Tennessee courts have yet to recognize the fundamental federal rights at issue here." App. G at A-347. The Tennessee court observed that Mr. Henderson *could* have raised this claim earlier but did not expressly invoke any state procedural rule barring the adjudication of the claim. App. G at A-348. Instead, the Court of Criminal Appeals denied Mr. Henderson's claim because his claim did not qualify under Tennessee Code Annotated § 40-30-117(a)(1), which permits motions to reopen post-conviction that allege a right that "is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." The court concluded that because Tennessee has never recognized the right that this Court established in *Rose*, the motion to reopen must be denied. *Id.* (citing *Bondurant*, 4 S.W.3d at 675). The TCCA's conclusion that Mr. Henderson's federal constitutional claim failed to satisfy Section 40-30-117(a) was based on the refusal of Tennessee courts to recognize, let alone implement, this Court's decisions. As the state court necessarily addressed the merits of the federal constitutional claim—albeit by ignoring this Court's unmistakable holdings—the state court necessarily resolved the underlying federal

question to determine whether Mr. Henderson satisfied Tennessee Code Annotated § 40-30-117(a)(1).

Thus, it is at least debatable whether Tennessee's procedural rule may preclude federal review of the claim because the rule was not "independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A state procedural rule is not independent if it "fairly appears to rest primarily on federal law, or to be interwoven with the federal law. *Id.* at 735 (internal quotation marks omitted). A state law ground is deemed interwoven if "the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). To be adequate, a rule must be "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). Here, the Tennessee court's procedural ruling is inextricably intertwined with its substantive determination that Tennessee does not recognize the right to selection of a grand jury foreperson in a discrimination-free manner. Had the Tennessee court decided to abide by this Court's clear holding in *Rose*, it would have necessarily determined that Mr. Henderson stated a basis for reopening the prior denial of state court relief. *See* Tenn. Code Ann. § 40-30-117 (providing for reopening post-conviction when a new constitutional right is recognized); *cf.*, *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001) (granting motion to reopen upon the recognition of state constitutional prohibition of the execution of intellectually disabled capital defendants).

Finally, the Tennessee court's observation that Mr. Henderson could have brought his claim earlier does not constitute a procedural bar sufficient to bar federal

review. In order for the state court's invocation of a state procedural default to bar federal review, "the last state court rendering a judgment in the case [must] 'clearly and expressly' state[] that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 (1989) (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985)). Absent an "explicit" statement of this sort, a state court's reference to a procedural bar will not suffice. *Id.* at 264 (procedural default rule "requir[es] ... a state court to be explicit in its reliance on a procedural default."); *see also Cruz v. Arizona*, 143 S. Ct. 650, 658 (2023) (affirming that the application of a state procedural rule must be straightforward and that the determination of whether a state procedural bar serves to block federal review is a federal question). In this case, the Tennessee court observed that Mr. Henderson could have presented the claim earlier but did not hold that his failure to do so defaulted the claim under any controlling state law. App. G, at A-348 (concluding "Petitioner has failed to allege a ground under which a petition for post-conviction relief may be reopened"). Moreover, the court failed to cite any state court procedural default rule, let alone "'clearly and expressly' state[] that its judgment rests on a state procedural bar." *Harris*, 489 U.S. at 263..[11]

Plenary review is essential not only to ensure that this Court's decisions are respected and followed, but also to ensure that the criminal justice system protects against the insidious influences of racial discrimination and that lower courts respect

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[11] In addition to failing to expressly and clearly invoke and rely on the state procedural bar, the fact that Tennessee Code Annotated § 40-30-117 provides an exception to state procedural default for claims involving new rules of constitutional law, means that the state court's adjudication of the default of the claim inherently and necessarily involves the merits of the constitutional claim itself.

and enforce this Court's decisions. Despite the importance of the issue and the obvious failure of the state court to abide by this Court's decisions, the lower courts refused to issue a certificate of appealability. Mr. Henderson was entitled to a COA because he demonstrated that his claims are reasonably debatable among jurists of reason. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When a claim is denied on procedural grounds without reaching the merits of the claim, movants are entitled to a COA where "jurists of reason" would find it debatable whether the "[motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 4 73, 484 (2000). Where Tennessee's denial of Mr. Henderson's claim mentioned a possible procedural default that was not expressly invoked and did not serve as the basis its denial, and, instead relied on a default that was intertwined with Tennessee's refusal to recognize the federal constitutional right to a grand jury foreperson selected in a nondiscriminatory manner, the refusal to issue a COA was demonstrably wrong.

## II. Certiorari is warranted to resolve a circuit split as to the appropriate standard for adjudicating claims of ineffective assistance of counsel for advice to plead guilty.

Clearly established precedent from this Court holds that, in evaluating trial counsel's performance regarding advising a client to plead guilty plea, the traditional *Strickland* analysis applies. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *McMann v. Richardson*, 397 U.S. 759, 771 (1970); and *Tollett v. Henderson*, 411 U.S. 258 (1973)). "Although our decision in *Strickland* dealt with a claim of ineffective assistance of counsel in a capital sentencing proceeding . . . the same two-part standard seems applicable to

ineffective-assistance claims arising out of the plea process." *Id.* at 57. Despite this Court's clear holding, the Sixth Circuit has followed the Tenth Circuit in imposing an additional, more stringent standard, demanding that petitioners challenging trial counsel's performance prove that the decision to waive a jury was "completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy." *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997); *Hatch v. Oklahoma*, 58 F.3d 1447, 1459 (10th Cir. 1995).

In this case, the Sixth Circuit found that 28 U.S.C. § 2254(d) barred review of Mr. Henderson's ineffective assistance of counsel claim, because the Tennessee Court of Criminal Appeals' use of the *Hoxsie-Hatch* standard was not contrary to clearly established precedent from this Court. App. B at A-025-26.[12] Citing its own opinion in *Moore v. Mitchell*, 708 F.3d 760, 786 (6th Cir. 2013), in which a separate panel of Sixth Circuit quoted *Hoxsie* (which, in turn, quoted *Hatch*), the court below concluded: "At the very least, this statement in *Moore* shows that the [Tennessee court's] articulation of the *Strickland* standard was not necessarily a misstatement of the law, and certainly was not clearly 'contrary to' *Strickland* as required by §2254(d)(1)." *Id.* at A-026. Respectfully, neither the Sixth nor the Tenth Circuit Courts of Appeal determine clearly established Supreme Court precedent; this Court does.

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[12] Federal review of claims previously adjudicated on the merits in state court is barred by the Antiterrorism and Effective Death Penalty Act unless the state court decision is "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by" decisions from this Court. 28 U.S.C. § 2254(d); *Cullen v. Pinholster*, 563 U.S. 170 (2011). For the purposes of § 2254(d)(1) "clearly established federal law" includes only the holdings, as opposed to the dicta, of this Court's decisions. *White v. Woodall*, 572 U.S. 415, 419 (2015).

Despite this Court's clear holding in *Hill* that the *Strickland* standard applies to claims of ineffective assistance of counsel involving a guilty plea, the Sixth Circuit failed to follow that standard. Instead, by approving Tennessee's use of the *Hoxsie-Hatch* standard, the Sixth Circuit endorsed the state court's requirement that Mr. Henderson pass the much more stringent "bears no relationship to a possible defense strategy" test instead of this Court's "fell below an objective standard of reasonableness" test.

The application of the *Hoxsie-Hatch* test is contrary to *Strickland* and *Hill*. As the Tennessee court's conclusion in this case demonstrates, under *Hoxie-Hatch*, even objectively unreasonable advice of counsel can resemble a "possible defense strategy" and any advice, however farfetched, stupid, or even illegal, expressed in a way that indicates that the attorney hopes it will somehow prevail bears a "relationship to a possible defense strategy." As a result, the use of the *Hoxsie-Hatch* standard effectively requires proof that the attorneys *intended* to not win. *Strickland* does not require that level of malfeasance.

Using the *Hoxsie-Hatch* standard, Tennessee courts determined that, although the advice given Mr. Henderson unquestionably fell below an objective standard of reasonableness, the advice bore some "relationship to a possible defense strategy"—essentially because the lawyers justified their uninformed advice with their hope the judge would not follow the law. That is not the test under *Strickland* and *Hill*. Under this Court's clearly established jurisprudence, Mr. Henderson is not required to prove that his lawyers intended for him to be sentenced to death. Rather, Mr. Henderson need only establish that trial counsel performance was objectively unreasonable, and he was prejudiced by the deficient representation.

Viewed against this well-established standard, trial counsel's putative defense strategy of "we hoped that the judge would not follow the law and not impose death" was patently unreasonable and therefore deficient under *Strickland*. Counsel had just obtained a necessary continuance to investigate and develop mitigating evidence. The decision to abort that process and immediately plead Mr. Henderson guilty and agree to judge sentencing only a week later was not a strategy to obtain additional proof or to develop legal arguments—it was an abdication of their role as counsel. Mr. Henderson was prejudiced by counsel's deficient performance because counsel did not use the time afforded by the continuance to gain the available mitigation evidence of his brain damage..[13] Had counsel not abdicated their role as lawyers and instead completed a basic mitigation investigation, the evidence they could have presented "'might well have influenced the jury's appraisal' of [Mr. Henderson's] culpability, and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla*, 545 U.S. at 393 (quoting *Wiggins v. Smith*, 539 U.S. 510, 538 (2003), and *Strickland*, 466 U.S. at 694).

While the Sixth and Tenth Circuit Courts of Appeals and to a much more limited extent the First Circuit remain outliers in the use of the *Hoxsie-Hatch* standard, its use is spreading perniciously through the district courts of other circuits. District courts in the Third, Eighth, and Eleventh Circuits have joined with

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[13] This Court has repeatedly found brain damage to be compelling mitigation. *See, e.g., Sears v. Upton*, 561 U.S. 945, 956 (2010); *Porter v. McCollum*, 558 U.S. 30, 43 (2009); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005).

district courts in the Sixth and Tenth in the use of the more onerous *Hoxsie-Hatch* standard..[14]

This issue merits the Court's attention. The lower courts are divided as to the standard of review for evaluating claims of ineffective assistance of counsel when counsel has advised a guilty plea. This case squarely presents an instance where a court of appeals has decided an important federal question, "that has not been, but should be, settled" by this Court. Sup. Ct. R. 10(c). In addition, this petition has catalogued the inconsistent approaches employed by the Sixth and Tenth Circuit Courts of Appeals and various district courts with respect to this issue. As such, the Court's review under Sup. Ct. R. 10(a) is appropriate given the circuits' inconsistent approaches to the analysis of ineffective assistance of counsel for advising a guilty plea.

## CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari. In the alternative, this Court should reverse, grant a COA, and remand

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[14] A Westlaw search reveals that federal courts in the Tenth Circuit have cited the heightened *Hoxie-Hatch* standard over a hundred times.

Third Circuit: *Miller v. Beard*, 214 F. Supp. 3d 304, 362 (E.D. Pa. 2016); *Gribschaw v. Wenerowicz*, No. CV 10 - 1106, 2016 WL 1161079, at *16 (W.D. Pa. Mar. 23, 2016).

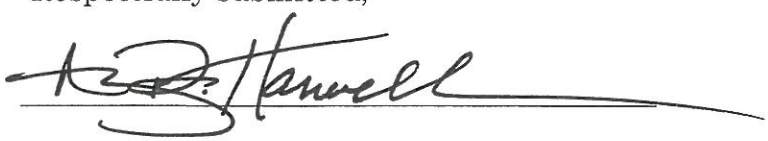
Eighth Circuit: *Hyatt v. Weber*, 468 F. Supp. 2d 1104, 1116 (D. S.D. 2006); *Reed v. Bryant*, No. 13-542, 2017 WL 902134, at *23 (E.D. Okla. Mar. 7, 2017); *United States v. Rector*, No. 08-CR-50015, 2013 WL 5929961, at *31 (W.D. Ark. Nov. 1, 2013).

Eleventh Circuit: *Robinson v. Sec'y, Dep't of Corr.*, No. 8:14-CV-1652-T-23JSS, 2020 WL 588298, at *17 (M.D. Fla. Feb. 6, 2020); *Brown v. United States*, No. CR407-308, 2012 WL 1605152, at *3 (S.D. Ga. May 8, 2012), *report and recommendation adopted*, No. CR407-308, 2012 WL 1898872 (S.D. Ga. May 23, 2012), *aff'd*, 533 F. App'x 881 (11th Cir. 2013); *White v. Haley*, No. 502-CV-00524, 2008 WL 11383870, at *8 (N.D. Ala. Apr. 1, 2008).

for full consideration of the grand jury claim in the Sixth Circuit, because jurists of reason could debate the default of Mr. Henderson's grand jury foreperson claim such that a COA should have issued.

Dated: November 30, 2023

Respectfully submitted,



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