No. 23-6160

IN THE
SUPREME COURT OF THE UNITED STATES

KENNATH ARTEZ HENDERSON,

Petitioner,

vs.

ZAC POUNDS, Warden,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

RESTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Whether certiorari is warranted to review the denial of a certificate of appealability on an equal-protection claim that selection of the grand jury foreperson was racially discriminatory, when reasonable jurists would not debate that the district court correctly denied that claim as procedurally defaulted.

II. Whether certiorari is warranted to review Petitioner's unextraordinary claim that his counsel were ineffective in advising him to plead guilty, when the Sixth Circuit correctly concluded that the state court's rejection of the claim was not contrary to this Court's precedent.

LIST OF DIRECTLY RELEVANT PROCEEDINGS

Pursuant to Supreme Court Rule 15.2, Respondent supplements the list of proceedings provided by Petitioner with the following matters:

State v. Henderson, No. 02C01-9808-CC-00243, 1999 WL 410421 (Tenn. Crim. App. June 15, 1999) (intermediate state appellate court affirming death sentence), *aff'd*, 24 S.W.3d 307 (Tenn. 2000).

Henderson v. Tennessee, 531 U.S. 934, 121 S. Ct. 320 (2000) (denying certiorari on direct appeal).

Henderson v. State, No. W2008-01927-SC-R11-PD (Tenn. Apr. 25, 2009) (denying application for discretionary review on denial of the motion to reopen the post-conviction proceeding).

Henderson v. State, No. 4465 (Fayette Cnty. Cir. Ct. Mar. 8, 2023) (denying motion to reopen post-conviction proceeding).

Henderson v. State, No. 4465 (Fayette Cnty. Cir. Ct. Mar. 8, 2023) (denying petition for writ of error coram nobis).

Henderson v. State, No. W2023-00509-CCA-R28-PD (Tenn. Crim. App. May 2, 2023) (denying application for permission to appeal from denial of motion to reopen post-conviction proceeding), *no perm. appeal filed*.

Henderson v. State, No. W2023-00515-CCA-R3-ECN, 2024 WL 278542 (Tenn. Crim. App. Jan. 25, 2024) (affirming the denial of the petition for writ of error coram nobis).

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

In 1997, while confined for a previous jail escape, Petitioner attempted a second escape. He manufactured an excuse to visit a dental office and then used a pistol that his girlfriend had smuggled into the jail to fatally shoot an escorting deputy as Petitioner fled the dental office. He pleaded guilty to numerous charges and waived his right to jury sentencing on his first-degree murder conviction. The trial court imposed a death sentence.

For the first time on federal habeas corpus review, Petitioner claimed an equal-protection violation because the foreman of the grand jury that indicted him was allegedly selected under a racially discriminatory process. The district court rightly rejected the claim as procedurally defaulted, and the Sixth Circuit denied a certificate of appealability. Petitioner also claimed that his trial counsel were ineffective by advising him to plead guilty. But the Sixth Circuit rightly concluded that the state court's rejection of that claim was not "contrary to" this Court's precedent.

Petitioner seeks this Court's review of these two claims through nothing more than a veiled request for error correction. But there is no error to correct. Reasonable jurists would not debate that the grand-jury claim is procedurally defaulted, and the state court's rejection of the ineffective-counsel claim was not "contrary to" this Court's precedent. Thus, certiorari should be denied.

STATEMENT OF THE CASE

I. Guilty Plea and Direct Appeal

Petitioner, who was serving sentences in the Fayette County, Tennessee jail for felony escape and aggravated burglary, orchestrated another escape attempt. *State v. Henderson*, 24 S.W.3d 307, 310 (Tenn. 2000). He ordered his girlfriend to smuggle a pistol into the jail and requested a tooth extraction by an outside dentist. *Id*. The jail scheduled a dental appointment with Dr. John Cima. *Id*.

Deputy Tommy Bishop took Petitioner to his appointment with Dr. Cima. *Id*. When Dr. Cima and his assistant entered Petitioner's room, Petitioner brandished the smuggled pistol. *Id*. Dr. Cima cried out for Deputy Bishop, who rushed into the room. *Id*. Petitioner shot Deputy Bishop in the neck, causing him to fall backwards, hit his head against the doorframe or wall, and crumble facedown onto the floor, "presumably unconscious." *Id*.

Petitioner left the treatment room and returned with the receptionist. *Id*. He stole Deputy Bishop's gun and robbed Dr. Cima of money, credit cards, and truck keys. *Id*. He then ordered Dr. Cima and the receptionist to exit the office with him. *Id*. But before leaving, Petitioner returned to the treatment room and executed Deputy Bishop by shooting him in the back of his head at point-blank range as he lay on the ground unconscious. *Id*.

Once Petitioner was outside, another patient surprised him, which allowed Dr. Cima and his receptionist to retreat into their office. *Id*. Dr. Cima called the police as Petitioner fled in Cima's truck. *Id*. at 311. Police chased Petitioner and eventually arrested him after he crashed the truck. *Id*. Police recovered the murder weapon, Deputy Bishop's gun, and the other items Petitioner had stolen. *Id*.

The Fayette County Grand Jury indicted Petitioner on one count of first-degree premeditated murder, three counts of first-degree felony murder, two counts of especially

aggravated kidnapping, and one count each of attempted especially aggravated kidnapping, aggravated robbery, aggravated assault, and felony escape. *Id*. At no time during his prosecution did Petitioner raise an equal-protection challenge based on alleged racial discrimination in the selection of the grand jury foreperson. *See generally id*. 310-19. He eventually pleaded guilty to all charges except for the three counts of first-degree felony murder, which were dismissed. *Id*. at 311.

Petitioner also waived sentencing by a jury. *Id*. After the sentencing hearing, the State alleged that four statutory aggravating circumstances justified the death penalty while Petitioner argued four statutory mitigating circumstances. *Id*. at 312. The trial court found that the State proved all four statutory aggravating circumstances beyond a reasonable doubt, and it determined that they outweighed the mitigating circumstances. *Id*. The court sentenced Petitioner to death for the first-degree premeditated murder of Deputy Bishop. *Id*. He also received lengthy sentences for the other felony convictions. *Id*. at 312 n.4. The Tennessee Court of Criminal Appeals ("TCCA") and the Tennessee Supreme Court affirmed his death sentence. *Id*. at 313. This Court denied certiorari. *Henderson v. Tennessee*, 531 U.S. 934 (2000).

II. State Post-Conviction

After the direct appeal, Petitioner sought state post-conviction relief. *Henderson v. State*, No. W2003-01545-CCA-R3-PD, 2005 WL 1541855, at *1 (Tenn. Crim. App. June 28, 2005), *perm. appeal denied*, (Tenn. Dec. 5, 2005). Relevant here, he claimed counsel were ineffective for advising him to plead guilty. *Id*. at *36. He did not raise any claim of racial discrimination in the selection of the grand jury foreperson. *See generally id*. at *1-46.

Petitioner did not testify at the post-conviction hearing, but his trial counsel did. *Id*. at *6-8. Andrew Johnston testified that the defense team began considering a guilty plea because a plea

"certainly would have been a mitigating factor[.]" *Id*. Michael Mosier testified that the defense team also decided to have the trial judge sentence Petitioner because the judge "had previously stated on the record that he was morally and philosophically opposed to the death penalty." *Id*. at *8. Counsel believed these strategic decisions gave Petitioner the best chance at avoiding a death sentence. *Id*. at *6-8.

The trial court denied the ineffective-counsel claim, and the TCCA affirmed. *Id*. at *36-38. The TCCA quoted *Strickland v. Washington*, 466 U.S. 668 (1984), at length. It also quoted *Hatch v. Oklahoma*, 58 F.3d 1447 (10th Cir. 1995), to conclude that "the decision to waive a jury must have been 'completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy.'" *Id*. at *36, *38 (quoting *Hatch*, 58 F.3d at 1459). It held that Petitioner failed to show deficient performance in counsels' advice to plead guilty. *Id*. at *38. The Tennessee Supreme Court denied review. *See id*. at *1.

III. Motion to Reopen State Post-Conviction

While his federal habeas corpus petition was pending, Petitioner moved to reopen his post-conviction proceeding under Tenn. Code Ann. § 40-30-117, in an attempt to exhaust an equal-protection claim that the selection of the grand jury foreperson involved racial discrimination. (Pet'r App. 345-346.) But the trial court summarily denied his motion to reopen, and the TCCA denied his appeal application on the procedural bases that Petitioner "failed to allege a ground under which a petition for post-conviction relief may be reopened" and "should have and could have [asserted the claim] in previous proceedings." (Pet'r App. 346-348.) The Tennessee Supreme Court denied discretionary review. (Pet'r App. 350.)

IV. Federal Habeas Corpus

Petitioner petitioned for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Western District of Tennessee. He asserted an equal-protection violation stemming from alleged racial discrimination in the selection of the foreperson for the grand jury that indicted him. (D.E. 16, Page ID# 131-32.) He also claimed that trial counsel were ineffective for advising him to plead guilty. (D.E. 16, Page ID# 91.)

The district court denied both claims. It acknowledged Petitioner's belated attempt to exhaust the grand-jury claim in state court. (D.E. 72, Page ID# 4188.) But it correctly found that the claim was not properly exhausted in state court, rendering it procedurally defaulted. It also found that Petitioner presented no basis to excuse the procedural default. (D.E. 72, Page ID# 4188.)

The district court also found that the TCCA reasonably applied this Court's precedent to hold that counsel were not ineffective for advising Petitioner to plead guilty. (D.E. 91, Page ID# 4417-22.) It rejected Petitioner's argument that the TCCA's citation to *Hatch* was contrary to this Court's precedent. (D.E. 72, Page ID# 4141-44.) It concluded that "[c]ounsel's performance was reasonable in advising [Petitioner] to plea, given the overwhelming evidence of [his] guilt, the limited mitigation evidence available, and counsel's belief that the judge was morally and philosophically opposed to the death penalty." (D.E. 91, Page ID# 4418.)

The Sixth Circuit denied a certificate of appealability for the grand-jury claim but granted review of the ineffective-counsel claim. (Pet'r App. 43.) It then affirmed the denial of the ineffective-counsel claim, concluding that the state court's decision was not contrary to clearly established federal law. *Henderson v. Mays*, Nos. 12-5028, 14-5911, 2023 WL 3347496, at *12-14 (6th Cir. May 10, 2023).

REASONS FOR DENYING THE PETITION

I. This Case Is No Vehicle to Review the Grand-Jury-Discrimination Claim.

This Court grants a writ of certiorari "only for compelling reasons." Sup. Ct. R. 10. But this petition tees up no "compelling reason[]"—as contemplated by Rule 10 or otherwise—to justify this Court's review of the defaulted grand-jury-discrimination claim.

The petition does not suggest that the decision below "conflict[s] with the decision of another United States court of appeals on the same important matter" or "conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a). It does not claim that the court below "departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court." *Id.* And it does not argue that the court below "decided an important question of federal law that has not been, but should be, settled by this Court." *Id*.

Instead, Petitioner asserts that certiorari is "warranted to ensure consistent application of this Court's well-established jurisprudence prohibiting racial discrimination in grand jury proceedings." (Pet. 12.) But that assertion and the authority offered in support do not account for the procedural posture of this claim, which the district court found defaulted, and the Sixth Circuit denied a certificate of appealability.

While this Court has jurisdiction to review a claim that was denied a certificate of appealability by a circuit court of appeals, *Hohn v. United States*, 524 U.S. 236 (1998), the dispositive question for a defaulted claim in that posture is whether "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Thus, this case is no vehicle to consider the underlying merits of the grand-jury claim because no other court has ever decided that issue; the district court and Sixth Circuit surely did not.

And reasonable jurists would not debate that Petitioner defaulted his grand-jury claim by failing to assert it when state-court remedies remained available to him. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") requires habeas corpus petitioners to properly exhaust state-court remedies for their claims. 28 U.S.C. § 2254(b)(1)(A). If a petitioner fails to properly exhaust a claim in state court when state-court remedies are authorized and state law bars exhaustion at a later time, the petitioner has technically exhausted the claim. But it is regarded as procedurally defaulted because "there are no state remedies any longer available to him." 28 U.S.C. § 2254(c); *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (internal quotations omitted).

Tennessee provides a robust array of opportunities for a criminal defendant to litigate constitutional claims and, thus, exhaust state-court remedies for them. After trial or even after a guilty plea with contested sentencing, a criminal defendant may pursue a direct appeal. Tenn. R. App. P. 3(b). In fact, direct appellate review by the Tennessee Supreme Court is automatic for defendants sentenced to death. *Henderson*, 24 S.W.3d at 313 (citing Tenn. Code Ann. § 39-13-206(c)(1) (1997)). After direct appeal, a defendant may collaterally attack a conviction and sentence through Tennessee's Post-Conviction Procedure Act, which is specifically meant to correct violations of the state or federal constitutions. Tenn. Code Ann. § 40-30-101 *et seq*. There is a one-petition limitation on post-conviction petitions, Tenn. Code Ann. § 40-30-102(c), but a petitioner may move to reopen a concluded post-conviction proceeding on the narrow, limited grounds under Tenn. Code Ann. § 40-30-117(a).

As relevant here, a post-conviction petitioner may move to reopen the petition to assert a claim 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." Tenn. Code Ann. § 40-30-117(a)(1) (emphasis added). But any motion alleging a

newly retroactive constitutional right "must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial[.]" *Id*. This is the avenue Petitioner pursued with his 2007 reopening motion that raised a grand-jury-discrimination claim under *Rose v. Mitchell*, 443 U.S. 545 (1979). (Pet'r App. 346.)

But this Court decided *Rose* in 1979, meaning Petitioner could and should have litigated this issue during his pretrial proceedings, direct appeal, or initial post-conviction review. The TCCA noted this when denying an appeal from Petitioner's failed motion to reopen. (Pet'r App. 348.) And it expressly found that the motion failed to meet the requirements of Tenn. Code Ann. § 40-30-117(a)(1). (Pet'r App. 348.) Thus, the district court rightly found this claim procedurally defaulted. (D.E. 72, Page ID# 4188.)

No State is compelled to adopt any mechanism for collateral review, much less a mechanism for successive collateral review. *See generally District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 69-70 (2009) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 556, 559 (1987)). Tennessee's statute for successive collateral review, Tenn. Code Ann. § 40-30-117(a), has been strictly interpreted and its procedural requirements are regularly enforced. Petitioner's motion to reopen, and the grand-jury claim it included, were rightly rejected for failure to satisfy those procedural requirements. Thus, reasonable jurists would not debate that the district court correctly denied the grand-jury claim as defaulted.

Petitioner's argument that the TCCA "necessarily addressed the merits of the federal constitutional claim" by choosing to ignore *Rose* is an incorrect characterization of the TCCA's decision. (Pet. 16-18.) Although the TCCA acknowledged the Tennessee Supreme Court's discussion of *Rose* in *State v. Bondurant*, 4 S.W.3d 662 (Tenn. 1999), it did not adjudicate the

grand-jury claim on its merits. That would have required the reopening of post-conviction proceedings first. *See* Tenn. Code Ann. § 40-30-117(b). Rather, it rejected the claim, principally due to its timing, under the independent and adequate state law grounds in Tenn. Code Ann. § 40-30-117(a)(1). (Pet'r App. 347-348.) And even if the TCCA's decision could be construed as including an alternative ruling on the merits, the denial of reopening on independent and adequate state grounds supports the district court's finding of default. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989).

II. The Sixth Circuit's Decision on the Ineffective-Counsel Claim Creates No Circuit Split or Conflict with This Court's Precedent.

Petitioner argues that the Court should grant certiorari to "resolve a circuit split as to the appropriate standard for adjudicating claims of ineffective assistance of counsel for advice to plead guilty." (Pet. 19.) But the decision below evinces no split on application of the familiar and fact-bound AEDPA-*Strickland* analysis. The Sixth Circuit—whose judges deal with AEDPA-*Strickland* claims day in, day out—did not abandon the decades-old *Strickland* deficient-performance standard when applying AEDPA to conclude that the state court's adjudication of Petitioner's ineffective-counsel claim was not "contrary to" this Court's precedent.

Under AEDPA, if a state court adjudicates a claim on the merits, a federal court may not grant habeas relief unless the state court's decision is (1) "contrary to, or involved an unreasonable application of, clearly established Federal law" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court." 28 U.S.C. § 2254(d). A state-court decision is "contrary to" clearly established federal law only if it (1) applies a rule that directly conflicts with a rule prescribed by the Supreme Court or (2) confronts a case with materially identical facts to a Supreme Court decision and decides the case differently. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

The Sixth Circuit began its AEDPA analysis of Petitioner's ineffective-counsel claim by acknowledging *Strickland v. Washington*, 466 U.S. 668 (1984), under which a petitioner must establish that counsel's performance was objectively deficient, and that the petitioner suffered prejudice due to counsel's deficient performance. *Henderson*, 2023 WL 3347496, at *13. The court recognized that, to establish deficient performance, the petitioner must prove that "counsel's representation fell below an objective standard of reasonableness." *Id*. (quoting *Strickland*, 466 U.S. at 687-88). In the context of guilty pleas, the court explained, prejudice is shown only when "there is a reasonable probability that, but for counsel's errors, [Petitioner] would not have pleaded guilty and would have insisted on going to trial." *Id.* (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Finally, the Court understood that its review of Petitioner's *Strickland* claim under § 2254(d) must be "doubly deferential." *Id*. (quoting *Campbell v. Bradshaw*, 674 F.3d 578, 587 (6th Cir. 2012) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)).

The Court then fully engaged with Petitioner's argument that the state court's rejection of his ineffective-counsel claim was contrary to the above foundational precedent of this Court.[1] Petitioner argued that the TCCA applied a standard contrary to *Strickland* and *Lockhart* by relying on *Hatch* and asking whether counsel's advice was "completely unreasonable" and "bears no relationship to a possible defense strategy." *Henderson*, 2023 WL 3347496, at *13 (quoting *Hatch*, 58 F.3d at 1459).

But the Sixth Circuit correctly held that this language from *Hatch* is not a misstatement of the law or contrary to *Strickland*. *Id*. at *14. *Hatch*'s "completely unreasonable" language tracks *Strickland*'s recognition that "[t]he proper measure of attorney performance remains simply

[1] Petitioner did not argue in the Sixth Circuit, and he does not argue now, that the state court unreasonably applied this Court's precedent.

reasonableness under prevailing professional norms." *Strickland* 466 U.S. at 688 (emphasis added). Indeed, *Strickland* uses the word "reasonable" repeatedly to discuss the adequacy of counsel's acts, omissions, investigations, judgments, assumptions, strategic choices, and overall assistance. *Id*. at 681, 689. Similarly, *Hatch*'s language about whether counsel's advice "bears no relationship to a possible defense strategy" tracks *Strickland*'s deference only to "strategic choices . . . based on professional judgment." *Id*. at 681. And *Hatch* itself repeatedly cited *Strickland* for all its foundational principles. *Hatch*, 58 F.3d at 1456-59.

So, Petitioner's argument boils down to the notion that the TCCA's decision, which was grounded in *Strickland*, is contrary to *Strickland* because it cited to a federal circuit court decision that applied *Strickland*. That argument presents no issue that is cert-worthy.

Rather, the TCCA's decision is what this Court has described as a "run-of-the-mill state-court decision applying the correct legal rule from [this Court's] cases to the facts of a prisoner's case [that] would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Williams*, 529 U.S. at 406. "It is difficult … to describe such a run-of-the-mill state-court decision as 'diametrically different' from, 'opposite in character or nature' from, or 'mutually opposed' to *Strickland*." *Id*. The TCCA's additional citation to *Hatch* does not put its decision in any different class.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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