No. 23-6160

CAPITAL CASE

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

REPLY TO STATE'S BRIEF IN OPPOSITION

KELLEY J. HENRY
Supervisory Asst. Federal Public Defender

AMY D. HARWELL*
Assistant Chief, Capital Habeas Unit

KATHERINE M. DIX
Asst. Federal Public Defender

810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047
Fax: (615) 736-5265
Email: amy_harwell@fd.org

**Counsel for Petitioner*

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INTRODUCTION

Certiorari is critical to ensure that the Constitution is enforced in Tennessee, which persistently allows race and gender discrimination to compromise the integrity of the justice system. Judges in Fayette County, Tennessee, where Petitioner was indicted and convicted of a capital offense, have selected only *white males* to serve as grand jury foremen since at least 1900..[1] Tennessee's highest court steadfastly refuses to apply this Court's unambiguous and well-established decisions forbidding racial discrimination in the selection of grand jury forepersons. *See, e.g.*, *State v. Bondurant*, 4 S.W.3d 662 (Tenn. 1999) (rejecting *Rose v. Mitchell*, 443 U.S. 545 (1979), and *Hobby v. United States*, 468 U.S. 339 (1984), and misapplying *Campbell v. Louisiana*, 523 U.S. 392 (1998)). Tennessee's extraordinary recalcitrance warrants this Court's intervention. *See, e.g., Flowers v. Mississippi*, 588 U.S. --, 139 S. Ct. 2228 (2019) (holding the Court broke "no new legal ground" but rather granted certiorari to "enforce and reinforce *Batson* by applying it to the extraordinary facts of this case"); *Foster v. Chatman*, 578 U.S. 488, 521 (2016) (applying *Batson* to Georgia Supreme Court's refusal to review superior court's denial of claim); *see also Moore v. Texas* (*Moore I*), 581 U.S. 1, 6 (2017) (invalidating Texas' obdurate use of the *Briseño* factors to determine whether a petitioner is intellectually disabled); *Moore v. Texas*, 586 U.S. --, 139 S. Ct. 666, 670 (2019) (overturning the Texas court's decision on remand as inconsistent with *Moore I*); *Shafer v. South Carolina*, 532 U.S. 36, 40 (2001)

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[1] As the result of a typographical error, the Petition mistakenly stated that the grand jury discrimination in Fayette County has only occurred "since at least 1990—when record keeping began." Petition at 1. Record keeping—and the discrimination—began at least 90 years earlier, in 1900. App. M at A-441–42 (listing each grand jury foreman and his years of service, starting in 1900).

(reiterating the holding of *Simmons v. South Carolina*, 512 U.S. 154 (1994), and reversing for failure to apply *Simmons*); *Kelly v. South Carolina*, 534 U.S. 246, 248 (2002) (same).

Further, the Tennessee Court of Criminal Appeals ("TCCA") rejected Petitioner's ineffective assistance of counsel claims by applying a more stringent standard than this Court set in *Strickland v. Washington*, 466 U.S. 668 (1984). Despite citing *Strickland*, the TCCA denied relief because Mr. Henderson failed to prove not only that his counsel's advice was objectively unreasonable but also that it bore "no relationship to a possible defense strategy." This heightened requirement is contrary to, and an unreasonable application of, *Strickland*. In refusing to apply *Strickland* properly and endorsing the TCCA's more onerous standard, the Sixth Circuit joined the First and Tenth Circuits and perpetuated a growing split amongst the circuits as to the correct standard for ineffective assistance of counsel claims.

REPLY

I. Certiorari is warranted to end pervasive and long-standing discrimination in the appointment of grand jury forepersons in Tennessee.

In an effort to shield Tennessee's discriminatory practices and its courts' willful refusal to respect this Court's decisions, Respondent wrongly asserts that Petitioner's case does not present a vehicle to review his grand jury discrimination claim because "no other court has ever decided that issue." Brief in Opp. at 6. That no state or federal court has considered the merits of this claim is precisely the reason this Court should grant certiorari.[2] The refusal of those courts to apply this Court's well-established

[2] Alternatively, if the Court determines that the issue requires further development, the Court should reverse, grant a certificate of appealability, and

case law perpetuates a century-old practice of racial discrimination in the grand jury system. Further, the district court's erroneous conclusion that this claim is procedurally defaulted presents no impediment to this Court's review of the claim.[3]

Moreover, Petitioner meets both requirements articulated in *Slack v. McDaniel* for a certificate of appealability ("COA") on his grand jury foreperson discrimination claim:

> [W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition 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.

529 U.S. 478, 578 (2000). Here, Petitioner has shown that reasonable jurists would find it debatable that his petition states a valid grand jury foreperson discrimination claim (it does) and that the district court was correct in finding the claim procedurally defaulted (it was not).

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remand this claim to the Sixth Circuit for consideration in the first instance. Pet. at 23–24.

[3] In addition to erroneously concluding the claim was procedurally defaulted, the district court also erroneously concluded that the claim was not exhausted. App F at A-328. Exhaustion requires a petitioner to "fairly present" a federal claim to the state courts to allow the state courts a "fair opportunity" to apply controlling legal principles to the facts bearing upon that claim. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before seeking federal habeas corpus relief. *Id.* at 845. To exhaust a claim in Tennessee, a "litigant shall be deemed to have exhausted all available state remedies available" when he has presented his claim to the Tennessee Court of Criminal Appeals or the Tennessee Supreme Court. Tenn. Sup. Ct. R. 39. Petitioner did so and attached the Court of Criminal Appeals' order as App. G to his Petition.

A. Reasonable jurists would debate the district court's procedural ruling that the grand jury foreperson discrimination claim was defaulted.[4]

The district court's determination that Petitioner's grand jury foreperson claim was defaulted is clearly debatable because the TCCA's ruling was not based on an adequate and independent state procedural ground. Because the TCCA's consideration of whether Petitioner satisfied the motion to reopen statute was necessarily intertwined with the federal constitutional claim, the state court ruling was not "independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Further, the Tennessee courts' application of state procedural rules is not "adequate" because they are not "firmly established and regularly followed." *Johnson v. Lee*, 578 U.S. 605, 606 (2016) (citation omitted).

1. The Tennessee court's refusal to hear Petitioner's claim was not independent of the federal question.

Tennessee Code § 40-30-117(a)(1) inherently links the reopening of state post-conviction proceedings to consideration of federal questions. The statute explicitly provides for proceedings to reopen, when:

> [T]he 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. The motion must be filed within one (1) year of the ruling of

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[4] Respondent misrepresents that the Petition did "not account for the procedural posture of this claim." Brief in Opp at 6. To the contrary, the Petition stated clearly that "the state courts . . . refused to address the merits of the claim because it is not recognized under state law," Petition at 2–3, and offered argument and authorities in support of his contention that "[r]easonable 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," Petition at 16–19.

> 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.

Tenn. Code Ann. § 40-30-117(a)(1). Accordingly, to determine whether a claim is cognizable under § 40-30-117(a)(1), the state court must necessarily consider the constitutional right the petitioner argues should be applied to his case. Proceedings may only be reopened if a new constitutional right exists and if it is retroactive. Thus, any decision that a federal constitutional claim is not cognizable under § 40-30-117(a)(1) necessarily is "interwoven with federal law." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Indeed, in this sense, the Tennessee court's holding is indistinguishable from that in *Ake v. Oklahoma*, in which this Court found the state court's decision to be insufficient to bar federal review. 470 U.S. 68, 75 (1985) (holding that a state law ground is interwoven if "the state has made application of the procedural bar depend on an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed").[5]

Here, the TCCA necessarily considered the constitutional right to a grand jury foreperson not selected in a racially discriminatory manner. It decided that, *because Tennessee refuses to recognize such a right, despite this Court's decisions*, the post-

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[5] Respondent seems to argue that the state court's refusal to adjudicate the claim on the merits is dispositive. In Respondent's view—which is contrary to this Court's determination in *Coleman v. Thompson*, 501 U.S. 722 (1991)—such a refusal is a state procedural bar and is necessarily independent of the federal claim. However, the refusal of a state court to expressly reach the merits of a constitutional claim does not control the determination of whether the procedural rule necessarily requires consideration of the federal question when deciding whether an exception to the procedural rule applies. *See, e.g.*, *Coleman*, 501 U.S at 741; *Ake*, 470 U.S. at 75 (holding that state waiver doctrine was interwoven with the federal constitutional question because "the state court must rule, *either explicitly or implicitly*, on the merits of the constitutional question") (emphasis added).

conviction proceedings should not be reopened. App. G at A-347 ("The Petitioner asks this Court to grant relief by first acknowledging the existence of rights not previously recognized by Tennessee and not recognized at the time of his trial."); *id.* at A-348 ("The Petitioner essentially asks this Court to disregard the holding of our supreme court in *State v. Bondurant*; we decline to do so."); *Id.* ("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.").

Respondent's assertion that the TCCA decided the case "principally" on timing further demonstrates the intertwining inherent in the state court's analysis. Brief in Opp. at 9. To determine appropriate timing under (a)(1), a state court must consider two things: (1) whether there is a new constitutional right that has been established and then, (2) whether the filing is within a year of the establishment of that right. Both require consideration of a federal question. Here, the fact that "the Tennessee courts have yet to recognize the fundamental federal rights at issue here" (App. G at A-347) is the reason for the bar, but even if Respondent were correct that the claim was barred based on timing, that too would be interwoven with the federal considerations.

2. The Tennessee court's application of state procedural rules is not an adequate procedural bar because the rules are not firmly established and regularly followed.

The TCCA's procedural bar of Petitioner's claim is also not adequate because procedural rules in motion to reopen cases are not "firmly established and regularly followed." *Johnson*, 578 U.S. at 606 (citation omitted). Tennessee courts interpret procedural rules flexibly when they want to allow inmates to litigate constitutional

claims and strictly when they do not. That is, Tennessee courts often reach the merits of constitutional claims presented in a motion to reopen even when a petitioner has not strictly complied with the motion to reopen statute. *See Keen v. State*, 398 S.W.3d 594, 615–18 (Tenn. 2012) (summarizing such instances). For example, in 1992, the Tennessee Supreme Court considered a constitutional claim on the merits even though the petitioner had not filed his motion to reopen within the statute of limitations. *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992). In 2001, the court allowed an inmate with an intellectual disability claim to reopen his case even though he had not strictly complied with the statute because using the state to bar the claim would mean "a potentially intellectually disabled person could be executed before the issue is reviewed." *Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001). In 2004, the court considered the merits of a constitutional claim even though it concluded that the petitioner had not satisfied the motion to reopen statute's standard (at the time) requiring presentation of "clear and convincing evidence." *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004). Thus, because Tennessee regularly does not follow the procedural requirements of § 40-30-117, any purported state procedural bar does not preclude federal review of Petitioner's federal constitutional claim.

B. Reasonable jurists would find the merits of Mr. Henderson's underlying claim at least debatable.

In the 1999 *Bondurant* decision, the Tennessee Supreme Court refused to enforce this Court's unequivocal prohibition against racial discrimination in the selection of grand jury forepersons in *Rose*, *Campbell*, and *Hobby*. It did so by

fundamentally misapplying *Campbell*.[6] It held, "As we read *Campbell*, the method of selection of the grand jury foreperson is relevant *only* to the extent that it affects the racial composition of the *entire grand jury*." *Bondurant*, 4 S.W.3d at 675 (emphasis added). In so holding, the court prohibited any equal protection and due process challenges to the use of racial considerations in the selection of grand jury forepersons in Tennessee. But *Campbell* did not limit claims of discrimination in the selection of grand jury forepersons solely to fair cross section analysis. To the contrary, *Campbell* found that, because the foreperson was also a voting member of the grand jury, it was required "to treat the case as one alleging discriminatory selection of grand jurors." *Campbell*, 523 U.S. at 397. This Court considered Campbell's standing for equal protection and due process claims as well as a fair cross section claim and determined that he had standing to raise each. *Id.* at 398, 401.

Bondurant's holding that grand jury foreperson discrimination is permissible as long as it does not affect the racial composition of the entire grand jury is directly to this Court's holding in *Campbell*—even while citing *Campbell* as authority. *Campbell* addressed the then-existing, Louisiana foreperson selection process wherein the presiding judge selected the foreperson from the grand jury venire separately from the rest of the grand jury. *Id.* at 396 (citing La. Code Crim. Proc. Ann., Art. 413(B)). Because—unlike in Tennessee—the foreperson was selected from

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[6] In *Bondurant*, the Tennessee court ignored that the grand jury foreperson selection procedure this Court denounced in *Campbell* was virtually identical to the (then-existing and persisting to current day) Tennessee procedure. Instead, the court disingenuously deflected the force of this Court's condemnation of that procedure, saying that "Louisiana law, rather than Tennessee law, was at issue." *Bondurant*, 4 S.W.3d at 675.

the grand jury venire, Louisiana's process was less vulnerable to abuse and racism than is Tennessee's unbridled procedure.

In *Campbell*, this Court recognized that "an accused suffers a significant injury in fact when the grand jury's composition is tainted by racial discrimination." 523 U.S. at 398. The Court further found, "The integrity of [the grand jury's] 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 (citing *Rose,* 443 U.S. at 555–56). The Court rejected the State's argument that no harm is inflicted when a single grand juror is selected based on racial prejudice because the discrimination is invisible to the grand jurors on that panel, and only becomes apparent when a pattern emerges over the course of years, holding, "This argument underestimates the seriousness of the allegations. . . ." *Id.* The Court found that if the allegations of racial discrimination in the selection of the grand jury foreperson were true, "the impartiality and discretion of the judge himself would be called into question." *Id.*.[7]

Contrary to *Bondurant's* conclusion that the introduction of an extra white man into grand jury deliberations only matters if a defendant can prove that the entire grand jury comprised in a racially discriminatory manner, *Campbell* does not support this conclusion. In Tennessee (as in Louisiana at the time of *Campbell*)—

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[7] In contrast to Tennessee's continued defiance of *Rose* and *Hobby* in *Bondurant*, after *Campbell*, Louisiana immediately amended its grand jury foreperson selection procedure to conform with the method used by most states and the federal judicial system. 1 S. Beale, W. Bryson, J. Felman, & M. Elston, Grand Jury Law and Practice § 4:6 (2d ed.) (2023 Update) (citing *State v. Cosey*, 779 So. 2d 675 (La. 2000) (citing La Code Crim Proc art 413, 1999 amendment)).

unlike in the federal system—the foreperson is not selected from among the already seated grand jurors. Tennessee's statute suffers from the same problem the Supreme Court condemned in *Campbell:* "[W]hen the Louisiana judge selected the foreperson, he also selected one member of the grand jury outside of the drawing system used to compose the balance of that body." *Id.* at 397.

The fallacy of the Tennessee Supreme Court's reasoning is seen easily by an apt analogy: If this Court were to be presented with a claim that since 1900, the trial judge of Fayette County, Tennessee, has appointed a white man to be an additional juror and the foreperson of each criminal petit jury, the response would not be that each criminal defendant must prove that addition caused the petit jury not to reflect a fair cross section of the community. Manifest discrimination and the infringement upon the function of the jury—even if racially balanced—inherently undermines the administration of justice, violates Petitioner's Fourteenth Amendment's due process and equal protection rights, and calls into question the impartiality and discretion of the trial judge.

Finally, *Bondurant* is contrary to *Campbell* in that the Tennessee Supreme Court held—completely without regard to this Court's analysis of the precise issue in *Campbell*—that the Tennessee foreperson is "ministerial and administrative." *Bondurant*, 4 S.W.3d at 675 (rejecting this Court's analysis of the Tennessee selection process in *Rose* and *Hobby* while ostensibly relying on *Campbell* to limit grand jury foreperson claims to fair cross section scrutiny). Just as continues today in Tennessee, prior to *Campbell*, the Louisiana's Supreme Court decried the foreperson's role as purely "ministerial." *Campbell v. State*, 661 So.2d 1321, 1324 (La. 1995). This Court was not persuaded. *Campbell* was clear: Because the foreperson casts a vote, the

designation of the grand jury foreman as "ministerial" was "wrong." *Campbell,* 523 U.S. at 402. As *Campbell* explains, the distinction between the discrimination in the selection of federal grand jury forepersons tolerated in *Hobby* and that not countenanced in *Campbell* is one that is "different in kind and degree because it implicates the impermissible appointment of a member of the grand jury. *What concerns Campbell is not the foreperson's performance of his duty to preside, but performance as a grand juror,* namely voting to charge Campbell with second-degree murder." *Id.* (emphasis added). The same is true in Tennessee: Because a grand jury foreperson may cast the deciding twelfth vote for indictment, his role is not merely ministerial. *Bondurant* is, accordingly, contrary to *Campbell.*

Because reasonable jurists would debate the underlying merits of Petitioner's grand jury foreperson discrimination claim, Petitioner was (and is) entitled to a COA. This Court should grant certiorari to prevent states with foreperson selection schemes like Tennessee's from perpetuating racial and gender discrimination in violation of the Constitution. *See* Pet. at 1 (listing states).

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.

Respondent maintains that there is no circuit split on "application of the familiar and fact-bound AEDPA-*Strickland* analysis." Brief in Opp. at 9. Claiming that the Sixth Circuit "did not abandon the decades-old *Strickland* deficient performance standard" because the court "began its AEDPA analysis . . . by acknowledging *Strickland v. Washington*, 466 U.S. 668 (1984)," Respondent argues that the Sixth Circuit "correctly held that this language from *Hatch* is not a misstatement of the law or contrary to *Stickland*." Brief in Opp. at 9, 10. Respectfully,

intonation of the *Strickland* standard does not prevent a circuit split where the First, Sixth, and Tenth Circuits impose an additional requirement beyond that required by *Strickland*.

As this Court recognized in *Terry Williams v. Taylor*, 529 U.S. 362, 391 (2000), a court's invocation of *Strickland* is not dispositive of whether an appropriate *Strickland* analysis has been performed. In *Williams v. Warden of the Mecklenburg Corr. Ctr.*, 487 S.E.2d 194 (Va. 1997), the Virginia Supreme Court cited *Strickland* eleven times, but this Court nevertheless found its analysis contrary to *Strickland*—because the Virginia court added a heightened requirement above that required by *Strickland*. *Williams*, 529 U.S. at 393 (finding that the Virginia Supreme Court "read our decision in *Lockhart* to require a separate inquiry into fundamental fairness") (citing *Lockhart v. Fretwell*, 506 U.S. 364 (1993)). Here, as in *Taylor*, the TCCA cited *Strickland*, but then added a more stringent standard—the *Hoxie-Hatch* "bears no relationship to a possible defense strategy" test. App I at 378 (citing *Hatch v. Oklahoma*, 58 F.3d 1447 (10th Cir. 1995)); see also App. B at A-025 (citing *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997).

Respondent tries to reconcile *Hoxie-Hatch* with *Strickland* saying that the *Hoxie-Hatch* "completely unreasonable" language "tracks" *Strickland's* requirement of "reasonableness under prevailing professional norms." Brief in Opp. at 11 Respondent's argument highlights that which is at issue. In *Strickland*, this Court clearly articulated that the level of reasonableness required of counsel is that of professional practice and standards. Under *Hoxie-Hatch*, in the First, Sixth, and Tenth Circuits, it is not sufficient for a petitioner to show his counsel failed to provide reasonable advice consistent with professional norms, instead, a petitioner must

show *absolute* unreasonableness—that is that there is no possible justification for counsel's advice. Here, this distinction is dispositive. While the state trial court found that trial counsel did not investigate Mr. Henderson's case as required by prevailing standards before advising him to waive jury sentencing, the TCCA nonetheless found that counsel's advice to waive based on a "hope" that the judge would not follow the law was not *absolutely* unreasonable. App. I at A-379.

Further, the *Hoxie-Hatch* requirement that a petitioner demonstrate that the advice of counsel "[bore] no relationship to a possible defense strategy" is, likewise, more stringent than the *Strickland* requirement that a petitioner prove that counsel's advice was not a "strategic choice[] . . . based on professional judgment." Because almost anything a counsel could say to a client bears a *relationship* to a "possible defense strategy" *Hoxie-Hatch* requires a petitioner to prove that his counsel intended to sabotage the case, *Strickland* requires only that the attorney's advice not reflect a strategic choice made using professional judgment under the prevailing professional norms. Again, the heightened requirement is dispositive in a case where counsel's advice was not based on professional judgment but rather upon non-legal "hope" that the court would not follow the law. Whether such advice is adequate under *Hoxie-Hatch's* requirements—it clearly fails under *Strickland*. Cert is warranted here because the TCCA's application of the *Hoxie-Hatch* standard in Petitioner's case was contrary to and an unreasonable application of Strickland.

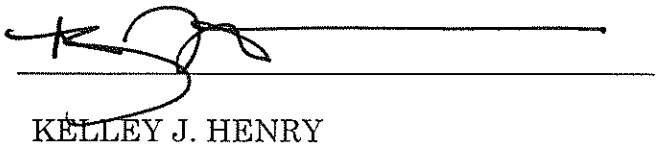
CONCLUSION

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 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: February 16, 2024

Respectfully submitted,



KELLEY J. HENRY
Supervisory Asst. Federal Public Defender

AMY D. HARWELL*
Assistant Chief, Capital Habeas Unit

KATHERINE M. DIX
Asst. Federal Public Defender

810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047
Fax: (615) 736-5265
Email: amy_harwell@fd.org

**Counsel for Petitioner*