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

PETITION TO REHEAR

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PETITION TO REHEAR

Pursuant to Rule 44, Petitioner Kennath Henderson respectfully requests rehearing and reconsideration of the Court's March 18, 2024 order denying the Petition for a Writ of Certiorari. This petition is submitted based on substantial intervening circumstances and substantial grounds not previously presented.

In his original petition, Mr. Henderson alerted the Court to a widening split of authority between the First, Sixth and Tenth and the other Circuit Courts of Appeals. 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). However, 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) and 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. In Mr. Henderson's case, 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.

Since Mr. Henderson submitted his petition, three cases in the Sixth Circuit have further perpetuated the split of authority as to the standard that controls the

adjudication of ineffective assistance of counsel claims. First, On March 15, 2024, the Sixth Circuit decided *United States v. Singh*, 95 F.4th 1028, 1033–34 (6th Cir. 2024). Like Mr. Henderson's case, *Singh* involved an ineffective assistance of counsel claim in the context of a guilty plea. *Id.* Three judges of the Sixth Circuit, Judges Griffin, Thapar, and Nalbandian adjudicated Mr. Singh's claim without reference to the *Hoxie-Hatch* standard used by the Sixth in Mr. Henderson's case and in *Moore v. Mitchell*, 708 F.3d 760, 786 (6th Cir. 2013). Instead, the panel used the *Hill/Strickland* standard—exactly as Mr. Henderson argued should have occurred in his case *Id.* at 1033 (citing *Hill*, 474 U.S. at 59).

Not only did the panel apply this Court's holding in *Hill*—and not the more onerous standard from *Hoxie*, *Hatch*, or *Moore*—but it also analyzed Singh's claim without reference to any possible strategy of counsel's advice. Instead, the panel determined that the dispositive question was whether Singh could prove that going to trial would have been rational under the circumstances of his case. *Singh*, 95 F.4th at 1033 (citing *Lee v. United States*, 582 U.S. 357, 370 (2017), and *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012)). The Sixth Circuit denied Singh's claim because he was unable to point to evidence contemporaneous with his plea that showed it was reasonably likely that but for counsel's advice he would have proceeded to trial. *Id.* (citing *Lee*, 582 U.S. at 369). The *Singh* court's use of *Hill*—to the exclusion of *Hoxie*, *Hatch*, and *Moore*—and its analysis that did not contemplate any possible defense strategy—creates an intra-circuit split within the Sixth Circuit that mirrors the split already extant between the First, Sixth and Tenth Circuits and the rest of the federal courts.

Second, on March 28, 2024, the Sixth Circuit granted habeas relief based on both trial counsel ineffectiveness and a *Batson* violation. *Upshaw v. Stephenson*, — F.4th—, No. 22-1705, 2024 WL 1320111 (6th Cir. Mar. 28, 2024). While the ineffective assistance claim did not involve a guilty plea, the Sixth Circuit's rationale in granting relief further widens the split within the circuit as to the appropriate standard to be used. In *Stephenson*, the Sixth Circuit found that because trial counsel "offered no reason for his actions," the district court's conclusion that counsel's actions were "not objectively reasonable," "comports with our precedent." *Id.* at *6 (citing *Ramonez v. Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007) (finding counsel's performance "objectively unreasonable" where he failed to interview or make reasonable attempts to interview three known potential alibi witnesses); *Towns v. Smith*, 395 F.3d 251, 258-60 (6th Cir. 2005) (holding that counsel's failure to investigate a potential defense witness was objectively unreasonable); *Clinkscale v. Carter*, 375 F.3d 430, 443 (6th Cir. 2004) (same)). In so holding, the panel implicitly found that a petitioner need not meet the heightened *Hoxsie-Hatch* burden of showing that counsel's actions (or inactions) "[bore] no relationship to a possible defense strategy." *Hoxsie*, 108 F.3d at 1246; *Hatch*, 58 F.3d at 1447; *Ortiz Oliveras*, 717 F.2d at 1; *Moore,* 708 F.3d at 786.

Finally, on February 26, 2024, Judge McKeague of the Sixth Circuit issued an opinion in a non-capital § 2255 case finding that to prevail on an ineffectiveness claim, a petitioner must overcome a presumption that the action might be considered strategic. In so doing, Judge McKeague quoted *Strickland*:

> "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the

> circumstances, the challenged action 'might be considered sound trial strategy.' "

Jackson v. Douglas, No. 23-1801, 2024 WL 862440, at *3 (6th Cir. Feb. 26, 2024). (citing *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). However, Judge McKeague stopped short of requiring—as Mr. Henderson's panel did—that the petitioner prove that counsel's action bore *no relationship to a possible defense strategy*.

These three cases from the Sixth Circuit demonstrate that within the circuit there is disagreement as to the petitioner's burden of proof in an ineffective assistance of counsel claim. This intra-circuit confusion imitates the inter-circuit split between the First, Sixth, and Tenth Circuits and the rest of the federal bench. While most circuits follow this Court's precedent set out in *Hill* and apply *Strickland* even when there has been a guilty plea, the First, Sixth, and Tenth have adhered to their own standard—applying a much more stringent test for deficient performance. Here, the heightened requirement was dispositive of Mr. Henderson's claim—a factor that makes this case an excellent vehicle for resolving the split in authorities. Because counsel's advice to Mr. Henderson was not based on professional judgment but rather upon non-legal "hope" that the trial court would not follow the law—the advice was unreasonable under *Strickland* but deemed "related to" a strategy under *Hoxie-Hatch*. Certiorari 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*.

This issue merits the Court's attention. The circuit 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

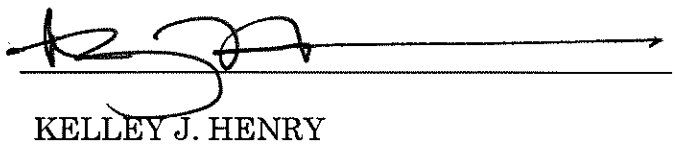
where a court of appeals has decided an important federal question, "that has not been, but should be, settled" by this Court. Sup. Ct. R. 10(c). In addition, Mr. Henderson's petition catalogued the inconsistent approaches employed by the Sixth and Tenth Circuit Courts of Appeals and various district courts with respect to this issue.

CONCLUSION

For the foregoing reasons, this Court should grant this petition to rehear and issue a writ of certiorari.

Dated: April 11, 2024

Respectfully submitted,



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