No. 07-1194

In the Supreme Court of the United States

STEVE HENLEY,

PETITIONER,

v.

RICKY BELL, WARDEN, RIVERBEND MAXIMUM SECURITY INSTITUTION,

RESPONDENT.

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

REPLY BRIEF OF PETITIONER

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ARGUMENT

The brief in opposition does not dispute that the courts of appeals are divided on both questions presented. As to the first, the Warden does not deny that the Sixth Circuit's decision squarely conflicts with the Fifth Circuit's decision in *Peterson v. Cain*, 302 F.3d 508, 515 (5th Cir. 2002), *cert. denied*, 537 U.S. 1118 (2003), on a pure question of law. And he does not deny that without this Court's intervention Henley will be executed, when he would be entitled to present evidence on the merits of his due process claim in the Fifth Circuit. The Warden also does not deny that the first question presented is an important question that warrants this Court's review. Rather, he protests that "this case does not present a proper vehicle to resolve the question presented," BIO-16; *id.* 21,[1] because Henley's claim was "waived" and therefore procedurally defaulted. But that contention was rightly rejected by both the district court and the Sixth Circuit, as it is plainly inconsistent with Tennessee and federal law.

As to the second question presented, the Warden does not dispute that the First, Third, and Seventh Circuits (and several state courts) have all recognized that tremendous prejudice arises from counsel's failure to introduce the promised testimony of an important witness. He does not deny that Henley would almost certainly have prevailed on his ineffective assistance of counsel claim had he sought habeas in any of those circuits. The Warden does persist in arguing that any testimony beyond Henley's grandmother's would have

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[1] "BIO-" refers to the brief in opposition; "Pet-" refers to the Petition; and "Pet. App." refers to Petitioner's Appendix.

been "cumulative," but he refuses to grapple with Henley's argument that, as a matter of law, the testimony of multiple family members pleading for a defendant's life is not merely cumulative in a capital sentencing proceeding.

Review is warranted on both questions.

1. a. The Warden does not dispute that the Sixth Circuit's decision in this case directly conflicts with the Fifth Circuit's decision in *Peterson*. He emphasizes that *Peterson* involved "*racial*" discrimination, BIO-19, in a cryptic attempt to distinguish between sex and race, but he does not explain why that difference should matter, and it surely does not. Pet-15-16, 18-20. *Hobby* itself involved a white male defendant challenging the exclusion of blacks and women and this Court emphasized that it is "well settled" that "purposeful discrimination against Negroes or women in the selection of … grand jury foremen is forbidden by the … Constitution." *Hobby v. United States*, 468 U.S. 339, 342 (1984); Pet-19. And a defendant's "standing to litigate whether his conviction was procured by means or procedures which contravene due process," *Campbell v. Louisiana*, 523 U.S. 392, 401 (1998), has never been limited to means or procedures involving race.

b. The Warden only briefly attempts to address whether *Campbell*'s due process holding was dictated by precedent. His arguments are unpromising.

The Warden does not even mention *Hobby*. He fails to acknowledge that in *Hobby* this Court highlighted Tennessee's system as one in which purposeful discrimination by race or sex would "distort the overall composition of the array or otherwise taint the

operation of the judicial process." *Hobby*, 468 U.S. at 348.

Instead, the Warden cites dicta from pre-*Hobby* decisions by this Court leaving open the question whether male defendants had standing to challenge the exclusion of women from grand juries *under the Equal Protection Clause*. BIO-17-18. Henley already discussed this line of cases in the Petition (at 14-15), noting that their recognition of the fundamental unfairness of discriminatory grand jury selection previewed and provided support for the due process jurisprudence of *Hobby* and *Campbell*. Pet-14-20.

c. The Warden primarily seeks to avoid certiorari by arguing that federal "habeas relief is barred because Henley did not fairly present his claim to the Tennessee state courts and is now barred from doing so under the waiver provisions of Tennessee's Post-Conviction Procedure Act." BIO-15-16, 19-20. That argument is specious and was rightly rejected by both the district court and the Sixth Circuit.

Federal habeas is available unless the state court's rejection of a petitioner's bid for post-conviction relief "clearly and expressly rel[ied] on an independent and adequate state ground." *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). Where "'it fairly appears that the state court rested its decision primarily on federal law,' this Court may reach the federal question on review unless the state court's opinion contains a 'plain statement' that [its] decision rests upon adequate and independent state grounds." *Harris v. Reed*, 489 U.S. 255, 261 (1989) (citation omitted) (alteration in original). Both the district court and the Sixth Circuit found in this case that the state court relied on federal law and did not "clearly and expressly" rely on any state law

ground to deny Henley relief. *See* Pet. App. 121a ("Because the record shows that the state court relied on federal law to resolve Petitioner's grand jury discrimination claim and did not clearly and expressly rely on an adequate and independent state ground, this Court may address Petitioner's claim."); *id.* 7a.

The district court's and court of appeals' decisions were correct because the state court here clearly and explicitly relied on *federal law* to deny relief. Pet. App. 90a. The state court "agree[d]" with *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999), which had held that "retroactive application of *Campbell*" to a conviction that was final *before Hobby* "was barred by *Teague*." Pet. App. 90a. *The Warden expressly concedes as much.* BIO-18 ("Applying the *Teague* analysis, the state court concluded that retroactive application of *Campbell* was not required."). As this Court has explained, "the *Teague* inquiry requires a detailed analysis of *federal* constitutional law." *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) (emphasis added). It does not matter for these purposes whether the state court believed it was directly applying *Teague* or instead adopting *Teague* as a rule of decision; either way, its decision did not clearly and expressly rely on adequate and independent state grounds. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) ("[W]hen resolution of [a] state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded.").[2]

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[2] *Cf. Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) ("Despite our puzzlement at the Court of Appeals' failure to resolve this case on the basis of procedural bar, we hesitate to resolve it on that

The state court, moreover, never said it was relying on state-law waiver principles. When the Tennessee state courts intend to invoke "waiver," they do so clearly and expressly. *E.g.*, *Wiley v. State*, 183 S.W.3d 317, 327 (Tenn. 2006) ("the issue was waived for post-conviction purposes. Tenn. Code Ann. §40-30-106(g)"); *Morris v. State*, 1998 Tenn. Crim. App. LEXIS 720, at *8 (Tenn. Crim. App. July 14, 1998) ("Since this issue was not presented on direct appeal nor in the first petition for post-conviction relief, the issue is waived."), *cert. denied*, 528 U.S. 828 (1999).

The Warden is left protesting that the state court *should have* denied Henley relief on state-law waiver grounds. BIO-20. The protest is both pointless and baseless. To begin with, even if the Warden were correct, his contention is irrelevant. This Court has made clear that "the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: '[T]he state court must have actually relied on the procedural bar as an independent basis for its disposition of the case.'" *Harris*, 489 U.S. at 261-62 (alteration in original).

On the merits, moreover, the Warden is simply mistaken about Tennessee waiver principles. Under settled Tennessee law, an unraised claim is not waived for purposes of post-conviction review so long as the

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basis ourselves. Lambrix asserts several reasons why his claim is not procedurally barred, which seem to us insubstantial but may not be so; as we have repeatedly recognized, the courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit. … [W]e proceed to decide the case on the *Teague* grounds that the Court of Appeals used.").

courts of Tennessee have not yet recognized it[3]—*even if the right exists under federal law.* Tennessee courts have consistently so held, explaining that "it is illogical to cast the veil of waiver over a petitioner's failure to pursue a right in the courts of Tennessee during a period of time in which those same courts were denying that the right existed." *Lingerfelt v. State*, 1991 WL 51407, at *4 (Tenn. Crim. App. Apr. 11, 1991).[4] In *State v. Coe*, 655 S.W.2d 903 (Tenn. 1983), *cert. denied*, 464 U.S. 1063 (1984), the Tennessee Supreme Court rejected the standing of a male to contest the systematic exclusion of women from the grand jury, *and the courts of Tennessee continue to reject this Court's decisions in* Hobby *and* Campbell.[5] If waiver

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[3] Tennessee's motion to reopen statute, Tenn. Code Ann. §40-30-117, and Tennessee's post-conviction waiver statute, Tenn. Code Ann. §40-30-106(g), both state the same rule: a claim not previously raised is waived unless it is based upon a constitutional right "*not recognized* as existing at the time of trial." (Emphasis added).

[4] *See also Branam v. State*, 1993 Tenn. Crim. App. LEXIS 523, at *2 (Tenn. Crim. App. Aug. 12, 1993) ("As Branam's first post-conviction petition predates the Tennessee Supreme Court's decision in *State v. Bolin* adopting [the United States Supreme Court's decision in] *Sandstrom*, we conclude that this issue is not waived.") (footnote omitted); *Gribble v. State*, 1995 Tenn. Crim. App. LEXIS 73, at *21 (Tenn. Crim. App. Feb. 8, 1995) ("At the time of the petitioner's trial and direct appeal, the position of Tennessee courts was that the instructions did not violate due process. Waiver should not apply."); *Allen v. State*, 854 S.W.2d 873, 875-76 (Tenn. 1993) (challenge to jury instruction invalidated by this Court in *Sandstrom* not waived even though not raised at trial, direct appeal, or in first post-conviction petition, because Tennessee state courts approved the jury instruction until after post-conviction petition adjudicated).

[5] The Tennessee Supreme Court has held that this Court "'greatly exaggerated' the powers of the Tennessee grand jury

does not apply absent the Tennessee courts' embrace of the right at issue, it "surely[] cannot apply" in circumstances like those here, where the right "had been specifically rejected as a ground for relief by the Tennessee courts." *Lingerfelt*, 1991 WL 51407, at *4.

In sum, the first question presents a square circuit conflict on an important issue of constitutional law, and there is no bar to this Court's review of it.

2. The Warden's opposition brief adds nothing insightful to the second question presented. He does not deny that the Sixth Circuit's decision rejecting a finding of prejudice conflicts with the decisions of other courts of appeals (and state courts) under like circumstances, and he makes no serious attempt to defend the decision on the merits.

a. The Warden does not deny that in the First, Third, and Seventh Circuits the result would almost certainly have been different. Pet-28-29, 31. Each of these circuits has sensibly concluded that counsel's failure to introduce the promised testimony of an important witness is intensely prejudicial to the defendant. Pet-28-29 & n.5 (citing, *e.g.*, *Ouber v. Guarino*, 293 F.3d 19, 33 (1st Cir. 2002) ("failing to present the promised testimony of an important witness" was "monumental"); *Anderson v. Butler*, 858 F.2d 16, 17-18 (1st Cir. 1988) ("little is more damaging")).

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foreman," and (contrary to this Court's express analysis, *Campbell*, 523 U.S. at 402-03) that "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." *See State v. Bondurant*, 4 S.W.3d 662 (Tenn. 1999). Certiorari is necessary to ensure the State's compliance with this Court's decisions.

The Warden makes no genuine effort to distinguish these cases. He observes that *Ouber* (the only case he even addresses) involved counsel that "repeatedly vowed" to introduce evidence and then did not. BIO-21-22. But nothing in *Ouber* (or any other case) turned on how many times counsel promised to introduce the evidence. The prejudice resulted from the adverse inference a jury naturally would draw from counsel's failure to introduce promised testimony—"reasonable jurors would think the witness[] to which counsel referred … w[as] unwilling or unable to deliver the testimony he promised." *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166-67 (3d Cir.), *cert. denied*, 510 U.S. 1028 (1993). This Court should resolve this important conflict among the circuits.

b. The broken promise here was particularly egregious. When Reneau called Henley's mother to the stand, the jury expected that it would hear why they should spare her son's life. When she did not testify, the jury was left wondering why. And as the Tennessee Court of Criminal Appeals found, it is a commonsense conclusion "that a jury is going to be prejudiced against a defendant upon that person's own mother refusing to testify on his or her behalf." Pet. App. 52a; *id.* n.10.[6]

The Warden continues to insist that Henley's mother did not "openly refuse" to testify in front of the jury. BIO-3. That is on one level incorrect and on another irrelevant. It is undisputed that Reneau called

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[6] The Warden contends that Henley is arguing for a "presumption of prejudice." BIO-22. That is mistaken. Henley argues only that the prejudice in these circumstances should be obvious to reasonable jurists—as is evident from the decisions of other circuits.

her to the stand in open court without ever having spoken to her before; that she declined to take the stand and instead asked for a recess to speak with Reneau; that after the recess she did not take the stand; and that the jury was given no explanation for her absence. It is hard to see how this is not an open refusal. But to the extent the Warden disputes its "open[ness]," the linguistics is unimportant, as the prejudice to Henley from this course of events was palpable. The Third Circuit's decision in *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005), *cert. denied*, 547 U.S. 1035 (2006), which found prejudice in similar circumstances, did not turn on whether there was some public refusal. Rather, the defendant's sons (who testified favorably at trial) were simply absent from the sentencing hearing, and the Third Circuit explained that: "Surely the jury was left wondering why the sons would not have pled for their father's life and could have reasonably drawn a negative inference from their absence from the courtroom during the penalty phase." 428 F.3d at 471; Pet-30.

c. The Warden touts the Sixth Circuit's view that the eleven pages of testimony from Henley's grandmother (besides Henley himself, the sole mitigation witness) gave the jury an adequate basis to choose life or death, and that counsel's failure to interview or call five of Henley's family members as witnesses was not prejudicial because their testimony would have been "cumulative." BIO-25. That reasoning is dangerously obtuse in the capital sentencing context and was plainly incorrect in this case.

First, as a matter of law, evidence is "cumulative" only "when it adds very little to the probative force of

the other evidence in the case." *United States v. Williams*, 81 F.3d 1434, 1443 (7th Cir. 1996). The mere fact that one witness testifies on a general subject does not render additional evidence "cumulative"—it depends on the circumstances. This is particularly true in a capital sentencing proceeding, which requires a balancing of the *weight* of mitigating and aggravating factors. As Judge Cole explained: "In this context, … positive cumulative testimony benefits the defendant because the testimony of several family members all pleading for the defendant's life has a greater impact on the jury than the testimony of a single individual, regardless of how favorable that person's testimony is." Pet. App. 29a.

Second, Henley's grandmother's testimony was hardly a "coherent and full factual picture of the defendant," Pet-32, sufficient to enable the jury to treat Henley as a "'uniquely individual human being[].'" *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (citation omitted). The testimony from Henley's mother, sisters, son, and daughter would have given the jury the reasons to choose life. Pet-6.

Third, Henley's grandmother suffered from a lack of credibility not shared by the other potential witnesses. The Warden does not dispute that, during the guilt phase, Henley's grandmother had attempted to provide Henley with an alibi and that the jury rejected her testimony, or that the prosecution's chief witness testified that Henley felt compelled to commit the murders on his grandmother's behalf. Pet-32-33. These unique credibility problems demolish the Warden's claim that testimony from additional witnesses lacking these handicaps would have been merely cumulative. *Cf. United States v. Stevens*, 2008

U.S. App. LEXIS 10455, at *5-6 (11th Cir. May 13, 2008) (evidence not cumulative because "there were credibility questions about the testimony of two of the eyewitnesses"); *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000) (same).

d. The Warden argues that "Henley's proffered [expert] testimony is similar to the mental health evidence this Court found insufficient in *Strickland*." BIO-24. But *Strickland* involved "overwhelming aggravating factors," *Strickland v. Washington*, 466 U.S. 668, 700 (1984), and the mitigating evidence there would obviously have needed to be more powerful to demonstrate prejudice. Henley's case involved only one aggravating factor.

e. The Warden also argues that the additional mitigation witnesses would have contradicted Henley's trial testimony that he did not abuse drugs or alcohol. BIO-23-24. But, as the Petition explains, Henley *did not present a residual doubt case at sentencing*. Pet-33-34. Where the jury has already convicted, the benefits of introducing mitigating evidence far outweigh the costs to the defendant's credibility.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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