No. 19–5351

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY LEE JOHNSON,

Petitioner,

v.

WILLIAM SPERFSLAGE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether clearly established United States Supreme Court precedent holds the Due Process Clause requires state appellate courts to exercise plain-error review of a forfeited shackling claim, an issue that was neither raised in nor passed upon by the Eighth Circuit?

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BRIEF IN OPPOSITION

OPINIONS BELOW

The Eighth Circuit Court of Appeals' unpublished opinion denying 28 U.S.C. § 2254 habeas corpus relief based on a lack of governing clearly established Federal law can be found at 768 Fed. Appx. 592 (8th Cir. 2019) Pet. App. A. Also unpublished is the order by the United States District Court for the Southern District of Iowa. Pet. App. B.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

"No State . . . shall 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."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(a) provides

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf

> of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> 28 U.S.C. § 2254(d)(1) provides:
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States

STATEMENT OF THE CASE

Petitioner seeks certiorari review of the lower federal courts' denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Each federal court held that Iowa's courts reasonably required petitioner to prove *Strickland* prejudice to prevail on a claim that his attorneys should have objected to shackling him at trial.

Petitioner argues the nature of the error relieves him of the burden to prove prejudice. Yet, at the time of petitioner's trial, various state and federal courts disagreed about whether a defendant must demonstrate prejudice when a "structural" error is raised via an ineffective-assistance-of-counsel claim. The law was not clearly established, precluding § 2254 habeas relief.

This Court has never held that impermissible shackling relieves a defendant from the burden to prove prejudice flows from his attorneys' failure to object. The Court's recent case, *Weaver v. Massachusetts*, 137 S. Ct. 1913 (2017), discussing when an attorney's failure to object to a structural error will eliminate the need to prove *Strickland* prejudice, does not govern the distinct issue of shackling. Indeed,

the Court has never held shackling to be a structural error; instead, it is amenable to harmless-error review. Absent clearly established federal law in the form of governing United States Supreme Court precedent, petitioner's habeas claim cannot merit relief. He also cannot demonstrate prejudice because he is surely guilty of two murders.

A. Factual Background

No one doubts petitioner killed his estranged wife and her paramour. Petitioner's teenaged daughter witnessed the murders and told the jury the story. *State v. Johnson*, No. 08–0320, 778 N.W.2d 218, 2009 WL 4842480, at *1–2 (Iowa Ct. App. Dec. 17, 2009); Resp't App. pp. 8–9.

The Iowa Court of Appeals thoroughly described the iron-clad evidence proving petitioner's guilt. First, that court explained petitioner's motive and intent to commit the double-murder:

> Sometime in March 2007, Johnson's wife, Kim Johnson, left the family's home in Coon Rapids and moved to an apartment in nearby Bayard. Johnson's teenage daughter, Jessica, moved in with Kim, and his teenage son, Josh, remained with him. In early April 2007, Johnson ran into an acquaintance, Mark Bonney, at the lumberyard in Bayard. Johnson asked Bonney if he knew that Kim had begun dating Greg White, and stated that he would like to get "his hands on" White. Bonney warned Johnson that White was strong and that he carried knives, but did not give serious consideration to Johnson's comment.

Id. at *1; Resp't App. p. 8.

About a month after the separation, petitioner acted on his threats:

> On the evening of April 29, 2007, Johnson built a bonfire at his home and drank "four or five" cans of beer. He then retrieved a loaded handgun from inside his home and drove to Kim's apartment in Bayard. Johnson parked about a block away from the apartment at just after

> 10:00 p.m. He was wearing a black sweatshirt with the hood pulled up over his head. As Johnson approached the apartment he noticed the wooden front door was open. Through the screen door, Johnson saw White in the kitchen, wearing only pajama pants. White did not notice Johnson outside the door.
>
> Johnson knelt and shot White three times through the screen door. He then entered the apartment and shot White once more. Kim ran from Jessica's bedroom, saw White on the floor, and ran back into the bedroom screaming and trying to shut the door behind her. Johnson followed Kim into the bedroom and shot her four times. He then went back into the hall and beat White on the head with the butt of his gun to make sure he was dead, crushing his skull. Johnson reentered the bedroom and beat the back of Kim's head with his gun, also crushing her skull. At that point, Jessica tried to push him off Kim, but he shoved her back to the bed. Johnson's hood fell away from his face, and Jessica realized he was her father. Johnson told her, "It is over. She was f'ing him. I'm going to jail, and I don't care." Johnson then left the apartment.

Id. at *1–2; Resp't App. pp. 8–9.

In the minutes after the killings, petitioner and his daughter each told multiple other people that petitioner had killed Kim.

> Jessica checked her mother for a pulse and tried to call 911. A neighbor, Shanda Thomas, heard the gunshots and ran outside. Jessica told Thomas that "her fucking dad shot her mom." As they waited for police to arrive, Jessica called her grandmother. Thomas heard Jessica tell her grandmother, "You need to get over here. Your fucking son shot my mom." Jessica then called her uncle, Joseph Johnson, and said, "Your fucking brother shot my mom."
>
> Soon after receiving the call from Jessica, Joseph also received a call from Johnson. Johnson asked, "Did you hear what I did?" to which Joseph responded, "Yes, Jessie told me." Joseph talked his brother into meeting him at the Guthrie County Sheriffs [sic] Office to turn himself in. When they arrived at the sheriff's office, Johnson noticed a scrape on his hand and told Joseph that he must have gotten it while "beating them . . . to make sure they were dead."

Id.; Resp't App. pp. 9–10. Petitioner also twice confessed his crime to his sister-in-law, Teresa, immediately after the shooting.

> The first time he said, "I have some sad news. I shot Kim." In his next phone conversation with Teresa, Johnson told her, "I shot them both" and told her, "You're going to have to take care of the children, because I'm going to jail probably." He continued, "I was stupid. I drove to town with a gun." Johnson explained to Teresa that he had gotten drunk and had driven to town to see if Kim was with another man, and if she was, "he was either going to do something, or he was going to kill them."

Id. at *1 n.1; Resp't App. p. 9 n.1.

Petitioner confessed to law enforcement also:

> Johnson was handcuffed and brought inside the sheriff's office. Officer Jeremy Long read Johnson his *Miranda* rights, asked him a few questions, booked him, and placed him in a jail cell. At 1:27 a.m. Johnson submitted to a breath test, which measured his blood alcohol at .019. Johnson also gave a DNA sample. At 1:39 a.m. Special Agent Mitch Mortvedt began to interview Johnson. The interview concluded at 3:38 a.m. Mortvedt interviewed Johnson again later that morning, from 10:02 to 11:31 a.m. During the course of these interviews, Johnson confessed to the shootings of Kim and White. Johnson explained the marital problems he and Kim had been going through, his discovery that Kim was dating someone else, and what led him to shoot the victims earlier that evening. Johnson also described exactly where he had thrown his gun on his drive home.

Id. at *2; Resp't App. p. 10. Law enforcement located the gun where petitioner told them it could be found, and forensic testing confirmed that gun to be the murder weapon. *Id.* at *2 n.3; Resp't App. p. 10 n.3. DNA testing also connected petitioner to the murder scene:

> DNA tested from the mouth of a Budweiser can found on the ground outside the apartment matched Johnson's. A muddy footprint consistent with Johnson's size 9 1/2 Dickies boots was discovered near the apartment. In addition, blood found on Johnson's jeans tested positive with Kim's DNA.

Id. at *2 n.2; Resp't App. p. 10 n.2.

B. Procedural Background

1. Trial

Based on the evidence discussed above, the State charged petitioner with two counts of first-degree murder. *Id.* at *2; Resp't App. p. 10. Petitioner pleaded not guilty, and his general trial strategy was to limit his culpability to a lesser-included offense by proving he acted out of sudden passion or without premeditation. *Id.* at *2 & n.4; Resp't App. p. 10 & n.4.

During the January trial, petitioner consented to being shackled to free the local deputy sheriffs from supervising him during trial. They could instead patrol the winter roads of their rural Iowa community. Trial Tr. pp. 9–11; Resp't App. 3–6. To "take care of any speculations on the part of the jurors," the district court proposed to inform the jury venire prior to voir dire that petitioner "has no plans to go anywhere," but agreed to wear shackles for the purpose of reducing the need for courtroom security. Trial Tr. pp. 9–11; Resp't App. pp. 3–6. Defense counsel was "agreeable" to the court's proposal but asked the court to advise the jury, in addition, "that there are no conclusions to be drawn from the fact that he has shackles on." Trial Tr. pp. 9–11; Resp't App. pp. 3–6. The court also asked petitioner personally if that approach was acceptable, to which petitioner responded: "Very much so, Your Honor." Trial Tr. pp. 9–11; Resp't App. pp. 3–6. Although jury voir dire was not transcribed by a court reporter, the district court judge testified during postconviction proceedings he in fact informed the jury that

petitioner was wearing shackles and that they should not draw any conclusions from that fact. C.A. App. 16–27.

The jury found petitioner guilty on each count of first-degree murder, and the district court sentenced petitioner to concurrent sentences of lifetime imprisonment. *Johnson*, 2009 WL 4842480, at *2; Resp't App. p. 10.

2. Direct Review

On direct appeal, petitioner did not raise any argument related to shackling but instead argued his attorney should have moved to suppress his confession to police. *Id.*; Resp't App. pp. 11–19. The Iowa Court of Appeals held counsel had no duty to move to suppress the confession. It noted "there was overwhelming evidence of Johnson's guilt without regard to his own statements." This included his daughter's eyewitness account, his confession to multiple other people, his DNA at the scene, his estranged wife's blood on his jeans, and shell casings matching his pistol at the scene. *Id.* at *4–5; Resp't App. p. 18.

3. State Postconviction Relief Proceedings

Next, petitioner applied for postconviction relief, challenging for the first time his attorneys' failure to object to shackling during trial. Resp't App. pp. 33–34. The postconviction district court concluded petitioner had been shackled, the jury was aware of the shackles, and counsel should have objected. Resp't App. pp. 38–39. As a legal matter, the court then placed the burden on the State to prove beyond a reasonable doubt that counsel's performance did not prejudice petitioner. Resp't App. pp. 40–44. Although the postconviction district court noted that the State

proved petitioner shot Kim "beyond any doubt," the court required the State to disprove prejudice. It held the State could not meet a burden to prove the shackling did not prejudice petitioner. Resp't App. pp. 31, 44. The court granted petitioner postconviction relief in the form of a new trial. Resp't App. p. 44.

The State appealed. It argued the district court erred by assigning to the State the burden to prove a lack of prejudice from the ineffective assistance of counsel. *See Johnson v. State*, No. 13–1554, 860 N.W.2d 913, 919 (Iowa Ct. App. 2014); Resp't App. p. 48. The Iowa Court of Appeals agreed with most jurisdictions that the burden to prove prejudice remains with the postconviction applicant when claiming his attorney should have objected to shackling. *Id.* at 919-20; Resp't App. pp. 53–54. Despite agreeing with the State's argument that uncontested facts overwhelmingly proved the elements of first-degree murder, the court remanded the case for the postconviction district court to apply the correct prejudice standard in the first instance. *Id.* at 921; Resp't App. pp. 58–59. On remand, the postconviction district court held that petitioner failed to prove a reasonable probability of a different outcome. Ruling Following Remand p. 2; Resp't App. p. 63.

This time petitioner appealed. He argued that shackling is inherently prejudicial and that his attorneys' error amounted to structural error. The Iowa Court of Appeals affirmed the denial of postconviction relief, agreeing with the district court that petitioner failed to carry his burden to prove *Strickland* prejudice. *Johnson v. State*, No. 15–0776, 886 N.W.2d 617, 2016 WL 4803734, at *1 (Iowa Ct. App. Sept. 14, 2016), *cert denied* 138 S. Ct. 148 (2017); Resp't App. p. 72.

The court noted, "It is unclear whether the jury could see Johnson was wearing shackles because he was seated when the jury entered the courtroom, was wearing long trousers, and was seated behind counsel table, which was partially shielded from the jury box by another table and file boxes." *Id.* at *2; Resp't App. p. 70. Balanced against the relatively un-offensive nature of the shackling was "overwhelming" evidence against petitioner. *Id.* at *3; Resp't App. p. 72. This Court denied certiorari review. *Johnson v. Iowa*, No. 16–9511, 138 S. Ct. 148 (2017).

4. Federal Habeas Proceedings

Simultaneously with his state postconviction relief case, petitioner sought federal habeas relief. D. Ct. Doc. 1 (Feb. 25, 2011). The federal district court stayed the habeas case until the conclusion of state proceedings. D. Ct. Doc. 11 (April 18, 2011).

Among other issues, petitioner briefed a multifaceted claim challenging shackling. The district court noted that petitioner had properly exhausted only one of the "multiple slightly differing claims" he presented regarding shackling—namely, that his trial attorneys were ineffective for failing to object to the shackling. Pet. App. B p. 6 n.1. The court held that any freestanding or "independent" claim of plain error regarding shackling was not presented in state court. Pet. App. B p. 6 n.1. Substantively, the district court held that Iowa's courts correctly required him to prove prejudice to prevail on his *Strickland* claim. Pet. App. B pp. 7–8. Like every court to consider this case, the federal district court characterized the evidence as "overwhelming." Pet. App. B pp. 6, 10–11. The court also noted "the

measures considered by the trial court to limit prejudice stemming from the shackles by restricting visibility of the shackles and the court's plan to give a neutral reason for their use." Pet. App. B p. 7. Considering those factors, the federal district court held that Iowa's courts reasonably rejected petitioner's ineffective-assistance-of-counsel claim. Pet. App. B p. 8.

The court also held that Iowa's courts reasonably rejected petitioner's two other ineffective-assistance claims because their rejection was supported by federal law and overwhelming evidence. Pet. App. B pp. 10–12. Finally, the district court granted a certificate of appealability for the shackling-based ineffective-assistance claim. Pet. App. B p. 13.

The United States Court of Appeals for the Eighth Circuit affirmed the denial of the § 2254 petition for habeas corpus. Pet. App. A p. 5. The federal appellate court held that *Deck v. Missouri*, 544 U.S. 622, 635 (2005), a case on direct review, did not clearly establish a rule governing whether prejudice must be proven to succeed on an ineffective-assistance claim raised in a collateral attack. Pet. App. A pp. 2–3. Because Iowa's courts "agreed with the majority of jurisdictions that Johnson should be required to show prejudice to establish ineffective assistance of counsel," they did not make " 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' " Pet. App. A p. 4 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). The court reasoned that there is no Supreme Court decision clearly establishing a governing rule and that

the Iowa courts' approach is consistent with the later case of *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). Pet. App. A p. 4.

REASONS FOR DENYING CERTIORARI

The Eighth Circuit's opinion in this § 2254 habeas case does not conflict with *Deck v. Missouri*, 544 U.S. 622 (2005). *Deck* holds that "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Id.* at 635. Although *Deck* notes that shackling is "inherently prejudicial," that case does not label shackling a "structural error" but instead allows a state to prove harmless error. *Id.* Petitioner is therefore wrong to interpret *Deck* to hold that the Due Process Clause requires state appellate courts to review shackling claims for plain error or that shackling is a structural error transcending the burden to prove prejudice as part of an ineffective-counsel claim.

Petitioner's novel interpretation of *Deck* is not worthy of certiorari review. He did not request plain-error review from Iowa's courts as required by settled habeas law. And he did not argue to the lower federal courts that the Due Process Clause required plain-error review by Iowa's courts. There is no United States Supreme Court precedent governing the claim he presented to Iowa's courts, precluding habeas relief under 28 U.S.C. § 2254(d). And there is no conflict among the federal circuit courts about whether clearly established law requires proof of prejudice to succeed on an ineffective-assistance claim based on shackling. Finally, the circuit court's opinion correctly distinguished *Deck* based on procedural posture

and applied the well-settled standard provided by *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Petitioner has not previously argued that the United States Constitution requires plain-error review of waived or forfeited constitutional errors on direct appeal.

Petitioner argues that Iowa's lack of plain-error review contravenes the Due Process Clause of the United States Constitution. He asks this Court to review for plain error. Petitioner did not ask for plain-error review on direct appeal. He also did not argue in postconviction proceedings that the direct appellate court's failure to notice plain error violated the Federal Constitution. For that reason, the federal district court held petitioner failed to present a freestanding "plain error" claim to Iowa's courts. Pet. App. A p. 6 n.1. Citing the exhaustion requirement of 28 U.S.C. § 2254(b), the federal court denied the claim. This Court need not review the question of whether due process requires plain-error review because petitioner did not present that issue to Iowa's courts. And although petitioner discussed Iowa's lack of plain error in his federal briefing, he did not argue due process requires plain-error review. Instead, he relied on Iowa's lack of plain-error review as a justification to omit the requirement of proving *Strickland* prejudice. This Court should not grant certiorari review for a question not presented to the lower federal courts.

B. A writ of habeas corpus may issue only for state-court adjudications contrary to United States Supreme Court precedent. No such precedent eliminates the requirement to prove an attorney's failure to object to shackling caused prejudice.

In petitioner's state-court collateral attack, the primary issue was which prejudice standard applies when an attorney fails to object to shackling during trial. Resp't App. p. 53. Yet, petitioner seeks review of a federal court's denial of the writ of habeas corpus—a collateral attack on a state-court conviction, not a direct review. The petition fails to account for this procedural posture and therefore misstates the question presented by this case.

Petitioner argues he should not have to prove prejudice. But 28 U.S.C. § 2254(d) asks whether the state courts' decision to require prejudice to complete a Sixth Amendment violation was contrary to, or an unreasonable application of, United States Supreme Court case law.

When a state court has adjudicated the merits of a claim, habeas relief cannot issue unless the state-court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under § 2254(d)(1)'s " 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court

precedent and arrives at a result opposite [that of the Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000) (O'Connor, J., concurring) (writing for a majority in the cited section). Under section 2254(d)(1)'s " 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

"The starting point for cases subject to § 2254(d)(1) is to identify the 'clearly established Federal law, as determined by the Supreme Court of the United States' that governs the habeas petitioner's claims." *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013) (per curiam). Only the Supreme Court can clearly establish federal law, and only its holdings—as opposed to its dicta—count as clearly established law. *White v. Woodall*, 572 U.S. 415, 420 (2014). And "if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." *Id.* at 426 (quotations omitted). Petitioner points to no United States Supreme Court case holding that the Due Process Clause requires a state court to engage in plain-error review or apply an automatic prejudice standard to an ineffective-counsel claim based on shackling.

Generally, in a § 2254 case alleging ineffective counsel, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). To show

constitutionally ineffective assistance of counsel under this standard, a petitioner bears the burden of affirmatively showing "both deficient performance by counsel and prejudice." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

To evade the prejudice requirement, and in support of his request for plain-error review, petitioner relies primarily on *Deck v. Missouri*, 544 U.S. 622 (2007). That case does not provide the clearly established federal law petitioner needs. In *Deck*, defense counsel repeatedly objected to the use of leg irons, handcuffs, and a belly chain during the penalty phase of a capital case that ultimately yielded a death sentence. *Id.* at 625. The Missouri Supreme Court held Deck could not prove prejudice, and it affirmed the sentence. *Id.* at 625–26.

On direct review, the Supreme Court cited the long-standing rule that shackles are not permitted as a routine matter during the guilt phase of trial, held that rule to be guaranteed by the Fifth and Fourteenth Amendments, and extended the rule to the penalty phase of trial. *Id.* at 629, 633. Yet, "mindful of the tragedy that can result if judges are not able to protect themselves," *Deck* recognizes the rule is subject to exceptions. *Id.* at 632. A judge is permitted, in the exercise of discretion, to consider case-specific "special circumstances, including security concerns, that may call for shackling." *Id.* at 633.

While shackling is "inherently prejudicial," *Deck* does not label shackling a "structural error," provide an automatic prejudice rule, or exempt even a preserved shackling claim from harmless-error review. *Id.* at 635. Shackles can, under *Deck*, undermine the presumption of innocence, interfere with the assistance of counsel,

and undermine symbolic objectives like the dignity and decorum of court proceedings. *Id.* at 630–31. Despite the "negative side effects," however, the Court did not hold shackling always justifies a new trial. *Id.* Instead, the Court approved the familiar harmless-error standard for preserved constitutional errors: "The State must prove 'beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.' " *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)) (marks omitted).

Thus, *Deck* does not clearly establish that shackling is a structural error. Even when a shackling error is preserved and presented on direct review it is subject to harmless-error analysis. This undermines the idea that due process would require automatic prejudice or even plain-error review. And *Deck* says nothing about whether a shackling error would be subject to the *Strickland* prejudice analysis in a collateral attack.

Petitioner therefore can only prevail with an extension of *Deck*, applying it to the ineffective-counsel claim contained in his collateral attack. The state courts were not unreasonable to reject that extension. "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Mirzayance*, 556 U.S. at 122 (internal quotation marks omitted).

Petitioner does not identify a Supreme Court case addressing whether a state court must forego the prejudice element of an ineffective-assistance claim based on

shackling. Respondent has found none. The lack of clearly established law is fatal to petitioner's habeas case.

C. The circuit courts are not split on the relevant question.

Respondent cannot locate a circuit court case holding that the Supreme Court has clearly established the law governing this issue. Each circuit to address this question has pointed to the paucity of United States Supreme Court precedent and held that a state court reasonably adjudicated an ineffective-assistance claim based on shackling by requiring a showing of prejudice. *Jones v. Florida*, 834 F.3d 1299, 1320 (11th Cir. 2016) (holding *Deck* does not alter burden to prove *Strickland* prejudice); *Walker v. Martel*, 709 F.3d 925, 941 (9th Cir. 2013) ("*Strickland* bears its own distinct substantive standard for a constitutional violation; it does not merely borrow or incorporate other tests for constitutional error and prejudice."); *Marquard v. Sec. for Dep't of Corrs.*, 429 F.3d 1278, 1313 (11th Cir. 2005) ("After *Deck*, Marquard still has the burden in his IAC-shackling claim to establish a reasonable probability that, but for his trial counsel's failure to object to shackling, the result of his sentencing would have been different."). Federal circuit courts have uniformly rejected petitioner's claim.[1]

The same set of circuit court cases demonstrates there is no federal circuit court split of authority on the broader question of whether an ineffective-assistance claim based on shackling requires proof of prejudice. *See also Whatley v. Georgia*,

[1] There can be no split among state courts regarding the question actually decided in this federal habeas case for the obvious reason that those courts do not decide petitions for writs of habeas corpus brought pursuant to 28 U.S.C. § 2254, and therefore have no occasion to apply § 2254(d).

927 F.3d 1150, 1187 (11th Cir. 2019) ("Petitioner cannot borrow presumed prejudice from a hypothetical direct appeal—that would never happen because the substantive shackles claim is procedurally defaulted—and use it to show actual prejudice under *Strickland*."). Thus, the broader question is also unworthy of certiorari review.

There is some evidence of a split of authority among the state courts on this broader question. *Compare Whatley v. Terry*, 668 S.E.2d 651, 663 (Ga. 2009) (requiring prejudice to prove ineffective-assistance claim based on shackling); *Stephenson v. State*, 864 N.E.2d 1022, 1037–38 (Ind. 2007) (same); *People v. Porter*, 2013 WL 5495555, at *3 (Mich. Ct. App. Oct. 3, 2013) (same); *with People v. Robinson*, 872 N.E.2d 1061, 1073 (Ill. Ct. App. 2007); *Dickerson v. State*, 269 S.W.3d 889, 893–94 (Mo. 2008). Yet, that split is not sufficiently developed to justify this Court's review (apart from not being directly implicated by this habeas case).

The split among the state courts is even less consequential because those cases were decided before *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911–12 (2017). With the framework provided by *Weaver*, the split is likely to resolve over time.

In *Weaver*, the United States Supreme Court considered whether "the prejudice inquiry is altered when the structural error is raised in the context of an ineffective-assistance-of-counsel claim." *Id.* at 1905. There, defense counsel failed to object when a court official excluded the defendant's mother and her minister from the courtroom during jury selection—a conceded violation of the constitutional right to a public trial. *Id.* at 1906. The Court answered the question presented

"specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection." *Id.* at 1907. It left open the question of how its opinion would apply to other structural errors raised in the ineffective-assistance context. *Id.* at 1912. As a result, *Weaver* is not the clearly established federal law petitioner needs to leverage against Iowa's resolution of his case.

To the contrary, *Weaver* demonstrates the Eighth Circuit correctly held that Iowa's courts reasonably adjudicated the claim. The Court's analysis of the public-trial right suggests the Court would require a showing of *Strickland* prejudice for a shackling error brought only in the ineffective-assistance context. Hence, the Iowa Court of Appeals was eminently reasonable in coming to the same conclusion in resolving a complicated and open issue.

Analytically, *Weaver* begins with the general principle that even preserved constitutional errors are subject to harmless-error review—that is, the government can prove beyond a reasonable doubt that the error did not contribute to the verdict. *Id.* at 1907 (citing *Chapman*, 386 U.S. at 24; *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991)). Yet, the Court noted that some errors—deemed structural errors—so affect the "framework" within which the trial proceeds that they are not subject to harmless-error review. *Id.* at 1907–08. The various rationales for dubbing a certain error "structural" highlighted a critical point: "An error can count as structural even if the error does not lead to fundamental unfairness in every case." *Id.* at 1908.

Turning to the structural right at issue there, the Court said the right to a public trial is subject to exception if the district court makes a finding of necessity on the record. *Id.* This suggested "that not every public-trial violation results in fundamental unfairness." *Id.* at 1909. So, "while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint." *Id.* at 1910. A violation of the public-trial-right therefore does not automatically satisfy the standards for *Strickland* prejudice. *Id.* at 1911. Thus, the defendant retained the burden to prove prejudice resulted from his attorney's failure to object to the courtroom closure. *Id.*

The Court buttressed its analysis by pointing out that failing to object in district court deprives the trial court of a chance to cure a violation of the right and increases systemic costs of remedying any error. *Id.* at 1912. "These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel." *Id.*

These principles apply equally to a claim that a trial attorney should have objected to shackling (notably, not a "structural error"). As with closing the courtroom, shackling is permissible in some instances. *Deck*, 544 U.S. at 632. This suggests the *Strickland* prejudice standard will not automatically be satisfied in every case of shackling, and therefore militates against discarding that well-established standard altogether. Also, some shackling errors are the result of a lack

of district court findings related to necessity. *Id.* Where no objection is made during trial, the State lacks the chance to provide evidence of necessity, and the district court cannot make the related findings. *See Weaver*, 137 S. Ct. at 1909. "It would be unconvincing to deem a trial fundamentally unfair just because a judge omitted to announce factual findings before making an otherwise valid decision . . . ." *Id.* at 1909–10. The trial might contain error, but the proceedings are not necessarily fundamentally unfair. Finally, a conviction vacated in a collateral attack bears greater costs, justifying a different prejudice requirement. *See id.* at 1912. In sum, *Weaver* will resolve the split among state courts, leading those courts to require—like every federal circuit to decide the issue—a showing of prejudice flowing from counsel's failure to object to shackling.

D. The state courts correctly required a showing of prejudice.

Apart from likely resolving the split among state courts, *Weaver* supports Iowa's decision to require *Strickland* prejudice. As the federal district court recognized, the lack of objection prevented the trial court from making a record on necessity or simply deciding not to employ shackles. Pet. App. B p. 7. *See Weaver*, 137 S. Ct. at 1909. And the collateral nature of the ineffective-counsel claim bears additional costs. Namely, a new trial here would occur more than a decade after the original conviction, of a clearly guilty person, solely because the lack of a contemporaneous objection prevented the trial court from either remedying the error or making sufficient findings to support shackling petitioner.

Petitioner labels shackling structural error and likens his attorney's performance to complete abandonment, obviating proof of prejudice. Yet, only in a very limited set of circumstances does counsel's performance result in structural error. *See Johnson v. United States*, 520 U.S. 461, 468 (1997) (listing limited types of structural error, including the complete denial of counsel). When the Court "spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case," the Court "indicated that the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. 685, 696–97 (2002). If the argument is only that counsel failed to oppose the prosecution at a specific point, the rule of *Strickland* applies and the rule of *Cronic* does not. *Id.* This is not a case of counsel abandoning petitioner altogether or acting with a conflict. As such, *Strickland* provides the relevant clearly established federal law: "a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." *Weaver*, 137 S. Ct. at 1910–11 (quotations omitted).

It would be anomalous to apply a less demanding prejudice standard to an ineffective-assistance claim brought in a collateral attack than is applied to a claim preserved by a contemporaneous objection. Even a preserved shackling claim raised in a § 2254 habeas petition would be evaluated for its effect on the verdict. *See Elmore v. Sinclair*, 799 F.3d 1238, 1247 (9th Cir. 2015) ("We assess whether Elmore's shackling 'had substantial and injurious effect or influence in determining the jury's verdict.' *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)."). The Eighth

Circuit correctly held that Iowa's courts reasonably required a showing of *Strickland* prejudice.

E. The state courts reasonably applied *Strickland*.

The Eighth Circuit also correctly held Iowa's courts reasonably held that petitioner could not prove *Strickland* prejudice. Here, petitioner bears the burden to prove the application of Supreme Court precedent—namely *Strickland*—was objectively unreasonable, not merely incorrect. *See Woodall*, 134 S. Ct. at 1702 ("clear error will not suffice."). The "standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 103 (internal quotations omitted). Petitioner did not meet that demanding standard.

Petitioner appeared in court in civilian clothing and the shackles were visible only below the cuffs of his pants, if at all. The district court agreed to admonish the jury that petitioner was in shackles voluntarily (so the deputies could perform other functions) and that the jurors should draw no adverse inference from the shackles. Trial Tr. pp. 9–11; Resp't App. pp. 3–6. This admonishment reduced any risk the jury would assume petitioner was shackled because the court deemed him to be dangerous.

In contrast with this inconspicuous shackling, stands the unmistakable evidence of petitioner's guilt. Petitioner's identity as the killer was undisputed, and the State overwhelmingly proved petitioner willfully, deliberately, and premeditatedly shot his wife and her new lover. He then bludgeoned them with the

butt of his handgun to ensure they were dead. The Iowa Court of Appeals succinctly recounted the evidence proving petitioner's intent to kill:

> This evidence includes Johnson: (1) stating to his friend, Mark Bonney, that he wanted to "get his hands on" White two to three weeks before the murders; (2) going into his house the night of the murders to retrieve his gun; (3) driving five and one-half miles to his wife's apartment; (4) parking his car approximately one block away from the apartment; (5) obscuring his face by wrapping himself in a hooded sweatshirt; (6) positioning himself by kneeling outside the apartment's screen door; (7) waiting several seconds before firing his gun; (8) proceeding to shoot White three times; (9) shooting White once more after entering the residence; (10) chasing Kim down the hallway, and opening the daughter's bedroom door before shooting Kim; (11) bludgeoning both White and Kim in the back of their heads with the butt of his gun multiple times, "to make sure they were dead;" and (12) declaring to his daughter after shooting the victims that Kim "was f-ing" White.

Johnson v. State, 860 N.W.2d at 921–22; Resp't App. p. 58. The same balancing demonstrates the Eighth Circuit correctly held that Iowa's courts reasonably concluded petitioner failed to demonstrate a reasonable probability of a different outcome had counsel performed differently.

F. Petitioner would not prevail even under the plain-error review he proposes.

Finally, petitioner would not prevail even under the plain-error doctrine he contends due process demands. He seems to argue that because shackling has been called "inherently prejudicial," he would automatically prevail under plain-error review. He equates plain error with automatic prejudice. This is incorrect.

The prejudice standard applicable in plain-error review is closer to *Strickland* prejudice than it is to automatic prejudice. Even when there is an error that is plain, "It is the defendant rather than the Government who bears the burden of

persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734–35 (1993). And plain-error review "is permissive, not mandatory." *Id.* at 735.

Petitioner seems to recognize he cannot demonstrate *Strickland* prejudice. Pet. App. B p. 3 ("Johnson does not argue on appeal that he can demonstrate prejudice under *Strickland*."). He also cannot demonstrate the prejudice demanded by plain-error review—i.e., that the error "affects substantial rights" and "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 466–67 (marks omitted). The district court's explanation minimized the unobtrusive shackling. And insurmountable evidence of petitioner's guilt rendered any error insignificant.

CONCLUSION

The petition for writ of certiorari should be denied.

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