No. 20–_____

IN THE
SUPREME COURT OF THE UNITED STATES

In re: NICHOLAS TODD SUTTON, *Petitioner*

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE
EXECUTION SET FOR FEBRUARY 20, 2020, at 7:00 PM (CST)

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Question Presented

In *Deck v. Missouri*, 544 U.S. 622, 629 (2005), this Court held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." Accordingly, the question presented in this case is whether this Court should exercise its authority to issue an original writ of habeas corpus and hold that Mr. Sutton's conviction and death sentence should be vacated because he was visibly shackled and handcuffed during his capital trial and sentencing where there was no hearing to determine whether a specific justification existed for heightened security, alternatives were not explored, and no steps were taken to minimize the prejudicial effect of the restraints.

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ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Nicholas Todd Sutton respectfully requests that this Court review this Original Petition for Writ of Habeas Corpus and grant relief from his unconstitutional conviction and sentence of death. Petitioner further requests that this Court stay his imminent execution and that it transfer for hearing and determination his application for habeas corpus to the district court in accordance with its authority under 28 U.S.C. § 2241(b). In support of his petition, Mr. Sutton sets forth the following:

Statement of the Basis for Jurisdiction

The Court has jurisdiction to entertain this original petition under 28 U.S.C. §§ 2241(a), 2241(c)(3), and 2254(a). *See also Felker v. Turpin*, 518 U.S. 651, 658-62 (1996).

Required Statement under 28 U.S.C. § 2242

Petitioner asserts that he is about to be executed under a death sentence rendered by a jury that observed him forcibly handcuffed and shackled in violation of the Fifth, Eighth, and Fourteenth Amendments. He is not making application to the district court of the district in which he is held because the legality of his detention has been determined by a court of the United States on a prior application for a writ of habeas corpus. The restrictions on second or successive habeas corpus applications contained in 28 U.S.C. § 2244(b)(1) and (2), which "inform [this Court's] consideration of original habeas petitions," *Felker*, 518 U.S. at 662–63, do not bar consideration of the claims raised herein. Petitioner has not made this application initially in the district court, *see* 28 U.S.C. § 2242, and Supreme Court Rule 20.4,

because adequate relief cannot be had in that court in light of the strict requirements of 28 U.S.C. §§ 2244(b) and 2253. Petitioner cannot show he "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" as required by 28 U.S.C. § 2244(b)(2)(A). Similarly, although Petitioner alleges factual and legal predicates for his claim not previously available that would preclude his death sentence, *see Sawyer v. Whitley*, 505 U.S. 333, 348 (1992), he cannot show that "but for constitutional error, no reasonable fact finder would have found [him] . . . guilty of the underlying offense" as required by 28 U.S.C. § 2244(b)(2)(A). Furthermore, *Trevino v. Thaler*, 569 U.S. 413 (2013) and *Martinez v. Ryan*, 566 U.S. 1 (2012) were decided after the conclusion of Mr. Sutton's federal habeas corpus proceedings. Accordingly, Mr. Sutton cannot assert ineffectiveness of post-conviction counsel to establish cause to excuse procedural default of a claim of ineffectiveness of trial counsel for failing to raise and litigate this issue. This case thus presents an exceptional circumstance which warrants the exercise of this Court's discretionary power, for the relief sought can be obtained only from this Court where that power is "informed," but not necessarily limited by these statutory restrictions. *See Felker v. Turpin, supra.*

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution states, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. Const. amend. V.

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment states, in relevant part: "nor shall any state 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." U.S. Const. amend. XIV.

Parties to the Proceedings Below

This petition stems from state post-conviction and coram nobis proceedings in which petitioner, Nicholas Todd Sutton, was the movant before the Supreme Court of Tennessee. Mr. Sutton is a prisoner sentenced to death and in the custody of Tony Mays, Warden of Riverbend Maximum Security Prison in Nashville, Tennessee.

Statement of the Case

I. Procedural History

Nicholas Todd Sutton was an inmate at Morgan County Regional Correctional Facility (MCRCF) in Morgan County, Tennessee, when he and two other inmates were charged with murder for the stabbing death of inmate Carl Estep. *State v. Sutton*, 761 S.W.2d 763, 764–65 (Tenn. 1988). Mr. Sutton and his co-defendants were tried together. *Id.* The jury convicted Mr. Sutton of premeditated murder and found the following aggravating circumstances: 1) Mr. Sutton had been previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person, Tenn. Code Ann. § 39–2–

203(i)(2) (repealed); 2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, Tenn. Code Ann. § 39–2–203(i)(5) (repealed); and 3) the murder was committed while the defendant was in a place of lawful confinement. Tenn. Code Ann. § 39–2–203(i)(8) (repealed). One of Mr. Sutton's co-defendants was given a life sentence by the jury, and the other was acquitted. The jury sentenced Mr. Sutton to death. *State v. Sutton*, 761 S.W.2d at 764.

The conviction and sentence were upheld on direct appeal. *State v. Sutton*, 761 S.W.2d 763 (Tenn. 1988). Post-conviction relief was denied by the state courts. *Sutton v. State*, C.C.A. No. 03C01-9702-CR-00067, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999). The federal courts denied habeas corpus relief. *Sutton v. Bell*, 645 F.3d 752 (6th Cir. 2011). Despite numerous inmate homicides in Tennessee prisons over the past thirty years, Mr. Sutton is the only person who is currently on Tennessee's death row for the killing of a prison inmate.

On June 8, 2016, Mr. Sutton filed a Motion to Reopen Post-Conviction Proceedings in light of new substantive Supreme Court law, as decided in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and held to be retroactive in *Welch v. United States*, 136 S. Ct. 1257 (2016). On October 4, 2016, the post-conviction court found that Mr. Sutton had raised a colorable claim and granted his motion. PC vol. I at 105. The court directed Mr. Sutton's counsel to file an amended petition for post-conviction relief on the *Johnson* claim and to investigate and raise all other meritorious claims. *Id.* at 106. Mr. Sutton filed his amended petition on February 2,

2017.

Id. at 119. The post-conviction petition raised, *inter alia*, a constitutional shackling claim. On that same date, Mr. Sutton filed a petition for writ of error coram nobis solely raising a statutory shackling claim under Tenn. Code Ann. § 40-26-105.[1] Affidavits from four jurors who served on the jury that convicted Mr. Sutton and sentenced him to death and Michael J. Passino, Mr. Sutton's prior post-conviction counsel, accompanied both petitions. Reopened PC vol. II at 202–25; CN vol. I at 17–40. The petitions and supporting materials detailed how Mr. Sutton was forced to appear before the jury wearing visible shackles and handcuffs, how the jury observed Mr. Sutton forcibly shackled and handcuffed, how it impacted the jury's deliberations, and how prior counsel failed to develop and present evidence of the shackling and handcuffs and its effect on the jury.

On April 11, 2018, the post-conviction court issued an *Order Dismissing the Amended Petition* without holding an evidentiary hearing. PC vol. VI at 846. Mr.

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[1] Tenn. Code Ann § 40-26-105 provides that:

> The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

Sutton timely appealed the dismissal of his post-conviction petition to the Tennessee Court of Criminal Appeals. On January 31, 2020, following oral argument, the Court of Criminal Appeals affirmed the post-conviction court's denial of Mr. Sutton's claims for post-conviction relief. *Sutton v. State*, No. E2018–00877–CCA–R3–PD, 2020 WL 525169 (Tenn. Crim. App. Jan. 31, 2020). In denying the constitutional shacking claim, Mr. Sutton was told the issue was not cognizable because he was before the court in a reopened proceeding initiated through Tenn. Code Ann. § 40–30–117 (the "motion to reopen statute"), finding instead that Mr. Sutton had attempted to raise a derivative ineffective assistance of counsel claim rather than a free-standing constitutional violation. *Id.* at *12. The Court of Criminal Appeals also noted that although Mr. Sutton was back in post-conviction proceedings, he could not raise any claims outside of those enumerated in the motion to reopen statute. Tenn. Code Ann. § 40–30–117. *Id.* at *6. Mr. Sutton sought discretionary review of the final decision of the judgment of the Court of Criminal Appeals. On February 13, 2020, the Supreme Court of Tennessee denied the application for permission to appeal.

On May 17, 2019, the coram nobis court entered an order denying Mr. Sutton's petition for writ of error coram nobis without holding an evidentiary hearing. CN vol. II at 280–92. Mr. Sutton timely appealed the dismissal of his coram nobis petition to the Tennessee Court of Criminal Appeals. On February 11, 2020, following oral argument, the Court of Criminal Appeals affirmed the coram nobis court's denial of Mr. Sutton's statutory shackling claim. *Sutton v. State*, 2020

WL 703607, No. E2019–01062–CCA–R3–ECN (Tenn. Crim. App. Feb. 11, 2020). Regarding Mr. Sutton's attempt to litigate his shackling claim through an error coram nobis proceeding, the Court of Criminal Appeals held:

> [T]he Petitioner's claim that jurors' viewing him in shackles and handcuffs, framed either as a free-standing claim or as a constitutional claim, **is not cognizable in a coram nobis proceeding** because the evidence "does not qualify as substantive admissible evidence that 'may have resulted in a different judgment, had it been presented at the trial.'" *Nunley*, 552 S.W.3d at 831 (quoting T.C.A. § 40-26-105(b)). The Petitioner "is not entitled to equitable tolling to pursue a patently non meritorious ground for relief." *Harris*, 301 S.W.3d at 153.

Id. at *6. Mr. Sutton sought discretionary review of the final decision of the judgment of the Court of Criminal Appeals. On February 14, 2020, the Supreme Court of Tennessee denied the application for permission to appeal.

Mr. Sutton is set to be executed on February 20, 2020 at 7:00 PM (CST).

II. Statement of Facts

The trial occurred in a small rural community where correctional institutions provided a substantial source of the county's employment and income, and where all of the jurors resided. *Sutton v. State*, 1999 WL 423005, at *8, *12. Mr. Sutton was put on trial for his life in a courthouse where excessive security measures provided the backdrop and support for the State's argument that he should be convicted and sentenced to death because he was a violent and dangerous man. The courthouse was an "armed fortress" with one witness testifying that he was amazed at the large number of armed officers present. *Id.* at *8.

Multiple police and corrections officers guarded the courthouse and courtroom during Mr. Sutton's trial. *Id.* The heightened security included officers

armed with rifles at each corner of the courthouse, armed vehicles blockading the surrounding streets, and more than a dozen armed officers, many with rifles, spread throughout the small courtroom where Mr. Sutton was tried. *Id.* During the guilt-innocence phase of trial, the State improperly placed on the defense table, where Mr. Sutton and his two codefendants were seated, the knives used in the homicide, despite the court's ruling that no sharp objects—including metal-tipped pens and pencils—be placed on defense counsel's table. *Id.* at *9. In response to knives being placed within reach of Mr. Sutton and his codefendants, multiple armed officers reached for their weapons and Mr. Sutton's lawyer moved away from him in fear. *Id.* All of this occurred where members of the jury would see it. The State's action added to the perception that Mr. Sutton was extremely dangerous.

The State compounded the error by then improperly arguing Mr. Sutton's future dangerousness based on his having a prior murder conviction. Specifically, the State argued:

> [A]nd what do we do to protect the Carl Esteps? What do we do? If a person is already in the penitentiary already serving time for armed robbery or a life sentence for murder, what is the next step? . . . What are you going to do to Nick Sutton, give him a life sentence? Will that prevent another Carl Estep?

Tr. vol. XXVII at 2632–33. That argument continued during rebuttal: "Ladies and gentlemen, we suggest to you that persons who are armed robbers and first-degree murderers are already conditioned to kill people." Tr. vol. XXVII at 2647.

The fortress-like atmosphere in the courthouse and courtroom, the incident triggered by the prosecutor dumping the knives all over defense counsel's table and

the State's closing argument regarding future dangerousness all conveyed to the jury an unmistakable message about Petitioner that underscored the State's view that Mr. Sutton posed an imminent and future threat and compelled them to convict Appellant and sentence him to death. This message was further illustrated by the decision to visibly shackle and handcuff Mr. Sutton in open court. This was yet another impermissible factor that had the jury terrified of Mr. Sutton and impacted their decision whether he should live or die.

REASONS FOR GRANTING WRIT OF HABEAS CORPUS

The Exceptional Circumstances of this Case, Particularly the Absence of Any Other Remedy, Warrant the Exercise of this Court's Jurisdiction.

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Mr. Sutton has twice been told that his shackling claim is not cognizable and that he is afforded no procedural mechanism in the State of Tennessee to right this claim of constitutional error. Furthermore, the restrictions on second or successive habeas corpus applications prevent the lower federal courts from addressing this claim. Thus, exceptional circumstances warrant the exercise of an extraordinary writ because adequate relief cannot be obtained in any other form or in any other court. For these reasons, this Court should permit Mr. Sutton to vindicate his rights through an original habeas petition.

I. Petitioner's Conviction and Death Sentence Should be Vacated Because He Was Visibly Shackled and Handcuffed During His Capital Trial and Sentencing.

Nicholas Sutton's rights to due process, an impartial jury and freedom from cruel and unusual punishment were violated when he was forced to appear before the jury wearing visible shackles and handcuffs. There was no showing that shackling and handcuffing were justified by an essential state interest, alternatives were not explored, and steps were not taken to minimize the prejudicial effect of the restraints. His conviction and death sentence must be vacated because the appearance of Mr. Sutton in chains was inherently prejudicial, undermined his constitutional rights, eroded the presumption of innocence, and tipped the scales in favor of conviction and the imposition of a death sentence.

A. The Jury Observed Mr. Sutton Forcibly Shackled and Handcuffed.

The shackling and handcuffing of a defendant is an "unmistakable indication[] of the need to separate a defendant from the community at large." *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986). This Court has noted that "no person should be tried while shackled . . . except as a last resort" because "the sight of shackles . . . might have a significant effect on the jury's feelings about the defendant" and "the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

This Court has held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in

the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 629 (2005). This is because "shackling undermines the presumption of innocence and the related fairness of the proceeding" and "can interfere with the accused's ability to communicate with his lawyer." *Id.* at 630–31. The use of shackles also "undermine[s] the[] symbolic yet concrete objectives" of "[t]he courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment." *Id.* at 632.

Shackling is equally prejudicial during the penalty phase of a capital trial as during the guilt-innocence phase. This Court has stated that "shackles at the penalty phase threaten related concerns" as shackles at the guilt-innocence phase because "[a]lthough the jury is no longer deciding between guilt and innocence, it is deciding between life and death," and "[t]hat decision, given the severity and finality of the sanction, is no less important than the decision about guilt." *Id.* at 632 (citations and quotations omitted). Shackling is so inherently prejudicial 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," and instead "[t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not

contribute to the verdict obtained.'" *Id.* at 635 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).[2] That is a hurdle that is almost insurmountable here.

These due process requirements were violated throughout Mr. Sutton's trial. Trial counsel filed a pre-trial motion asking that the Tennessee Department of Correction not bring Appellant "within the presence of any juror or prospective juror while he is visibly wearing any physical restraints . . . ." Tr. vol. VII at 271. The trial court denied the motion on the grounds that being shackled would not prejudice Petitioner "since it will [be] a matter of proof that [he is an] inmate[]." *Id.* at 272. It appears that some attempt was made to conceal the shackles because during the second day of jury selection, co-defendant's counsel objected to Mr. Sutton and his co-defendants being moved around in shackles and handcuffs past doorways through which prospective jurors could see them:

> Mr. Fox: We have gone to great extents to insure that these defendants are not paraded in front of jurors or potential jurors in their chains and lockup. It is my understanding that someone in charge directed that at least one or more of these prisoners be paraded out the front door a moment ago, when there were alternative routes they could have taken, in front of potential jurors. And that it was called to that official's attention before they were taken out the door and he said, "Take them anyway in handcuffs and chains."
>
> And we would like some admonishment that that is not to occur, Your Honor.

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[2] In discussing the "inherent prejudice" resulting from shackling a defendant, this Court noted, like the consequences of compelling a defendant to stand trial while medicated, the negative effects that result from shackling "cannot be shown from a trial transcript." *Deck*, 544 U.S. at 635.

Tr. vol. XII at 930. In response, the trial court instructed the prosecution and guards to: "Keep the prisoners away from the jurors as much as possible out of the chains and so forth." *Id.* Despite this admonition, the jury was not instructed to disregard the shackles. Thus, insufficient steps were taken to minimize the prejudicial effect of the shackling and handcuffing, and the jury observed Mr. Sutton in restraints throughout the trial.[3]

The prejudice to Mr. Sutton caused by his visible shackling and cuffing was so lasting that, more than thirty years later, at least one juror remains traumatized by the experience. Juror Nancy Koger Jeffers states:

> I was scared to death that Mr. Sutton or another defendant would come after me or my family. For at least two months after the trial, I would wake up in the middle of the night, get my children out of bed and drive to my mother's house. I couldn't feel safe in my own home. Even though the trial was thirty years ago, I am still affected by it. I will always carry the emotional trauma of this case.
>
> A big cause of my fear was how heavily guarded the courthouse and courtroom were. Although we were told that the security was because it was a murder case, I knew it had to be really bad to call for that much security. The courtroom was small and crowded with several guards. Mr. Sutton and his co-defendants wore heavy chains. Other than this being a murder case, the heightened security was never explained to us.
>
> I recall during the trial when the prosecutors placed the shanks/homemade knives on the defense counsel's table, within reach of the defendants. I could not believe he did that. I reacted in shock but told myself that hopefully, the defendants could not reach any of the weapons since they were chained.

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[3] During a bench conference at the start of the penalty phase, the prosecution informed the trial court that "the Defendants are still handcuffed." Tr. vol. XXV at 2465.

Reopened PC vol. II at 206–07. Clearly, the shackling was obvious and frightening to jurors.

Ms. Koger Jeffers is not the only juror that recalls the shackling and handcuffing of Mr. Sutton in vivid detail. At least three other jurors have similar memories. Jury Foreperson Billy Dyer recalls that Mr. Sutton was "well-secured and shackled in the courtroom. There was hand-cuffing in front, not behind the back." *Id.* at 203. Juror Johnny Lively states that "[t]here was a lot of courtroom security throughout the trial" and Mr. Sutton "wore leg shackles." *Id.* at 212. Juror Diana Cagley remembers:

> There was a lot of courtroom security during the trial. The defendants were shackled and the attorneys were not allowed to lay down pens or pencils on the table. That told me something about the defendants. Armed guards were everywhere and [the trial judge] did not let anyone leave the courthouse until the jury had been escorted back to the jail and we had called our families.

Id. at 215.

"[T]here is a legal presumption against the use of visible restraints in court that flows from due process guarantees to a fair trial." *Mobley v. State*, 397 S.W.3d 70, 100 (Tenn. 2013). "The use of visible restraints undermines the physical indicia of innocence and the related fairness of the fact-finding process." *Id.* Accordingly, when shackles and handcuffs "inadvertently become[s] visible to the jury, the trial court should give cautionary instructions that it should in no way affect the jury's determinations." *Id.* at 101. Again, the jurors received no such instruction.

The shackling and handcuffing of a defendant "almost inevitably affects adversely the jury's perception of the character of the defendant." *Deck*, 544 U.S. at

633. Here, Mr. Sutton was on trial for murder and his propensity for violence was a critical issue in both the guilt-innocence and penalty phases. The appearance of a defendant in chains implies to a jury, as a matter of common sense, that court authorities consider the defendant a danger to the community and a threat to those in the courtroom, and the defendant possesses the character of someone who would commit the charged offense. As a result, in finding Mr. Sutton guilty, the jury likely relied upon the improper inference that he was a violent person as evidenced by the visible shackles.

In the penalty phase of a capital trial, the jury knows that the defendant is a convicted murderer, "[b]ut the extent to which he continues to be dangerous is a central issue the jury must decide in determining his sentence." *Duckett v. Godinez*, 67 F.3d 734, 748 (9th Cir. 1995). If the jury is led to believe that the defendant is so dangerous that shackles and handcuffs are required to secure the courtroom against his actions, it is likely to conclude that the safety of other inmates and the prison staff can only be ensured by executing him. When a defendant is shackled and handcuffed, "a jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision." *Elledge v. Dugger*, 823 F.2d 1439, 1450 (11th Cir. 1987). The jurors here likely viewed Mr. Sutton as a future danger due to the shackles and handcuffs and relied upon that improper inference in reaching a death sentence.

This is especially true where, as the prosecutor did here, the prosecution argues that the jury impose death because of Mr. Sutton's future dangerousness:

> [A]nd what do we do to protect the Carl Esteps? What do we do? If a person is already in the penitentiary already serving time for armed robbery or a life sentence for murder, what is the next step? . . . What are you going to do to Nick Sutton, give him a life sentence? Will that prevent another Carl Estep?

Tr. vol. XXVII at 2632–33. As the prosecution argued for the jury to answer this question with a death sentence, Mr. Sutton's shackles stood in mute, but powerful, support of that argument.

Because the sight of shackles and handcuffs inherently implies that the person is a danger to the community, "the use of [restraints] can be a "thumb [on] death's side of the scale." *Deck* at 633 (quoting *Sochor v. Florida*, 504 U.S. 527, 532 (1992); citing *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring in judgment) (through control of a defendant's appearance, the State can exert a "powerful influence on the outcome of the trial")). Therefore, trial courts cannot place defendants in shackles and handcuffs during a criminal trial, unless in the judge's discretion there are special circumstances that call for restraint. *Id.* As this Court has clearly stated, the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is "justified by an essential state interest"—such as the interest in courtroom security—specific to the defendant on trial. *Deck*, 544 U.S. at 635 (quoting *Holbrook*, 475 U.S. at 568-69).

To justify the use of restraint during a criminal trial, the determination "must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." *Id.* at 633. There is nothing in the trial record to justify the use of physical restraints on Mr. Sutton—no indication that he was an escape risk or posed a danger to those in the courtroom. The sole reason Mr. Sutton was shackled and handcuffed was because he was incarcerated at the time of trial. That is not a special circumstance that calls for the use of restraints. The facts of this case are similar, if not identical, to facts in cases where improper shackling has been found. *See, e.g., Deck*; *United States v. Haynes*, 729 F.3d 178 (2d Cir. 2013); *Lakin v. Stine*, 431 F.3d 959 (6th Cir. 2005). In addition, the trial court failed to determine whether, even if heightened security measures were justified—which they were not—what if any lesser measures could be used to ensure security without resorting to highly prejudicial handcuffing and shackling. Moreover, there was no hearing to determine whether a specific justification existed for heightened security, alternatives were not explored, and steps were not taken to minimize the prejudicial effect of the restraints.

Although the prejudice caused by shackling and handcuffing Mr. Sutton is clear, since there was no adequate justification for him to be restrained, Mr. Sutton "need not demonstrate actual prejudice to make out a due process violation." *Deck*, 544 U.S. at 635. This is so because the use of handcuffs and shackles is inherently prejudicial. *Id.* (citations omitted). Accordingly, when the trial court ordered Mr. Sutton to be chained throughout his trial, when it was not justified by an essential

state interest, it was a violation of his rights to due process, an impartial jury and freedom from cruel and unusual punishment.

This error could not be and was not harmless. The mere presence of shackles and handcuffs connoted dangerousness, a non-statutory aggravating factor, and the trial court did nothing to dispel that connotation. Therefore, because it cannot be established that the shackling and handcuffing of Mr. Sutton "did not contribute to the verdict [and sentence] obtained," *id.* at 635 (quotation marks omitted), Mr. Sutton is entitled to habeas relief.

B. Because the Facts Underlying this Constitutional Error are Newly Discovered, Procedural Bars in Both State and Federal Court Now Prevent Any Lower Court from Providing Adequate Relief.

The evidence demonstrating that Mr. Sutton was visibly shackled and handcuffed during his capital trial and sentencing, that the jury observed Mr. Sutton forcibly shackled and handcuffed, and its effect on the deliberations is newly discovered evidence. This evidence was not previously developed and presented due to the denial of resources available to Mr. Sutton's previous post-conviction counsel and the failings of both trial and prior post-conviction counsel. The facts underlying this claim would have been admissible had they come to light at any time during the trial or on motion for a new trial. The juror statements that they saw the shackles the State put on Mr. Sutton are credible in that they are offered in sworn

statements under penalty of perjury and are not in any way self-serving.[4] Had this evidence been presented and litigated on a motion for a new trial or in the initial state post-conviction proceedings, as discussed in Section A herein, it would have resulted in a different judgment.

First, trial counsel failed to interview the jurors in preparing the Motion for New Trial.[5] If counsel had done so, he could have proffered evidence, now presented in this petition, of at least four jurors who saw Mr. Sutton shackled in the courtroom and how the shackling undermined the presumption of innocence and the fairness of Mr. Sutton's trial. Had counsel presented this evidence, there is a reasonable probability that the Motion for New Trial would have been successful. At a minimum, counsel would have preserved the issue for appellate review. *See Virgin Islands v. Forte*, 865 F.2d 59, 62–64 (3d. Cir. 1989) (stating that "had the objection been made [defendant] would have been successful on appeal.").

Second, Mr. Sutton was unable to raise and litigate his shackling claim in the initial state post-conviction proceedings due to the failings of post-conviction counsel and limited state funding to develop claims in post-conviction. Michael J. Passino, Mr. Sutton's then-inexperienced previous post-conviction counsel, failed to interview the jurors and develop and present evidence of shackling in the state post-conviction

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[4] If there are any questions about the veracity of the statements, this matter should be remanded for an evidentiary hearing to develop the record and allow the lower court to gauge the credibility of the witnesses.

[5] The sole attorney responsible for representing Mr. Sutton at trial is now deceased and could not be interviewed by current counsel.

proceedings. The post-conviction court refused to allocate the necessary funds to conduct a proper investigation. As a result, Mr. Passino, who was based in Nashville, was unable to interview the jurors, who lived in East Tennessee, to establish the extent to which they had been aware of the shackles and the effect it had on their deliberations.

As Mr. Passino now admits:

> Although I was still in a small practice, in fact and effect, living at the economic margins, the actions of [the post-conviction judge], the size of the record, the complexity of the legal actions, demanded almost my full attention to the case as well as my investment of my personal funds in various investigative and expert services because [the post-conviction judge] denied important requests. Although the records of the Administrative Office of the Tennessee Supreme Court will reflect the substantial time I invested in Mr. Sutton's case during a relative short period, at a reimbursement rate of what I seem to recall being $20.00, the plain fact is that it was impossible for me to conduct an adequate investigation or properly pursue each and every non-frivolous issue as required, if not demanded by the Tennessee Supreme Court's Rules governing the ethical obligations of attorneys and/or the ABA Guidelines on the Appointment and Performance of Counsel in Capital Standards. I say this not to excuse my performance, but to state a fact not subject to principled dispute by reasonable minds having a minimal understanding of a capital attorney's duties coupled with a proper respect for the law. The reality was that I was presented with the circumstance of doing a competent job, in a complex case, with significant legal and factual issues in a short time while simultaneously having to maintain a law practice and support (or contribute to the support of) a family, my wife, and our children.

CN vol. I at 35–36.

Mr. Passino also failed to interview the jurors because:

> I was ignorant of the vital purpose of juror interviews in capital work post-trial and post-conviction and based on this ignorance did not see or realize the important connection between such information and issues I actually presented in the Petition. The

> decision was not a tactical or strategic one, and I had neither the knowledge nor a factual basis for making it. Compounding the above, while investigation was ongoing, and I was trying to develop and present issues for the hearing, I did not consider amending the Petition to expand or more carefully articulate issues, nor did I give the matter thoughtful consideration when I was researching related issues.

Id. at 36–37. Mr. Passino had no strategic reason for failing to develop and raise the shackling claim despite raising a claim of prejudicial courtroom security. As he concedes:

> while I was focused on courtroom security, which one [post-conviction] witness described as much like an armed fortress, I did not allege the shackling issue in the Petition, did not seek to amend it in, and did not seek to develop testimony on the issue although shackling presented a distinct constitutional fair trial issue, was factually and legally supported, if not compelling, and folded into existing claims bolstering those claims as well as standing on its own bottom. The failure to further investigate and present the shackling issue was not a tactical or strategic decision. In fact, given its relationship to facts that I knew and issues I was investigating, this oversight is one of breathtaking stupidity, at best.
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> * * *
>
> With respect to the shackling issue . . . I did not interview these jurors [who provided affidavits for the current coram nobis proceedings], did not present their testimony, did not present a separate [shackling] claim, decisions that were neither strategic nor tactical . . . .

Id. at 37–38.

As a result of Mr. Passino's failure to interview the jurors and raise a shackling claim, in the initial post-conviction proceedings, the lower court erroneously concluded that measures were taken at trial to hide the shackles from the jury when in fact, the jurors did see Mr. Sutton handcuffed and shackled. *Sutton*

v. State, 1999 WL 423005, at *8.[6] Post-conviction counsel's failings and the limited funding for investigation denied Mr. Sutton his rights to due process, to present a defense, and to the effective assistance of counsel in the development and presentation of his post-conviction claims. This Court "has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).[7] Had post-conviction counsel been provided the necessary funding for investigation and interviewed the jurors, he could have developed and presented the shackling claim in the initial post-conviction proceedings. Accordingly, Mr. Sutton is without fault in failing to present this newly discovered evidence.

Since this evidence was uncovered, current counsel has worked to find a forum to present his shackling claim. He attempted to raise a constitutional

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[6] This erroneous conclusion is established because the only evidence which can properly prove or disprove the visibility of shackles must come through the jurors themselves. No juror, however, was ever presented in the prior post-conviction proceedings.

[7] Characterizing the values undergirding *Gideon* and *Strickland*, the Court in *Ake* noted that "[m]eaningful access to justice has been the theme of these cases." *Id.* at 78. Going further, the Court made clear that "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process," acknowledging "that a criminal [proceeding] is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Id.* "[F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system . . . .'" *Id.* (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)). "To implement this principle, we have focused on identifying the 'basic tools of an adequate defense or appeal, and we have required that such tools be provided to those defendants who cannot afford to pay for them." *Id.* (citations omitted).

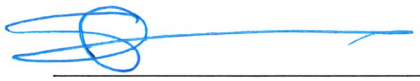
shackling claim in the reopened post-conviction proceedings and filed a shackling claim via a petition for writ of error coram nobis. The state courts denied both claims, finding that the shackling issue is not cognizable in either proceeding. *Sutton v. State*, 2020 WL 703607, at *6; *Sutton v. State*, 1999 WL 423005, at *6, *12. Therefore, there is no procedural mechanism in the State of Tennessee to right this claim of constitutional error. Furthermore, the restrictions on second or successive habeas corpus applications prevent the lower federal courts from addressing this claim, and *Trevino v. Thaler*, 569 U.S. 413 (2013) and *Martinez v. Ryan*, 566 U.S. 1 (2012) were decided after the conclusion of Mr. Sutton's habeas proceedings and therefore cannot provide cause to excuse the procedural default of this claim.

Mr. Sutton has been left with no other forum, but this one, to plead his cause. He has shown egregious harm to his rights to due process, an impartial jury and freedom from cruel and unusual punishment and yet has found the courthouse doors slammed shut to consideration of the merits of his claim. This Court is literally his last hope.

Conclusion and Prayer for Relief

This Court should grant Mr. Sutton habeas corpus relief on his shackling claim or remand that claim for an evidentiary hearing.

Respectfully submitted,



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