No. 20-363

In the

Supreme Court of the United States

Frederick Whatley,

Petitioner,

v.

GDCP, Warden,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Georgia Supreme Court reasonably denied Petitioner's claim that trial counsel was ineffective for failing to object to his visible restraints during the sentencing phase in this 28 U.S.C. § 2254 proceeding by applying *Strickland*'s actual prejudice analysis instead of Petitioner's preferred presumed prejudice analysis borrowed from this Court's direct review of a substantive shackling claim.

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The decision of the Georgia Supreme Court in the criminal direct appeal is published at 270 Ga. 296, 509 S.E.2d 45 (1998).

The decision of the Georgia Supreme Court affirming denial of state habeas relief is published at 284 Ga. 555, 668 S.E.2d 651 (2008) and is included in Petitioner's Appendix D at 249a-81a.

The decision of the district court granting in part and denying in part federal habeas relief is unpublished but can be found at 2013 U.S. Dist. LEXIS 50590 and is included in Petitioner's Appendix C at 107a-248a.

The decision of the Eleventh Circuit Court of Appeals reversing the district court's grant of habeas relief and affirming the district court's denial of relief is published at 927 F.3d 1150 (11th Cir. 2019) and is included in Petitioner's Appendix A at 1a-95a.

The order of the Eleventh Circuit Court of Appeals denying rehearing and rehearing en banc is published at 955 F.3d 924 (11th Cir. 2020) and is included in Petitioner's Appendix E at 282a-90a.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on June 20, 2019. Pet. App. 1a. A petition for writ of certiorari was timely filed in this Court on September 8, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right to a … have the Assistance of Counsel for his defence.

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law … .

28 U.S.C. § 2254(d) provides:

> 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; 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.

INTRODUCTION

On collateral review, the Georgia Supreme Court determined Petitioner Frederick Whatley was not prejudiced by trial counsel's failure to object to him being in shackles during the sentencing phase of his trial. In making this determination, the court declined Whatley's invitation to apply the presumed prejudice analysis used by this Court in *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007 (2005), explaining that *Deck* addressed a due process challenge to the use of shackles—not an ineffective-assistance claim—on direct review rather than collateral review. The state court correctly reasoned that, on collateral review of an ineffective assistance claim, the actual prejudice analysis from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), is the appropriate standard. And under that standard, the

court reasonably determined that the balance of prejudice factors were not in Whatley's favor.

Whatley argues there is an "acknowledged" split among the courts of appeals for the Seventh, Ninth, and Eleventh circuits on whether a state court's decision is reasonable under this Court's precedent when it does not apply *Deck's* "inherently prejudicial" standard. No such split exists, much less an "acknowledged" one. All of the courts of appeals in question agree that *Strickland*'s actual prejudice analysis is to be used to determine an ineffective-assistance claim related to the failure to object to the use of restraints in the courtroom. More importantly, the cases Whatley relies upon from the Seventh Circuit—the circuit that has allegedly split from the Ninth and Eleventh circuits—does not address a state court's determination of a *Strickland* restraint claim through the lens of the Antiterrorism and Effective Death Penalty Act (AEDPA). Instead, the Seventh Circuit decided the claims under de novo review.

Whatley's petition thus reduces to a request for this Court to conduct error correction of a factbound *Strickland* claim, and one that lacks merit. This Court should deny the petition.

STATEMENT

A. Facts of the Crimes

"At the time of the murder, [Whatley] had recently arrived in Georgia after escaping from a halfway house in Washington, D.C." Pet. App. 5a. "[A]fter arriving" in Georgia, Whatley "told a cousin that he needed a gun to 'make a lick,' to commit a robbery." *Id.* at 5a. Whatley stole a silver revolver and held up "Roy's Bait Shop" on the evening of January 26, 1995. *Whatley v.*

State, 270 Ga. 296, 297, 509 S.E.2d 45, 48 (1998). "He forced an employee [Tommy Bunn] to lie down behind the counter, pressed the gun against the employee's head, and told another person, the storeowner [Ed Allen], to give him the money from the register." Pet. App. 5a; *see Whatley*, 509 S.E.2d at 48. After he was given the money in a "sack," Whatley shot the "the storeowner in the chest" and, "according to expert testimony," was "standing just 18 inches" from the victim when the shot was fired. Pet. App. 5a. Whatley also tried to shoot the employee (still lying behind the counter) in the head, but the bullet hit the counter and missed." *Id.*

After exiting the store, Whatley attempted to kidnap and carjack Ray Coursey. *Whatley*, *supra*, at 48. But "[b]efore the car could leave, the 'mortally wounded' storeowner grabbed a gun from the store and fired 'several shots'" at Whatley—who returned fire. Pet. App. 5a-6a. "[T]he storeowner eventually collapsed and died from bleeding caused by the first gunshot." *Id.* at 6a. Whatley dropped the money and, as he "fled on foot," Coursey "noticed that [Whatley] was limping." *Id.*

Coursey informed law enforcement that Whatley had used a "silver revolver." *Id.* One of the law enforcement officers "had taken a report from a man who said that his silver revolver was missing" and "he suspected his cousin—[Whatley]—had taken it." *Id.* When Whatley was found by law enforcement "he had a bullet wound in his leg, and the officers found the missing silver revolver under his mattress." *Id.* "A firearms expert concluded that the missing silver revolver was in fact the murder weapon." *Id.* Additionally, fibers and DNA obtained from a bullet taken from the car Whatley "tried to carjack" matched Whatley's clothes and DNA, and

Whatley's "palm print was on the sack of money that was dropped outside the store when [he] fled." *Id.*

B. Proceedings Below

1. Trial Proceedings

a. Guilt Phase

Johnny Mostiler was appointed to represent Whatley "two years before trial." Pet. App. 261a. Mostiler "was a highly experienced attorney" and "was experienced in death penalty cases."[1] *Id.* Whatley wore shackles throughout both guilt/innocence and sentencing. D7-5:110; D7-9:106.[2] There does not appear to be a dispute among the parties that the jury was kept from seeing the shackles during the guilt phase; and the record shows that Mostiler assisted in accomplishing this task. D7-5:31, 109-11, 135-40; D7-7:10, 51, 87-88, 107, 136; D7-8:18-19, 46, 49.

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[1] Whatley casts aspersions on Mostiler in his statement of the case, including calling him a "notorious" public defender and referencing allegations of racial bias from another case. *See* Pet. brief at 6-7. Putting aside whether these are even appropriate under Supreme Court Rule 14(1)(g), the question presented here involves only the *prejudice* prong of *Strickland*. Moreover, the data Whatley relies on regarding Mostiler's caseload at the time of his representation was rejected by both the Eleventh Circuit and the Georgia Supreme Court as proof of ineffective assistance: "We agree with the reasoning of the Eleventh Circuit that statistics that fail to shed light on the amount of work actually done in the particular case at issue are insufficient to show the kind of complete breakdown in representation necessary for prejudice to the defense to be presumed." Pet. App. 262a (citing *Osborne v. Terry*, 466 F.3d 1298, 1315 n.3 (11th Cir. 2006)).

[2] "D" refers to the Electronic Court Filing (ECF) number associated with the document filed in Whatley's federal habeas proceeding, followed by the appropriate ECF page number.

After hearing the evidence of Whatley's crimes, the jury convicted him of malice murder, two counts of aggravated assault, armed robbery, motor vehicle hijacking and possession of a firearm during the commission of a felony. D6-6:25.

b. Sentencing Phase

(1) State Presentation

The State presented evidence that, prior to the murder, Whatley "was charged in three separate criminal cases from 1988 to 1990: (1) he forged a U.S. Treasury check, (2) he robbed a man at gunpoint, and (3) he assaulted a woman in public." Pet. App. 9a. Whatley pled guilty to the forgery and robbery[3] crimes and received overlapping probation and rehabilitation treatment, and he was assigned a caseworker, Eugene Watson. *Id.* at 9a-11a. After spending two months serving probation at a treatment center, Whatley "absconded." *Id.* at 11a. After leaving the center, Whatley was brought back to court for a determination of probation revocation, which the trial court did not initially revoke. *Id.* However, later the court "ordered [Whatley] to show cause as to why his probation should not be revoked in the robbery case," Whatley "didn't appear [for the show cause hearing], and the Court issued a bench warrant for his arrest." *Id.* at 11a-12a. During this time period, Whatley was arrested and charged with "assault with intent to rape" a woman. *Id.* at 12a. After the trial court noted that "Herculean efforts" had

[3] "During the plea colloquy in the robbery case, [Whatley] admitted that he 'put a loaded shotgun . . . to the [victim's] back and demanded [his] wallet which he forcibly took from [the victim]. . . . [Whatley] was arrested that same day . . . and the . . . loaded shotgun and shells were recovered.'" Pet. App. 9a (some brackets in original).

been made to help Whatley with his "difficult personality" and possible "psychological problems," his probation was revoked in the "robbery case," and Whatley was sentenced "to prison for a term of 4 to 12 years." *Id.* at 12a-14a. Whatley was released after 47 months and was "put in a halfway house in Washington, D.C." *Id.* at14a. "He fled on December 2, 1994," "became a fugitive from justice," and "was still a fugitive when he" came to Georgia in January of 1995. *Id.*

(2) Defense Sentencing Presentation

Mostiler "countered the State's case with nine witnesses; collectively, they portrayed [Whatley's] life as worth saving." Pet. App. 14a-15a. These witnesses included family, friends, his caseworker Watson, and Whatley. "As a brief introduction, ...[Whatley] was raised by his great-aunt and great-uncle, Marie and Cleveland Thomas. He moved to Washington, D.C., to live with his mother a couple of time during his teenage years." *Id.* at 15a. The crimes presented by the State prior to the murder in Georgia, all occurred in Washington D.C. *Id.* Watson, Whatley's caseworker, who testified last at trial, stated that he "worked with [Whatley] for about a year and a half," thought Whatley was "both personable and likeable," and "'had a lot of potential.'" *Id.* at 21a. Watson spoke with Whatley's great-aunt and great-uncle "'on a very regular basis, maybe once a week'" and he "'could see' 'that [Whatley] came from a good family,'" and "[h]e called [the Thomases] [Whatley's] 'support.'" *Id.*

Prior to Whatley testifying, the jury had not seen his shackles. However, before Whatley took the stand the prosecutor asked if the jury needed to be temporarily dismissed from the courtroom, to continue the

practice of keeping Whatley's restraints from being visible. D7-9:105-06. In response, Mostiler stated "Well, he's been convicted now." *Id.* The trial court agreed and Whatley proceeded to the jury stand with his shackles visible to the jury. *Id.* There is no further mention of the shackles in the trial transcript.

Whatley began his testimony with an explanation of "his upbringing." Pet. App. 16a. When he was "a child, he was told that his mother 'had some problems'" and he was raised by "his great-aunt and great-uncle (the Thomases)." *Id.* "[Whatley] described the Thomases' household as 'very stationary, very unconditional as far as . . . loving and . . . support, and ideally everything that a child could . . . ask for growing up.'" *Id.* When he was a teenager, he went to live with his mother in Washington D.C. but they were unable to get along. *Id.* 16a-17a. Whatley testified that his "involvement with drugs" began when he started "dealing drugs" and then he got involved with "'individuals that were into forgery and uttering and credit cards, white collar crimes.'" *Id.* at 17a. He also "claimed he 'did not have the shotgun on' him during" the robbery he committed in D.C.—despite having admitted to possessing the shotgun when he pled guilty to the crime. *Id.* Additionally, Whatley generally blamed others for his failure to return to the treatment center and the halfway house. *Id.* at 17a-18a. Whatley admitted that, after he came to Georgia, that "he eventually stole a pistol from a man he was staying with. …because [he] had been selling drugs and needed to go to 'rough neighborhoods' to sell." *Id.* at 18a. "On the night of the murder, 'it just so happened' that he got a ride and 'passed by' the bait shop. He 'felt like it was in a secluded area,' so he could 'go in,' 'get the money,' and 'get out of town.'" *Id.* at 18a-19a.

Whatley then gave his version of the murder. After he had taken the money from the victims and "was backing out of the shop …[h]e heard someone coming to the door and turned around—at that point, the victim grabbed a gun. [Whatley] turned back, apparently saw the gun, and fired a shot." *Id.* at 19a. He stated that this "was the [shot] that hit the counter." *Id.* After making it outside, and claiming he fired no other shots inside the store, "[Whatley] and the victim continued shooting at each other." *Id.* "[Whatley] wrapped up the direct examination by saying he did not intend to kill the victim. He only intended to rob the store." *Id.* at 20a.

"On cross examination, [Whatley] stuck to his story ….[and] never admitted that he fired two shots inside the shop." *Id.* Regarding the "robbery in Washington, D.C. …[Whatley] said he did not have the shotgun …acknowledged the plea agreement—where he admitted to putting a loaded shotgun to the victim's back—but said he was willing to admit facts that didn't happen because of the plea deal." *Id.* at 19a-20a. Also on cross examination, the prosecutor asked Whatley to step down from the witness stand, after which the prosecutor and Whatley reenacted the crime. D7-10:13-16. Trial counsel did not object and Whatley does not appear from the record to be reluctant during the reenactment.[4] *Id.*

In closing, "[t]he State argued that life without parole was inadequate given the nature of the murder," that Whatley "attempted to pin part of the

[4] Whatley states he was "forced" (Pet. brief at 8) to participate in the reenactment, but once again the trial transcript does not show any hesitation or concern on Whatley's part in reenacting the crime. *See* D7-10:12-16. Nor does the trial transcript provide the description Whatley relies upon from the dissent stating that Whatley "shambled" around the courtroom. *See* Pet. brief at 9 (quoting Pet. App. 82a).

responsibility on the victim," that his "troubles were always someone else's fault," and " he showed no remorse." Pet. App. 22a. Mostiler "argued for a life sentence without parole," and he argued that Whatley "entered the bait shop with no intention of killing anyone." *Id.* at 23a. Mostiler "also tried to humanize [Whatley], calling the Thomases 'a good strong family' that taught him right and raised him well," asserting that Whatley was sorry for his crimes, and explaining that Whatley's "tragic mistake was moving in with his dysfunctional mother in Washington, D.C." *Id.*

After "90 minutes" of deliberation, the jury recommended a sentence of death. *Id.* at 45a. The jury found the statutory aggravating circumstances that the offense of murder was committed while the defendant was engaged in the commission of another capital felony (armed robbery), and that the offense of murder was committed by a person who had escaped from a place of lawful confinement. D6-7:36-37. Following the jury's binding recommendation, the trial court sentenced Whatley to death for murder. *Id.* at 90. The trial court also sentenced Whatley to life imprisonment for armed robbery, twenty years for each aggravated assault count, twenty years for motor vehicle hijacking, and five years for possession of a firearm during the commission of a felony, to run consecutively.[5] D7-11:82-83.

2. Direct Appeal

The Georgia Supreme Court affirmed Whatley's convictions and sentences on December 4, 1998. *Whatley*, 509 S.E.2d 45. On direct appeal, Whatley "complain[ed] that the jury was permitted to see him in shackles."

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[5] Whatley's motion for new trial was denied in April of 1998. D6-7:57.

Id. at 52. The court examined the record and found "that Whatley wore leg shackles during the trial, but these shackles were not visible to the jury when he was seated at the defense table." *Id.* However, the court also acknowledged that "in the penalty phase, Whatley was called to testify," the prosecutor brought up the issue of the shackles, but trial counsel "replied to the prosecutor's comment, 'well, he's convicted now,' and the trial court permitted Whatley to take the stand with the jury present." *Id.* The Georgia Supreme Court held Whatley's "contention [was] without merit" because "[a] party cannot during the trial ignore what he thinks to be an injustice, take his chance on a favorable verdict, and complain later." *Id.* (quotation marks omitted).

Whatley filed a petition for writ of certiorari with this Court, which was denied in May of 1999. *Whatley v. Georgia*, 526 U.S. 1101, 119 S. Ct. 1582 (1999). In his petition to this Court, Whatley did not request certiorari review for his substantive due process shackling claim. D8-5.

3. State Habeas Proceeding

Whatley filed a state habeas petition in August of 1999. D9-1. Whatley "claimed that Trial Counsel provided ineffective assistance (1) by failing to investigate and present mitigating evidence about his background and mental health (the 'Mitigation Claim') and (2) by not objecting to [Whatley's] appearing before the jury in shackles during the penalty phase (the 'Shackles Claim')." Pet. App. 24a-25a. The court of appeals summarized at length the evidence—from both parties—regarding the "Mitigation Claim." *Id.* at 25a-45a. However, the court noted that "[t]he parties did not present evidence on the Shackles Claim at the evidentiary hearing. Instead, the State Habeas

Court relied on the transcript of the penalty phase." *Id.* at 45a. Whatley argued that *Deck* "strongly" supported his "Shackling Claim" "because shackling [was] inherently prejudicial" thus, "'by definition' he was prejudiced due to Trial Counsel's failure to object." *Id.*

The state habeas court rejected both claims. D14-14. The Georgia Supreme Court granted Whatley's application for a certificate of probable cause to appeal in March of 2008. Pet. App. 249a. The court analyzed Whatley's "Mitigation Claim" at length and affirmed the state habeas court's denial of relief. *Id.* at 265a-76a. It did so in part because of the credibility concerns regarding Whatley's new mitigation evidence. *Id.* at 266a-76a.

Regarding the "Shackling Claim," the court assumed, for the purpose of its *Strickland* analysis, "that trial counsel performed deficiently in failing to recognize the legal basis for an objection to visible shackling in the sentencing phase." *Id.* at 278a. The court recognized that if the due process shackling claim had been decided on direct appeal, prejudice would have been presumed. *Id.* However, the court reasoned that because "the issue [was] the ineffective assistance of trial counsel in failing to object to such shackling, [Whatley was] entitled to relief only if he [could] show that there [was] a reasonable probability that the shackling affected the outcome of the trial." *Id.* The court held Whatley could not meet the *Strickland* prejudice requirement: "In view of the balance of the evidence presented at his trial, we conclude as a matter of law that Whatley cannot show that his trial counsel's failure to object to his shackling in the sentencing phase in reasonable probability affected the jury's selection of a sentence." *Id.*

Whatley filed a timely petition for writ of certiorari with this Court but did not present a question on his ineffective-assistance shackling claim. D14-

24. This Court denied his petition for a writ of certiorari on May 18, 2009. *Whatley v. Terry*, 556 U.S. 1248, 129 S. Ct. 2409 (2009).

4. Federal Habeas Proceeding

In his § 2254 petition, Whatley again argued that counsel provided ineffective assistance by failing to object to Whatley's shackles at sentencing. D1:63-68. The district court, citing *Strickland* standards, examined the Georgia Supreme Court's decision. D51:91-92. First, the district court determined that Mostiler had not performed deficiently at sentencing with regard to Whatley's shackling. *Id.* at 92-93. Second, the court held that, even assuming that Mostiler had performed deficiently, Whatley had not demonstrated *Strickland* prejudice. *Id.* at 92-94. Having found no *Strickland* violation, the district court next applied the AEDPA-required deference and held that "the Supreme Court of Georgia's decision regarding Whatley's claim of ineffective assistance of counsel based on a failure to object to shackling disclosed during a reenactment" did not run afoul of § 2254(d). *Id.* at 94.

Although the district court denied relief on Whatley's ineffective-assistance shackling claim, it granted relief as to the sentence because the court found Mostiler was ineffective with regard to the mitigation investigation and presentation. Pet. App. 49a. After being denied a certificate of appealability (COA) by the district court (Pet. App. 27a), Whatley sought and was granted a COA on his ineffective-assistance shackling claim by the court of appeals. Pet. 14 n.2.

The court of appeals laid out the facts of Whatley's shackling claim. Pet. App. 71a. It noted that "before [Whatley] took the stand during the penalty phase, the State raised the shackles issue" but "Trial Counsel didn't object

and simply said, 'Well, he's convicted now.'" *Id.* (quoting *Whatley*, 509 S.E.2d at 52.). "[Whatley] then testified, which included a 'physical demonstration of his version of events,' with visible shackles." *Id.* (quoting *Whatley, supra*). The court observed that Whatley "raised a *substantive* shackling claim" on direct appeal—which the Georgia Supreme Court "treated …as procedurally defaulted" because "it was not raised and rejected in the trial court." *Id.* (emphasis in original). Whatley agreed that the state court "treated the substantive claim as procedurally defaulted." *Id.*

Because Whatley's due process shackling claim was defaulted, he "brought an *ineffective assistance of counsel* claim instead" during his state collateral proceedings. *Id.* at 72a (emphasis in original). The court of appeals examined the Georgia Supreme Court's denial of this claim and determined that the state court "applied *Strickland*'s actual prejudice standard" instead of the "presumption of prejudice [that] would apply if [Whatley's] claim were on direct appeal." *Id.* at 73a. Examining state law and citing this Court's precedent, the court of appeals held the state court had correctly refused to "borrow" the "presumed" prejudice standard applicable on direct appeal to replace *Strickland*'s "actual" prejudice standard. *Id.* at 76a-79a

"On top of" having to prove *Strickland* prejudice, Whatley also had to "show that the Supreme Court of Georgia's decision on actual prejudice was unreasonable." *Id.* at 80a. The court first looked at the facts: Whatley "had a violent criminal history" that included "robb[ing] a man at gunpoint and assault[ing] a woman in public; "[h]e had been given many chances to turn things around, but he never did"; and in this case, "he tried to kill two people—he just happened to miss one of them—presumably trying to leave no witnesses." *Id.* The court decided that "the shackles were trivial in light of

evidence before the jury." *Id.* And, just as importantly, the court held it "must respect the state court's decision 'so long as fairminded jurists could disagree on the correctness of' it." *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 785 (2011) (quotation marks omitted). The court of appeals concluded that Whatley had not met this "deferential standard." *Id.* at 80a-81a.

REASONS FOR DENYING THE PETITION

I. There is no circuit split on the question presented.

The split identified by Whatley does not exist.[6] Whatley argues that the Seventh Circuit has split from the Ninth and Eleventh Circuits on whether a state court reasonably applies federal law under 28 U.S.C. § 2254(d) if it does not "account" for the "inherently prejudicial" language in *Deck* regarding shackling. Pet. 15. But the Seventh Circuit never answered that question in the decisions cited by Whatley. Instead, the Seventh Circuit conducted de novo review of ineffective-assistance restraint claims. Most importantly, the Seventh Circuit did not apply *Deck*'s presumed prejudice standard from which the "inherently prejudicial" language arises. Rather, the court of appeals, after taking into account the facts of each case, applied *Strickland*'s actual prejudice test. Likewise, the Ninth and Eleventh Circuits, albeit through the lens of § 2254(d), analyzed each ineffective-assistance shackling

[6] Whatley states that this is an "acknowledged circuit split." Pet. brief at 2. Neither the majority nor the dissent in this case state there is a circuit split on the question presented. *See* Pet. App. 1a-95a. Although the dissent points to the decisions of the Seventh Circuit, it merely does so to point out that another court has determined that a petitioner had shown prejudice under the *Strickland* standard for a restraint claim. Pet. App. 91a. But the dissent does not identify this is a circuit split, as it is not.

claim under *Strickland*'s "reasonable probability of a different outcome" standard. The courts of appeals are in accord and Whatley's petition for certiorari review should be denied.

As an initial matter, the Court's use of the term "inherently prejudicial" in *Deck* was simply another way of expressing "presumed prejudice." The *Deck* Court was tasked with determining whether a defendant's due process rights of the Fifth and Fourteenth Amendments prohibit the use at a resentencing trial[7] of physical restraints visible to the jury, absent a trial court determination that the restraints were justified by a state interest specific to a particular trial. *Deck*, 544 U.S. at 629. In defense of the death sentence, the State argued that "that the defendant suffered no prejudice" from the visible restraints at trial. *Id.* at 634. This Court disagreed, explaining that the State argument "fails to take account of this Court's statement in *Holbrook*[8] that shackling is 'inherently prejudicial.'" *Id.* at 635 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568-69, 106 S. Ct. 1340, 1345-46 (1986)). In conclusion, one sentence later, this Court held: "Thus, where a

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[7] "The State Supreme Court upheld Deck's conviction but set aside the sentence" and "[t]he State then held a new sentencing proceeding." *Deck*, 544 U.S. at 625.

[8] *Holbrook* concerned whether the defendant "was denied his constitutional right to a fair trial when, …the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectators' section." *Holbrook*, 475 U.S. at 562. The Court noted that visible shackling was "inherently prejudicial" but "reason, principle, and common human experience, [] *counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial*." *Id.* at 569 (quotation marks omitted) (citation omitted) (emphasis added). This Court concluded that "if the challenged practice is not found inherently prejudicial *and* if the defendant fails to show actual prejudice" the claim fails. *Id.* at 572 (emphasis added). Thus, this Court made clear that "inherently prejudicial" was synonymous with a presumption of prejudice.

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 639 (emphasis added). Thus, as in *Holbrook*, the Court's use of the term "inherently prejudicial" was another way of saying "presumed prejudice."

A. The Eleventh Circuit held that the Georgia Supreme Court reasonably applied *Strickland*'s actual prejudice standard instead of *Deck*'s presumed prejudice standard.

The Eleventh Circuit correctly determined—in a ruling not challenged here—that Whatley's substantive shackling claim was procedurally defaulted because it was not raised at trial and "the Supreme Court of Georgia rejected it under the invited error doctrine" on direct review. Pet. App. 24a (emphasis in original) (citing *Whatley*, 509 S.E.2d at 52). Thus, as stated above, Whatley raised his shackling claim under an ineffective assistance of counsel claim during state habeas.[9] *Id.* at 25a. On appeal from the denial of habeas relief, Whatley argued that the court should presume prejudice as would have been done on direct appeal if the claim were not defaulted. *Id.* at 72a. But the Georgia Supreme Court refused to apply a presumed prejudice standard because *Strickland's* "actual" prejudice standard applied. *Id.* at 73a. After examination, the Eleventh Circuit held that this determination was correct under state law and was not unreasonable under this Court's precedent. *Id.* at 75a-81a.

[9] The court of appeals stated that Whatley "has never argued that he can show cause and prejudice to excuse the procedural bar." Pet. App. 72a n.56.

B. The Ninth Circuit has also held that a state court's decision to apply *Strickland*'s actual prejudice test was reasonable.

In a procedurally identical case in the Ninth Circuit, *Walker v. Martel*, 709 F.3d 925 (9th Cir. 2013), the court of appeals rejected a petitioner's attempt to import the prejudice analysis on direct review of a claim of improper visible restraint at trial to a *Strickland* claim of failure to object at trial. Petitioner Walker was restrained during trial with a knee brace under his pants—which the jurors "noticed …during trial because it made Walker limp to and from the witness stand when he testified during both the guilt and penalty phase." *Walker,* 709 F.3d at 929. "On direct appeal, the California Supreme Court held that any objection to the use of the brace had been waived by the failure to object at the time." *Id.* at 930. During state collateral proceedings, Walker raised an ineffective-assistance claim for failure to object. *Id.* The California Supreme Court summarily denied Walker's *Strickland* claim on the merits. *Id.*

The federal district court granted relief on Walker's ineffective-assistance restraint claim for the penalty phase, but the court of appeals reversed. *Id.* at 930-31. The court of appeals explained that *Strickland*'s actual prejudice standard applied—not the "presumed-prejudice" standard from *Deck*.[10] *Id.* at 941. Ultimately, the court held that the state court's summary prejudice determination was not an unreasonable application of this Court's precedent because the state court "reasonably could have concluded that the jury's knowledge of the knee restraint was trivial in

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[10] The court of appeals first determined that because "*Deck* was not decided until 2005, after the California Supreme Court's 2004 decision summarily denying Walker's second state habeas petition …*Deck* could not be clearly established law for this case." *Id.* at 941.

relation to the magnitude of his crimes, given the caliber of the mitigation." *Id.* at 944.

C. The Seventh Circuit decisions do not evidence a split from the Ninth and Eleventh Circuits on the question presented.

The Seventh Circuit cases Whatley relies on do not conflict with the above cases from the Eleventh and Ninth Circuits because they do not address the reasonableness of a state court's decision under federal law and the AEDPA standard. Rather, the court performed de novo review of petitioners' ineffective-assistance restraint claims. Moreover, in each case, the Seventh Circuit analyzed the prejudice prong of the ineffective-assistance claims under *Strickland*'s actual prejudice standard—not *Deck*'s presumed prejudice standard.

1. In *Roche v. Davis*, there was no state court decision on the penalty phase ineffective-assistance shackling claim; and the court of appeals applied *Strickland's* actual prejudice standard.

In *Roche v. Davis*, the petitioner argued in his state collateral proceeding that trial counsel was ineffective regarding him being shackled during both phases of trial. 291 F.3d 473, 481 (7th Cir. 2002). The Indiana Supreme Court held that trial counsel was not ineffective during the *guilt* phase regarding the shackling issue; however, *the state court did not address the penalty phase of Roche's trial*. *Roche, supra*, at 483; *see also Roche v. State*, 690 N.E.2d 1115, 1124 (1997). Given this procedural history, the Seventh Circuit only reviewed the guilt phase ineffective-assistance claim under § 2254(d). The Court determined that "the Indiana Supreme Court's determination that counsel was not deficient was unreasonable" under federal law. *Roche*, 291 F.3d at 483. However, the court concluded that the

state court's prejudice determination was reasonable, holding: "because of the overwhelming evidence of Roche's guilt, we cannot say that there was a 'reasonable probability' that but for counsel's deficient performance, the result of the guilt phase of his trial would have been different." *Roche*, 291 F.3d at 484 (quoting *Strickland*, 466 U.S. at 694).

When it came to the penalty phase, the Seventh Circuit was not constrained by the § 2254(d) standard—as the Eleventh Circuit was here—but even without that distinction, the *Roche* opinion still does not represent a conflict. The Seventh Circuit did not presume prejudice in determining Roche's ineffective-assistance claim—it applied *Strickland*'s actual prejudice standard. *Id.* In doing so, the court pointed out that there was "considerable evidence concerning the mitigating circumstances" of Roche's life that was presented that made the determination of whether the "aggravating circumstances outweighed the mitigating circumstances …a closer call than whether there was sufficient evidence of Roche's guilt during the guilt phase." *Id.* Also, unlike here, the jury was "unable to recommend the death penalty" and the trial judge sentenced Roche to death.[11] *Id.* Thus, while the *Roche* court opined that there was "inherent prejudice associated with shackling,"[12] it did not presume prejudice; instead, it weighed the specific circumstances of

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[11] Georgia requires a unanimous jury verdict in order for a death sentence to be imposed. O.C.G.A. § 17-10-31(c).

[12] Notably, in determining whether the Indiana state court's decision regarding the guilt phase was reasonable under this Court's precedent, the court of appeals did not mention the "inherently prejudicial" language. *Id.* at 483-84. Moreover, *Deck* makes no distinction between the guilt phase and the sentencing phase for purposes of applying its presumption of prejudice. *See Deck*, 544 U.S. at 632 ("The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases.").

Roche's trial under the *Strickland* standard and determined Roche was entitled to relief. *Id.*

2. In the *Stephenson* cases, the court of appeals never stated it was reviewing the state court's decision on the penalty phase ineffective-assistance restraint claim through § 2254(d); and the court appeals applied *Strickland*'s actual prejudice standard.

Whatley also relies upon the companion cases of *Stephenson v. Wilson*, 619 F.3d 664 (7th Cir. 2010) (*Stephenson I*) and *Stephenson v. Neal*, 865 F.3d 956 (7th Cir. 2017) (*Stephenson II*) regarding an ineffective-assistance stun belt claim to support his split argument. But as in *Roche*, the Seventh Circuit's ultimate decision in *Stephenson II* was not constrained by § 2254; and the court performed a *Strickland* prejudice analysis based on the circumstances of the petitioner's case. *Stephenson II*, 865 F.3d at 958-59.

In *Stephenson I*, the district court granted relief on Stephenson's ineffective-assistance stun belt claim and did not rule on any other claim. *Stephenson I*, 619 F.3d at 666. The court of appeals reversed and remanded the case to the district court in part, because it needed "a better sense of counsel's performance as a whole" to decide the stun belt claim. *Id.* However, the court of appeals discussed at length the issue of counsel's effectiveness during the guilt phase and the Indiana Supreme Court decision on this claim. *See Stephenson v. State*, 864 N.E.2d 1022, 1028-42 (2007). The court of appeals determined that "[t]he factors relied on by the court to uphold the use of the stun belt [during the guilt phase] were insufficient in light of the case law both then and now." *Stephenson I*, *supra*, at 667. But this determination only dealt with the deficiency prong of Stephenson's ineffective-assistance claim. The court did not mention the state court's

decision on the prejudice prong of the sentencing phase. *Id.* at 673-74 ("We have thus far been considering *prejudice only at the guilt phase of the trial.*") (emphasis added). Nor did the Seventh Circuit mention whether the state court's decision was unreasonable in its application of *Deck* to the sentencing phase prejudice prong. *Id.* Instead, the court only discussed trial counsel's "residual doubt" defense during sentencing and how that played into the jury's decision.[13] In conclusion, the court of appeals held that [t]he question of prejudice from Stephenson's having been required to wear the stun belt at the penalty hearing will require the further consideration of the district court on remand." *Id.* at 674. But whether the state court's decision on the prejudice prong for the penalty phase was to be reviewed de novo or through § 2254(d) is not stated. *Id.*

"On remand, the district judge ruled that Stephenson had not been prejudiced by his lawyer's failure to object to his having to wear a stun belt visible to jurors in the penalty phase of the litigation." *Stephenson II*, 865 F.3d at 957. The court of appeals examined de novo the question of ineffective-assistance and determined the district court's decision was "a mistake." *Id.* at 958. First, the court of appeals examined how the stun belt is typically used and found particularly troubling that the "stun belt's manual brags that 'the psychological impact [of the stun belt] becomes a predominant factor of and for optimum control.'" *Id.* at 959 (brackets in original). Second,

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[13] The court referenced its previous *Roche* decision granting relief on *Strickland* prejudice in the penalty phase, but specifically noted that the decision was "without reference to the doctrine of residual doubt." *Id.* at 674. Obviously, if the court required the presumed prejudice standard from *Deck* to apply, there would be no need to consider a residual doubt defense in the penalty phase.

while the court acknowledged the aggravation of the "trio of murders," it also pointed out the "brevity of the penalty phase," and the fact that there was "no evidence that the defendant was at all likely to act up at the penalty phase of his trial." *Id.* The court concluded that trial counsel was ineffective for failing to object because "[t]he possibility that the defendant's having to wear the stun belt—for no reason, given that he had no history of acting up in a courtroom—contaminated the penalty phase of the trial persuades us to reverse the district court's denial of Stephenson's petition for habeas corpus." *Id.*

Nowhere in *Stephenson II* does the court of appeals discuss the state court decision, *Deck*, *Roche*, or even mention the phrase "inherently prejudicial." It does however reference *Strickland* when determining whether counsel was ineffective during the penalty phase for not objecting to the stun belt. *Id.* at 959. Moreover, the court goes through the significant evidence of Stephenson's guilt when rejecting his claim that counsel was ineffective during the guilt phase for not objecting to the stun belt. But, as stated *supra*, *Deck* makes no distinction between the guilt phase and the sentencing phase regarding its presumption of prejudice. *See Deck*, 544 U.S. at 632 ("The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases."). Therefore, contrary to Whatley's arguments, overwhelming evidence of guilt would not matter to the Seventh Circuit if it were applying the *Deck* presumption of prejudice.

3. *Wrinkles* does not address the question presented.

Finally, Whatley concludes that "[i]n the Seventh Circuit, therefore, a habeas petition in these circumstances turns on whether the restraints were, in fact, visible to the jury." Pet. 17. However, the case on which Whatley relies—*Wrinkles v. Buss*, 537 F.3d 804 (7th Cir. 2008)—does not address his question presented. While visibility was an issue in *Wrinkles*, the Seventh Circuit stated in *Stephenson v. Wilson*, decided three years after *Wrinkles*, that the jurors admitted "awareness" of the stun belt at trial did not prove a "prejudicial effect." *Stephenson I*, 619 F.3d at 671.

In state collateral proceedings, Petitioner Wrinkles raised a substantive claim challenging the constitutionality of his stun belt. *Wrinkles*, 537 F.3d at 809. To prove his claim, Wrinkles presented juror affidavits suggesting that the jury saw the stun belt he was wearing at trial. *Id.* at 809-10. The state collateral court found in its final order that Wrinkles "did not prove that the belt was visible or that the jury knew about it." [14] *Id.* at 810. On appeal, the Indiana Supreme Court determined the substantive restraint claim was procedurally defaulted and that Wrinkles had not shown cause in the form of ineffective-assistance to overcome the default. *Id.* at 813.

However, and the crux of contention in Wrinkles' federal habeas proceedings was the seemingly counterfactual finding by the Indiana Supreme Court that Wrinkles' attorneys were "later proven wrong" about their assumption that the jury could not see the stun belt. *Id.* at 810. The issue was important because Wrinkles argued that he was prejudiced by trial

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[14] After the lower court issued its final opinion, Wrinkles submitted additional juror affidavits in support of his claim but the court did not "admit the additional juror affidavits into evidence." *Id.*

counsel's failure to object "because, in his opinion, the jurors were aware that he was restrained by the stun belt and were thus more inclined to view him as a dangerous person." *Id.* at 815. After lengthy discussion of the Indiana Supreme Court's language and state law, the court of appeals determined that the Indiana Supreme Court had not made a factual finding regarding the visibility of the stun belt. *Id.* at 815-22. This meant the lower state court's factual finding still stood. *Id.* at 822-23. The court of appeals concluded that "[w]ithout evidence that the jurors saw the stun belt, *or that he was otherwise affected by the stun belt throughout trial*, Wrinkles cannot demonstrate prejudice." *Id.* at 823 (emphasis added). Consequently, contrary to Whatley's argument, in the end, the court of appeal's decision turned on more than just visibility. And again, *Wrinkles* does not evidence a split and does not address the question Whatley presents to this Court.

In sum, Whatley has failed to identify a split implicating the question presented.

II. The court of appeals did not unreasonably apply *Deck*, and in turn neither did the Georgia Supreme Court.

Next, Whatley argues that the Eleventh Circuit erroneously determined that "in assessing *Strickland* prejudice, a state court need not account for this Court's shackling cases because they '[do] not apply to [a] Sixth Amendment ineffective assistance claim.'" Pet. 17 (quoting Pet. App. 73a). In making this argument, Whatley ignores the first task the court of appeals had to decide—the correct standard of review for Whatley's ineffective-assistance claim. The state court held that *Strickland*'s actual prejudice standard applied, and Whatley "argue[d] that the due process cases, and the presumption of prejudice they bring with them, [applied] to his ineffective assistance of counsel claim." Pet.

App. 74a. Because it was impossible to apply *both* prejudice standards, the court of appeals had to decide which standard should have been applied by the state court. To make this determination, the court of appeals looked to state and federal law. The court correctly concluded that Whatley could not impose a direct appeal standard of prejudice to a collateral claim of ineffective assistance. *Id.* at 78a-79a. Whatley has not shown this decision was wrong or worthy of this Court's certiorari review.

The court of appeals correctly surmised that the "question before us is whether [Whatley] can borrow the presumed prejudice that would apply on direct appeal—a direct appeal that would never happen because the substantive claim is procedurally defaulted—to show actual prejudice under *Strickland*." *Id.* at 78a-79a. Looking to state law, the court of appeals answered: "a petitioner cannot rely on the legal standard that would have applied on direct appeal (here, presumed prejudice)—if only the claim weren't procedurally defaulted—to show ineffective assistance of counsel on collateral attack (that is, actual *Strickland* prejudice)." *Id.* at 75a. Whatley does not argue that the Eleventh Circuit's reading of state law was wrong—and it is not. *See Seabolt v. Hall*, 292 Ga. 311, 314, 737 S.E.2d 314, 317 (2013) ("'Though [Hall] would have been entitled to the benefit of presumed prejudice on direct appeal, [] we have held that where structural errors are raised in the context of an ineffective assistance of counsel claim, prejudice will not be presumed.'") (quoting *Griffin v. Terry*, 291 Ga. 326, 328, 729 S.E.2d 334, 337 (2012) (citations omitted) (quotation marks omitted) (brackets in original). The court of appeals refused to "breathe life into [Whatley's] defaulted claim—tossing Georgia procedural law aside—by treating his collateral attack as a direct appeal." Pet. App. 77a.

The court also acknowledged that this Court's precedent—*Premo v. Moore*— did not allow a court to "borrow the legal standard from one context and apply it in another." Pet. App. 75a. Petitioner Moore challenged "the adequacy of representation in providing an assessment of a plea bargain without first seeking suppression of a confession assumed to have been improperly obtained." *Premo v. Moore*, 562 U.S. 115, 118, 131 S. Ct. 733, 738 (2011). The court of appeals for the Ninth Circuit held that the state court's decision on Moore's ineffective-assistance claim was based upon an unreasonable application of *Strickland* and "was contrary to *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 [] (1991)." *Moore*, 562 U.S. at 120 (partial citation omitted). But this Court rejected the court of appeal's application of *Fulminante* to the ineffective assistance claim and instead held: "The applicable federal law consists of the rules for determining when a criminal defendant has received inadequate representation as defined in *Strickland*." *Id.* at 121. The Court explained that "'[a]n ineffective-assistance claim can function as a way to escape rules of waiver" thus "'the *Strickland* standard must be applied with scrupulous care.'" *Id.* at 122 (quoting *Richter*, 562 U.S. at 105).

In rejecting the court of appeals' reasoning, this Court pointed out that "[t]he *Fulminante* prejudice inquiry presumes a constitutional violation, whereas *Strickland* seeks to define one," therefore, "[t]o prevail on prejudice before the state court Moore had to demonstrate" *Strickland*'s "reasonable probability of a different outcome." *Moore*, *supra,* at 128-29. And *Fulminante* "[said] nothing about prejudice for *Strickland* purposes." *Id.* at 129-30. All of this supported this Court's refusal to apply the harmless error test for the underlying constitutional error—which presumed prejudice and

shifted to the State the burden of showing "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 130. At the close, this Court held that the "state postconviction court's decision involved no unreasonable application of Supreme Court precedent" and reversed the court of appeals. *Id.* at 131.

This Court explained and relied upon this concept again in *Weaver v. Massachusetts,* 137 S. Ct. 1899 (2017)—albeit in relation to an underlying claim of structural error raised with a *Strickland* claim. Petitioner Weaver claimed that trial counsel was ineffective in failing to ensure his right to a public trial. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905 (2017). "In the direct review context, the underlying constitutional violation—the courtroom closure—has been treated by this Court as a structural error, i.e., an error entitling the defendant to *automatic reversal without any inquiry into prejudice*." *Id.* (emphasis added). However, the Court had to decide "whether invalidation of the conviction [was] required …or if the prejudice inquiry is altered when the structural error is raised in the context of an ineffective-assistance-of-counsel claim." *Id.* The Court concluded that the "prejudice inquiry" to be applied was *Strickland*'s actual prejudice[15] because, in part, of the finality concerns, which are not present on direct review. *Id.* at 1913. The denial of relief by the state court was "affirmed." *Id.* at 1914.

[15] Presumed prejudice for an ineffective-assistance claim occurs "in only a very narrow set of cases in which the accused has effectively been denied counsel altogether: These include the actual or constructive denial of counsel, state interference with counsel's assistance, or counsel that labors under actual conflicts of interest." *Id.* at 1915. There has been no such determination in this case.

Whatley repeatedly refers to this Court's "inherently prejudicial" language in *Deck* as proof that the state court and the court of appeals wrongly determined the prejudice prong of his *Strickland* claim. But nowhere does Whatley explain how this language is to be used other than as a presumed prejudice standard—which is exactly what the court of appeals concluded. In responding to the dissent, the court of appeals correctly pointed out that the majority "distinguished *Deck* to explain why the presumption of prejudice that comes with *Deck* does not apply in this context." Pet. App. In other words, the court "did not distinguish *Deck* as a way of discounting the effect that shackling has on a jury." *Id.* Lastly, the court of appeals explained that while "[t]he Dissent does not go so far as to say that it's borrowing the prejudice [from *Deck*], [] that's the practical effect of its analysis" because "[i]t thumbs the scale so far in favor of prejudice, based on the 'inherently prejudicial effect' of shackling, [] that it's difficult to imagine a situation when actual *Strickland* prejudice wouldn't be shown." *Id.*

Simply put, Whatley has not shown that the state court's refusal to use the presumed prejudice standard from *Deck* was an unreasonable application of this Court's precedent. As a result, Whatley has failed to show that the court of appeals decision is worthy of this Court's certiorari review.

III. The court of appeals' determination that the Georgia Supreme Court reasonably applied *Strickland* is correct.

Having shown that there is no split among the courts of appeals, and that both the state and federal court correctly determined the correct prejudice standard, this only leaves a factbound application of a *Strickland* claim by a state court reviewed through the lens of § 2254(d). This Court

does not ordinarily grant certiorari review for this purpose, and there is no reason to do so here, because the decision below is correct.

Strickland requires a court assessing prejudice to weigh the aggravating and mitigating evidence to determine a reasonable probability of a different outcome. *See Strickland*, 466 U.S. at 699-700. Nowhere in *Strickland*, or any of this Court's applications of *Strickland*, has this Court held that evidence that would entitle a petitioner to relief on a *substantive* claim must always tip the scale conclusively in a petitioner's favor. Where prejudice is not presumed for an ineffective assistance of counsel claim, the prejudice analysis is a review of the balance of the evidence as it would stand before a jury without any presumption.

A careful reading of the Georgia Supreme Court's opinion shows that it was well aware of the evidence presented in both phases of trial and determined that the lack of objection by his counsel "in reasonable probability affected the jury's selection of sentence."[16] Pet. App. 278a. In mitigation, Whatley informed the jury he had a good childhood and his family, friends, and caseworker testified to his positive attributes. *Id.* at 15a-16a, 21a-22a. However, the record showed overwhelming evidence of guilt, a prior criminal history—to include Whatley's fugitive from justice status when he committed the crimes. *See id.* at 8a-14a. And Whatley's refusal to take full responsibility for his crimes—to include testimony that he would not have

[16] Whatley refers to the state court's decision as "perfunctory[]" (Pet. brief at 12), and the dissent's reasons for determining the state court decision was not entitled to deference hinges on its belief that the state court did not consider certain evidence (see Pet. App. 95a). Neither is an appropriate method of review under § 2254(d) as "[t]here is no text in the statute requiring a statement of reasons." *Richter*, 562 U.S. at 98.

shot the victim in this is case if the victim had not taken out his gun in self-defense—could be viewed as aggravating. *Id.* at 17a-21a. Additionally, despite the physical evidence to the contrary, Whatley refused to admit that he shot the victim at close range. *Id.* at 20a. Finally, it only took the jury 90 minutes to agree unanimously to a sentence of death. *Id.* at 45a. When these facts are weighed against the visibility of the shackles, even with the reenactment—which the jury could have reasonably found an off-putting technique by the prosecution—it was not unreasonable for the state court to determine there was no prejudice under *Strickland*'s standard.

"'When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.'" *Moore*, 562 U.S. at (quoting *Richter*, 562 U.S. at 105). Without doubt, there is a "reasonable argument" to support the state court's denial of Whatley's ineffective-assistance claim. Certiorari review should be denied.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

<u>/s/ *Sabrina D. Graham*</u>

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