No. _____

In the Supreme Court of the United States

CHARLES GREGORY CLARK,
Petitioner,

v.

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

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November 5, 2021

CAPITAL CASE

QUESTIONS PRESENTED

The trial court required Charles Gregory Clark to be visibly restrained during his entire capital murder trial, without a hearing and making no requisite findings regarding their necessity. At trial, the only issue in dispute was whether Mr. Clark had the specific intent to kill required to make the murder capital. The defense psychologist testified that he did not intend to kill. The prosecution psychologist testified that it was "equally possible, or perhaps more so," that Mr. Clark did not intend to kill. Postconviction counsel failed to interview jurors and abandoned a ineffectiveness/shackling claim before the postconviction evidentiary hearing. Federal habeas counsel obtained affidavits from two jurors that they had seen the restraints and affidavits from three other jurors who did not believe Mr. Clark had the specific intent to kill.

The district court found the shackling claim "substantial" under *Martinez v. Ryan*, but erroneously concluded that failing to appeal following abandonment of the claim placed it outside *Martinez*. Without mentioning the weakness of the specific intent evidence, the Eleventh Circuit found the overwhelming evidence that Mr. Clark *killed* Mr. Ewing made it impossible to establish prejudice for his *capital* murder conviction, and thus, declared the claim not "substantial" under *Martinez*. The questions presented are:

I. Under *Strickland v. Washington*, may a circuit court sustain denial of relief by determining a claim is not substantial, where, to do so, it ignores evidence regarding the central issue, thus ignoring the totality of the circumstances as to prejudice?

II. Should this Court grant certiorari to resolve the circuit split created when the Eleventh Circuit adopted a stringent "cause" requirement irreconcilable with *Martinez*'s holding that, whether a claim is substantial is governed by the *Miller-El v. Cockrell* standard?

III. Given this Court's holdings in *Holbrook v. Flynn* and *Illinois v. Allen*, may a circuit court, ignoring the central evidence undergirding the claim, hold an ineffective assistance of counsel shackling claim not substantial when the district court, having addressed thoroughly the underlying strength of the claim, found it substantial and granted a certificate of appealability?

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a corporation, and a corporate disclosure statement is not required. Sup. Ct. R. 29.6.

LIST OF PROCEEDINGS

Clark v. Comm'r, Ala. Dep't of Corrs., No. 19-11443-P (11th Cir. 2021).

Clark v. Comm'r, Ala. Dep't of Corrs., No. 1:16-cv-00454 (S.D. Ala. 2019).

Clark v. State, No. CR-12-1965 (Ala. Crim. App. 2015).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Gregory Clark respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit affirming denial of habeas corpus relief.

RELEVANT OPINIONS BELOW

The opinion of the Eleventh Circuit is published, *Clark v. Comm'r, Ala. Dep't of Corrs.*, 988 F.3d 1326 (11th Cir. 2021), and attached as Pet. App. A.[1] Mr. Clark's Petition for Rehearing and Rehearing *en Banc* was denied on June 9, 2021. Pet. App. D.[2] The district court's decision denying relief is unpublished, *Clark v. Dunn*, 2019 WL 1119354 (S.D. Ala. Mar. 11, 2019), and is attached as Pet. App. B.[3] The district court's decision partially granting a Certificate of Appealability is attached as Pet. App. C.[4] The decision of the Alabama Court of Criminal Appeals ("ACCA") denying postconviction relief is published. *Clark v. State*, 196 So. 3d 285 (Ala. Crim. App. 2015). The ACCA's decision on direct appeal is published. *Clark v. State*, 896 So. 2d 584 (Ala. Crim. App. 2003).

[1] Pet. App. 2a.
[2] Pet. App. 115a.
[3] Pet. App. 9a.
[4] Pet. App. 97a.

JURISDICTION

The Eleventh Circuit issued its opinion on February 25, 2021, and denied rehearing and rehearing en banc on June 9, 2021.[5] Due to the ongoing pandemic, this Court's order extending the deadline for filing petitions for certiorari to 150 days was still in effect, making Mr. Clark's petition due on November 8, 2021. Sup. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment, in relevant part, provides, "No person shall . . . be deprived of life . . . without due process of law." U.S. Const. amend. V.

The Eighth Amendment, in relevant part, prohibits "cruel and unusual punishments." U.S. Const. amend. VIII.

The Fourteenth Amendment, in relevant part, provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act, in relevant part, provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on

[5] Pet. App. 2a, 115a.

> 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.

28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

During trial, making no hearing or findings that restraints were necessary, Mr. Clark was required to wear a leg brace and a stun belt. At least two jurors saw the leg brace, remembering it even 18 years later.[6] Trial counsel did not object, and failed to ensure jurors did not see the restraints.

A. Relevant facts of the crime.

Mr. Clark became addicted to crack cocaine approximately three years before this crime.[7] Over time, his addiction deepened, and he exhibited signs of extreme paranoia and mental delusion in the 18 months before his arrest.[8]

Mr. Clark had been continuously using crack since 10:00 or 11:00 a.m. on February 13, 1998, the morning before the murder.[9] On the way to his

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[6] Pet. App. 126a, 130a. (All five of the juror affidavits from Mr. Clark's § 2254 petition are reproduced in the Petitioner's Appendix. Pet. App. 116a-130a).
[7] (Vol. 9, R. 1238, 1267).
[8] (*Id.*).
[9] (Vol. 8, R. 1097); (Trial Ex. 40) (audio statement of Mr. Clark).

girlfriend's apartment, his stepfather's truck ran out of gas.[10] Before continuing his journey on foot, knowing he would be walking through a dangerous part of town late at night, he took his hunting knife from the glove compartment.[11]

After leaving to buy more crack,[12] Mr. Clark ended up in Gulf Shores.[13] Low on gas, he stopped by Mr. Ewing's gas station, waiting for it to open.[14] When Mr. Ewing arrived, Mr. Clark asked him to turn on the gas pump, and while it pumped, Mr. Clark went inside to buy cigarettes.[15] Eventually, Mr. Ewing told Mr. Clark he owed him fourteen dollars and some change for the cigarettes and gas.[16] Mr. Clark paid, and they talked for another five minutes.[17]

As Mr. Clark began to leave, Mr. Ewing asked him to pay for the gas.[18] Mr. Clark told him he had already paid.[19] Mr. Ewing threatened to call the

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[10] (*Id.*).
[11] (*Id.*).
[12] (Vol. 6, R. 696, 721).
[13] (Vol. 8, R. 1097); (Trial Ex. 40).
[14] (*Id.*).
[15] (*Id.*).
[16] (*Id.*).
[17] (*Id.*).
[18] (*Id.*). Mr. Ewing was somewhat mentally limited, having been "damaged in the head just a little bit from a wreck." (Vol. 7, R. 860). Apart from signing his name, Mr. Ewing could not read or write, and he could not make change correctly without the cash register. (Vol. 7, R. 861).
[19] (Vol. 8, R. 1097); (Trial. Ex. 40).

Sheriff's Department, and Mr. Clark invited him to do so, insisting he had paid.[20] Mr. Ewing came around the counter, and they began "pushing [and] shoving."[21] Mr. Ewing went behind the counter and got a "stick,"[22] resembling a nightstick or billy-club.[23] As Mr. Ewing approached with the stick, Mr. Clark drew his knife.[24] Mr. Ewing struck Mr. Clark with the stick and pulled out a plug of his hair, while Mr. Clark slashed and stabbed Mr. Ewing.[25]

Mr. Ewing's autopsy revealed 15 stab wounds, 17 superficial cuts, and several scrapes on Mr. Ewing's back, chest, face, arms and hands.[26] Although some of the stab wounds were deep enough to cause Mr. Ewing to bleed to death, many were superficial, with "at least 10 . . . [having] barely touched the skin," appearing more "like a scratch."[27] One punctured Mr. Ewing's heart, however, and would have caused death in minutes.[28] Many wounds were "defensive," and Mr. Ewing and the perpetrator were likely in close proximity during the struggle.[29]

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[20] (*Id.*).
[21] (*Id.*).
[22] (*Id.*).
[23] (Vol. 6, R. 658); (Trial Ex. 47).
[24] (Vol. 8, R. 1097); (Trial Ex. 40).
[25] (*Id.*).
[26] (Vol. 7, R. 809).
[27] (Vol. 6, R. 798).
[28] (Vol. 7, R. 810).
[29] (Vol. 7, R. 819).

B. Expert trial testimony regarding intent.

At trial, the facts of the crime were generally undisputed. Thus, the debate centered mostly upon the testimony of two expert witnesses who testified regarding Mr. Clark's likely mental state at the time of the offense, and whether he harbored the "particularized intent to kill," necessary for the murder to qualify as capital. *See Kennedy v. State*, 472 So. 2d 1092, 1105 (Ala. Crim. App. 1984); *see also* Ala. Code §§ 13A-5-40(b)-(c), 13A-6-2(a)(1).

Trial focused mainly on the requisite element of a particularized intent to kill. Both sides introduced evidence, through testimony of psychological experts, about Mr. Clark's mental state and its relation to his intent. Trial counsel relied on Dr. Rosenzweig, while the State called Dr. DeFrancisco.

Dr. Rosenzweig discussed the effects of cocaine intoxication and withdrawal, explaining that, as a cocaine dose increases, a user becomes more nervous, agitated and paranoid.[30] The paranoia leads users to "jump to conclusions," "misread the cues around them," and "perceive, perhaps, danger or harm or mal-intent of other people that is not there."[31] Mr. Clark exhibited this paranoia in the 18 months preceding the crime.[32] Dr. Rosenzweig concluded Mr. Clark acted on what he misperceived as a threat from Mr.

[30] (Vol. 9, R. 1221-71).
[31] (*Id.*).
[32] (Vol. 9, R. 1239).

Ewing, with no intent to kill him.[33] In her expert opinion, although Mr. Clark was legally sane, he lacked the specific intent to kill.[34]

The State's expert, Dr. DeFrancisco, also testified that Mr. Clark was sane at the time of the offense.[35] Asked whether Mr. Clark knew right from wrong on the date of the offense, Dr. DeFrancisco hesitated, noting that Mr. Clark was suffering from cocaine intoxication or withdrawal at the time of the offense and responding to how he "perceived the situation," before concluding that he at least "kn[e]w what he was doing."[36] Dr. DeFrancisco noted Mr. Clark was addicted to cocaine, which can cause "paranoia," and "make a person not be themselves [sic]."[37] He continued, "So what happens is that when you do something, okay, *that depends on what you're perceiving in your mind*. In other words, your actions are determined by basically your thoughts, what you *believe* is going on."[38]

When pressed yet again about whether Mr. Clark knew right from wrong, Dr. DeFrancisco insisted on clarifying his answer, explaining:

> I think you would know right from wrong[, but] I think you could distort things in your mind by thinking something was right when it wouldn't be right. For example, what I mean by that is, because it affects the central nervous system so acutely, *you could believe*

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[33] (Vol. 9, R. 1263).
[34] (Vol. 9, R. 1263, 1271).
[35] (Vol. 9, R. 1287).
[36] (*Id.*).
[37] (Vol. 9, R. 1288).
[38] (Vol. 9, R. 1289) (emphases added).

> *something is happening when it really isn't happening. But you could believe it is and act on that belief.*[39]

Although, Dr. DeFrancisco agreed that Mr. Clark "could distinguish right from wrong," he concluded, "My opinion is that his judgment was impaired and that he was responding to what he *perceived* as reality."[40]

Summarizing, Dr. DeFrancisco stated that Mr. Clark knew what he was doing, but concluded there was "no question that the major influence to this unfortunate tragedy was the use of cocaine,"[41] explaining:

> It's conceivable that [Mr. Clark] premeditated this thing, he robbed this guy and was going about his business and was fine. It's also conceivable that he was cocaine ingested and he was responding to his own distortions in his mind, what he perceived was going on, and went from there.[42]

On cross-examination, Dr. DeFrancisco reaffirmed that, although he could not conclude definitively that Mr. Clark lacked an intent to kill, such a conclusion was not only reasonable, but was "*equally as possible, or perhaps more so* . . . that [Mr. Clark] was doing what he said he was doing . . . in response to . . . the perceived risk of harm. That he reacted as he did . . . because of the effect of the cocaine on him and *not because he intended to kill anyone* or rob

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[39] (*Id.*) (emphasis added).
[40] (Vol. 9, R. 1291) (emphasis added).
[41] (Vol. 9, R. 1292-93).
[42] (Vol. 9, R. 1293).

anyone."[43]

C. Postconviction proceedings.

State postconviction counsel initially raised an ineffective assistance claim for trial counsel's failure to object to Mr. Clark having to wear a shock belt and leg brace throughout trial.[44] However, postconviction counsel formally abandoned the claim before the evidentiary hearing,[45] and it was procedurally defaulted.[46] This resulted from his failure to conduct a proper postconviction investigation, including speaking with the jurors to determine if any had seen the restraints. For the first time,[47] federal habeas counsel interviewed most jurors learning that at least two saw the leg brace,[48] with one so affected by it he described seeing Mr. Clark in "shackles."[49]

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[43] (Vol. 9, R. 1298-99). Dr. DeFrancisco also testified that the wounds in the autopsy report were consistent with Mr. Clark's version of what happened: "That there was an ensuing struggle and that they fought for a period of time, then it stopped and it started, and it stopped and it started, and it didn't look like it was something that he just went in and just went (indicating), I'm going to kill you to get this money and crack cocaine. It looked like a struggle that had occurred for a number of minutes that stopped and started." (Vol. 9, R. 1302).
[44] (Vol. 24, Tab #J-58, R. 70).
[45] (Vol. 30, Tab #J-66, R. 3).
[46] Pet. App. 3a.
[47] Pet. App. 118a, 121a, 124a, 127a, 130a.
[48] Pet. App. 126a, 130a.
[49] Pet. App. 126a.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's reliance on overwhelming evidence that Mr. Clark killed Mr. Ewing ignored an essential element of capital murder under Alabama law, in complete disregard of the requirements of *Strickland*.

Mr. Clark's trial revolved around intent, with three jurors having sworn they did not believe Mr. Clark intended to kill Mr. Ewing, and the State's own psychological expert having testified that, as to the intent element, the State had failed not only to prove its case beyond a reasonable doubt, but also possibly by a preponderance of the evidence. But in continuing to refuse to apply *Martinez*, as described more fully in the following section, the Eleventh Circuit merely held that the evidence that Mr. Clark killed Mr. Ewing was overwhelming, and thus, his underlying shackling claim was not substantial.[50] Notwithstanding the wholesale weakness of the evidence regarding intent, not once does the decision below even mention the word.[51]

Disregarding the unanimity among sister circuits that *Martinez* applies in cases like this, the Eleventh Circuit yet again[52] avoided applying *Martinez*. Remarkably, even though the State's own psychological expert testified that, on intent, it was "*equally as possible, or perhaps more so*" that Mr. Clark did

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[50] Pet. App. 5a-6a (*Clark*, 988 F.3d at 1332-33).
[51] *Id.* (*passim*).
[52] The Eleventh Circuit has never applied *Martinez* in favor of a habeas petitioner.

not intend to kill Mr. Ewing,[53] the decision below relied solely on the overwhelming (and undisputed) evidence that Mr. Clark *killed* Mr. Ewing, failing even to mention the central issue of intent.[54]

In stark contrast, the district court conducted a thorough and proper analysis, faithful to *Strickland*, in which it considered the entire circumstances, including a detailed discussion of the intent element and the juror affidavits.[55] It found, as discussed in more detail in the following section, that the underlying ineffectiveness claim was strong regarding both prongs of *Strickland*.[56] The court recognized it need not make a final determination on those issues, but merely that they be reasonably debatable.[57] Thus, the court, having undertaken the proper analysis, issued a COA.[58]

While the Eleventh Circuit recognized that Mr. Clark's petition "presented evidence that, at trial at least two jurors saw him physically restrained with a leg brace[,]"[59] the affidavits of three jurors stating their belief that Mr. Clark did *not intend* to kill Mr. Ewing went unmentioned. By failing even to address these key facts and evidence regarding intent, the Eleventh

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[53] (Vol. 9, Tab #J-18, R. 1298-99) (emphasis added).
[54] Pet. App. 2a-6a (*Clark*, 988 F.3d at *passim*).
[55] Pet. App. 102a-114a.
[56] Pet. App. 111a, 113a, 114a.
[57] *Id.*
[58] *Id.*
[59] Pet. App. 5a (*Clark*, 988 F.3d at 1331).

Circuit contravened this Court's directive that issues regarding ineffective assistance of counsel, here bound up in the decision on substantiality, require consideration of the totality of the evidence. *Strickland*, 466 U.S. at 682, 694-95.

By avoiding the key facts, the Eleventh Circuit reached a decision irreconcilable with *Strickland* and its progeny, and *Martinez* and *Miller-El*. If *Strickland* is to be abandoned, it is for this Court to say.

II. The Eleventh Circuit's decision creates a split with the Third, Seventh, and Ninth Circuits, and is fundamentally at odds with the other circuits that have addressed the issue generally and irreconcilable with *Martinez and Miller-El*.

The Eleventh Circuit's opinion denied the substantiality of Mr. Clark's claim based upon its determination that Mr. Clark could not demonstrate prejudice.[60] This not only contravened *Strickland*'s requirement that it consider the totality of the circumstances, but also conflicted directly with the approach taken by three other circuits, creating a circuit split. The Third, Seventh, and Ninth Circuits have all held that a finding of deficient performance *alone* satisfies a petitioner's burden of showing cause to excuse a procedural default. *Workman v. Superintendent, Albion SCI*, 915 F.3d 928, 940-41 (3d Cir. 2019); *Brown v. Brown*, 847 F.3d 502, 513 (7th Cir. 2017); *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013).

[60] Pet. App. 4a-6a (*Clark*, 988 F.3d at 1332-34).

The Eleventh Circuit gave a nod to the district court's untenable conclusion that *Martinez* may not apply to any claim not only abandoned, or otherwise not raised, in the initial post-conviction court, but also thereafter not raised on appeal from that proceeding.[61] This highlights the Eleventh Circuit's determined refusal to apply *Martinez*. Instead, it simply avoided those commands, conflicting even with those circuits not yet expressly adopting the Third, Seventh, and Ninth Circuits, but still recognizing *Martinez*'s applicability to claims such as Mr. Clark's.

A. By holding Mr. Clark's claim is not substantial based on prejudice, the Eleventh Circuit created a split with decisions of the Third, Seventh, and Ninth Circuits holding that a finding of deficient performance *alone* satisfies the cause required to excuse procedural default.

In *Detrich*, the Ninth Circuit held that a finding of deficient performance *alone* satisfies a petitioner's burden of showing cause to excuse a procedural default, and thus a petitioner does not have to prove prejudice at this stage. 740 F.3d at 1245-46. It reached this result based on *Martinez*'s requirement that, to demonstrate cause, a claim need merely satisfy the COA standard of "some merit." *Id.*

Detrich relied largely on Justice Breyer's distinguishing, in *Gallow v. Cooper*, 977 U.S. 933 (2013), between "cause" under *Martinez* and "cause and

[61] Pet. App. 4a, 7a (*Clark*, 988 F.3d at 1330 & n.5).

prejudice" under *Strickland*. *Detrich*, 740 F.3d at 1246. As Justice Breyer explained, "cause and prejudice under *Strickland* are determined separately from, and after, a determination of 'cause' under *Martinez*." *Gallow*, 977 U.S. at 933. Justice Breyer, the author of *Trevino v. Thaler*,[62] further explained that "[t]he ineffective assistance of state habeas counsel might provide cause to excuse the default of the claim, thereby allowing the federal habeas court to consider the full contours of [a petitioner's] ineffective-assistance claim." *Gallow*, 977 U.S. at 933.

The Seventh Circuit adopted *Detrich*'s reasoning, explaining, "To demonstrate cause under *Martinez-Trevino*, the petitioner must show deficient performance by counsel on collateral review as required under the *first* prong of the *Strickland* analysis . . . ." *Brown*, 847 F.3d at 513 (emphasis added).

The Third Circuit adopted the reasoning of *Detrich* and *Brown*. *Workman*, 915 F.3d at 940-41. In doing so, the Seventh Circuit explained, "This rule is sensible, workable, and a proper reading of *Martinez*." *Id.* at 941. As a result, "If Workman shows that his underlying ineffective-assistance-of-trial-counsel claim has some merit and that his state post-conviction counsel's performance fell below an objective standard of reasonableness, he has shown

[62] 569 U.S. 413 (2013) (holding that *Martinez* applies to states, like Alabama, where postconviction proceedings are the first realistic pleading stage where ineffective assistance of trial counsel claims can be raised).

sufficient prejudice from counsel's ineffective assistance that his procedural default must be excused under *Martinez*." *Id.* Thus, the Eleventh Circuit's holding below directly splits with the Third, Seventh, and Ninth Circuits, and this Court should grant certiorari to resolve that conflict.

B. The Eleventh Circuit's decision also conflicts with other circuits that recognize *Martinez* applies to claims like Mr. Clark's.

Although the district court found *Martinez* could serve as cause to excuse procedural default of the shackling claim because postconviction counsel failed to present it at the initial postconviction proceeding,[63] it denied relief because postconviction counsel did not thereafter pursue it on appeal to the ACCA or ASC.[64]

This belies all logic, and the manner all sister circuits to have addressed similar claims have applied *Martinez*. Appellants typically do not and, usually cannot, raise issues on appeal they have failed to raise below.[65] And the federal

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[63] Pet. App. 107a-114a.

[64] Pet. App. 67a.

[65] Alabama appellate courts will not address claims abandoned in a lower court proceeding, particularly where no evidence was put forth to support it. *See Dean v. City of Dothan*, 516 So. 2d 854, 855 (Ala. Crim. App. 1987) ("This issue was never raised below and the record is totally silent in this regard. . . . A reviewing court cannot predicate error on matters not shown by the record. . . . Indeed, a silent record supports a judgment.") (citation and quotation marks omitted); *see also Davis v. State*, 331 So. 2d 807, 808 (Ala. Crim. App. 1976) ("We will not consider these issues . . . that . . . were not raised below.") (citation omitted).

courts, including the Eleventh Circuit, have longstanding procedures for handling such matters: either remanding to State court (if it appears the State court may consider it), or deeming the claim technically exhausted but procedurally defaulted, and determining whether cause exists to excuse the default. *See, e.g.*, *Bailey v. Nagle*, 172 F.3d 1299, 1305-06 (11th Cir. 1999) (noting the "familiar principle that federal courts may treat unexhausted claims as procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile."). *Bailey* went on to consider whether the petitioner could establish *cause* to excuse the procedural default. *Id.*; *see also Kelley v. Sec'y, Dep't of Corrs.*, 377 F.3d 1317, 1351 (11th Cir. 2004).

It was well established, long before *Martinez*, that "[a] habeas petitioner who has defaulted his federal claims in state court *meets the technical requirements for exhaustion*; there are no state remedies any longer 'available' to him." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (citation omitted). The Eleventh Circuit itself has long recognized that the federal courts may, "forego the needless 'judicial ping-pong' when that claim would inevitably be procedurally barred." *Kelley*, 377 F.3d at 1351 (quoting *Snowden v. Singletary*, 135 F.3d 732, 736 (11th Cir. 1998)).

Most important, if the district court's reasoning was correct, it would eviscerate this Court's main concern in *Martinez*, that: "if counsel's errors in

an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, *no court* will review the prisoner's claims." 566 U.S. at 9 (emphasis added).

Although not relying on the district court's faulty logic about *Martinez*, the Eleventh Circuit gave a nod to the district court's rationale, stating *Martinez* may well not apply to any claim not only abandoned, or otherwise not raised, in the initial post-conviction court, but also thereafter not raised on appeal from that proceeding.[66] This highlights the Eleventh Circuit's continued determination to avoid applying this Court's directives in *Martinez*.

By denying the substantiality of the claim based on its analysis of prejudice alone, the decision below conflicts directly with the Third, Seventh, and Ninth Circuits. And other circuits to address similar issues, without discussing the difference between "cause" and "cause and prejudice" have still applied *Martinez* readily, holding it can provide cause for such procedural defaults.

For example, during the pendency of Mr. Clark's appeal, the Eighth Circuit declined to apply *Martinez*, to a claim *presented* to, and ruled upon by, the first state postconviction court, but was abandoned on appeal. *Thomas v. Payne*, 960 F.3d 465, 472-73 (8th Cir. 2020). However, it clarified that if, as

[66] Pet. App. 4a, 7a (*Clark*, 988 F.3d at 1330 & n.5).

here, the state postconviction court had *never* heard nor ruled on the claim, then *Martinez would* apply, so long as the claim was substantial. *Id.* at 472, 474.

Also during Mr. Clark's appeal, the Fifth Circuit joined in properly applying *Martinez* in deciding whether to issue a COA on a *Martinez*-based claim. *Ramey v. Davis*, 942 F.3d 241 (5th Cir. 2019). In *Ramey*, the Fifth Circuit analyzed the "first prong" of *Martinez*, explaining, "[T]o successfully rely on *Martinez*, Ramey must first show that the underlying *Strickland* claim 'is substantial' or that it 'has some merit,' and that state 'habeas counsel was ineffective for failing to raise the underlying *Strickland* claim." *Id.* at 254 (internal citations omitted). It continued, "[T]o demonstrate that his *Strickland* claim 'has some merit,' Ramey must also show that he was 'actual[ly] prejudiced' by trial counsel's allegedly ineffective assistance." *Id.* at 255 (citation omitted) (brackets in original). Then, "[b]ecause there is evidence suggesting that Ramey's state habeas counsel did not conduct an adequate investigation, it is unclear whether" that "failure" "was a strategic decision or evidence of deficient performance," a COA should issue as to the first prong. *Id.* at 256. As to the "second part of the *Martinez* inquiry"—whether "his state habeas counsel's failure to pursue Ramey's underlying *Strickland* claim prejudiced" him—the court granted a COA, reasoning, "Given the conclusion that reasonable jurists may debate whether" the "claim was 'substantial'—and

therefore whether Ramey was prejudiced by the alleged ineffective assistance of counsel—it necessarily follows that reasonable jurists would debate whether Ramey was prejudiced by state habeas counsel's failure to raise his *Strickland* claim in state habeas proceedings." *Id.* at 257. The court also noted that, for a COA to issue, only the standard of *Miller-El* need be met. *Id.* at 250 & n.1.

Although the district court's ultimate reason for declining to apply *Martinez* was incorrect, it correctly found the underlying claim of ineffective assistance for failure to challenge the shackling substantial[67] in light of the weakness of the evidence of intent.[68] However, disregarding this Court's command that the question of substantiality be viewed under the *Miller-El* standard, the Eleventh Circuit evaded *Martinez*. As described in Section I, the circuit court ignored *Strickland*'s command to consider the totality of the evidence, failing even to mention either the weakness of the intent evidence or that three jurors averred their belief that Mr. Clark did not intend to kill. The Eleventh Circuit has created a split with every other circuit to have addressed claims indistinguishable from Mr. Clark's.

On substantiality, the Eleventh Circuit discussed *Marquard v. Sec'y, Dep't of Corrs.*, 429 F.3d 1278 (11th Cir. 2005), and *Jones v. Sec'y, Dep't of*

[67] Pet. App. 111a-114a.
[68] Pet. App. 106a-114a.

Corrs., 834 F.3d 1299 (11th Cir. 2016).[69]

Excising the weakness of the trial evidence of intent, and the arguments in briefing and oral argument, these cases might appear to support the conclusion reached. However, the district court, which recognized the weakness of the intent evidence, correctly distinguished *Marquard* and *Jones*, recognizing that both cases *support* the substantiality of Mr. Clark's claim, which presented far greater prejudice.[70]

The district court noted that *Marquard* involved only sentencing phase restraints, and required consideration of "the brutality of the murder; the defendant's premeditation; the unanimous jury recommendation; and the existence of four aggravating circumstances versus zero mitigating circumstances."[71] The district court described *Jones* as having been based on the overwhelming evidence of guilt, "the gruesomeness of the murder and victim's horrific suffering; the lack of provocation for the crime; and the defendant's extensive violent criminal history."[72] Further, the district court noted that, in *Jones*, the defendant was only visibly shacked for one of five days, during jury selection.[73]

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[69] Pet. App. 5a-6a (*Clark*, 988 F.3d at 1332-34).
[70] Pet. App. 111a-114a.
[71] Pet. App. 112a.
[72] *Id.*
[73] *Id.*

Distinguishing the two cases, the district court noted:

> Some of the factors the Eleventh Circuit relied on in *Jones* and *Marquard* are present here, but others are either absent or arguably less compelling. For example, there was no jury finding of premeditation, and even the state's expert did not believe the petitioner entered the store with the intent to kill Ewing. While two of the aggravating circumstances in *Marquard* were present in this case, two others were not. Unlike in *Jones*, the petitioner had no violent criminal history, and it appears he was shackled during trial itself, for several days. The petitioner's jury deliberated for over 3.5 hours, and its vote was not unanimous as in *Marquard* or as far above the minimum legal threshold as in *Jones*.[74]

This was not a case where "the prisoner had a violent criminal history," "tried to kill two people, presumably trying to leave no witnesses," and where "the shackles were trivial in light of the evidence presented to the jury." *Whatley v. Warden, Georgia Diagnostic and Classification Ctr.*, 927 F.3d 1150, 1187 (11th Cir. 2019). Rather, as the district court noted, "even the state's expert did not believe [Mr. Clark] entered the store with the intent to kill."[75] Indeed, not only did the State's expert not believe Mr. Clark *entered the store* with any intent to kill, he even opined it was "*equally as possible, or perhaps more so*," that Mr. Clark did not have the intent to rob or kill anyone *even as the events unfolded*.[76]

Given the force of the underlying claim, trial counsel's deficient

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[74] Pet. App. 112-13a.
[75] Pet. App. 112a.
[76] (Vol. 9, Tab #J-18, R. 1299).

performance was blatant. As the district court found, "it is difficult to understand why trial counsel did not object."[77] The district court correctly determined it need not make a final determination regarding either trial counsel's deficient performance or whether Mr. Clark was prejudiced.[78] However, after an in-depth discussion of both factors, it found:

> It [] appears that trial counsel was presented with a *strong case for a valid objection* to his client's appearance before the jury with visible shackles. Counsel was presumably aware of all the pertinent facts and should have been aware of the pertinent law, and no countervailing considerations that might have counseled against raising a due process objection have been suggested. Because the Court has denied relief based on procedural default, it need not definitively resolve whether trial counsel's performance was constitutionally deficient. For purposes of considering the petitioner's request for a COA, it is sufficient to conclude that reasonable jurists could so view the case, and the Court so concludes. . . .[79]

and:

> The high *inherent danger of prejudice from visible shackling* – so high it obviates proof in support of a due process claim – suggests that courts should not easily dismiss its impact on a verdict or, especially, a recommendation of death . . . [However, a]s with deficient performance, it is not necessary for the Court to resolve whether the petitioner suffered actual prejudice as a result of trial counsel's failure to object to the visible shackling of his client. For present purposes, it is sufficient to conclude that reasonable jurists would find the issue debatable. The Court concludes that they would.[80]

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[77] Pet. App. 108a.
[78] Pet. App. 111a, 113a.
[79] Pet. App. 111a (emphasis added).
[80] Pet. App. 113a (emphasis added).

The Third, Seventh, and Ninth Circuits have expressly rejected the notion that cause to excuse a procedural default requires a threshold level of proof regarding prejudice. Rather, due to the difference Justice Breyer articulated between "cause," for *Martinez*, and "cause and prejudice," for the ultimate *Strickland* question, had Mr. Clark's claim been raised in these circuits, *Martinez* would have been applied, assuredly resulting in a remand. In a capital case, this represents a particularly manifest injustice. "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J., concurring).

And the Eleventh Circuit's nod to the possibility that *Martinez* may not apply in such a situation is irreconcilable with all other circuits to have addressed similar issues. And, as a capital case, "any doubts . . . must be resolved in [Mr. Clark's] favor." *Hughes v. Dretke*, 412 F.3d 582, 588 (5th Cir. 2005).

The decision thus represents much more than error. Rather, it creates a split with the Third, Seventh, and Ninth Circuits, is at odds with the Fifth and Eighth Circuits, and is irreconcilable with *Martinez* and *Miller-El*. If allowed to stand, it will eviscerate *Martinez*'s central concern that "no court" will ever hear a substantial claim of ineffective assistance of counsel, *Martinez*, 566 U.S.

at 9, in a circuit that handles a disproportionate number of capital habeas cases.

This Court should be deeply disturbed by the fundamental injustice of a man facing death when one quarter of the jurors did not believe one of the requisite elements of *capital* murder was proven. This is particularly so when the decision affirming denial of relief failed even to mention those affidavits or the weakness of the evidence of intent. The death recommendation was 11-1, and the life juror, who did not see the restraints, was among those who believed Mr. Clark did not intend to kill.[81] "[I]f there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that a jury would change its recommendation." *Bertolotti v. Dugger*, 883 F.2d 1503, 1519 & n.12 (11th Cir. 1989).

Reasonable jurists *must* be able to debate this issue. In granting the COA, the district court has done so. If *Martinez* is to be abandoned, it is up to this Court to say so. If this Court wishes to reconsider *Martinez*, it should grant certiorari and order briefing. Otherwise, it should summarily grant, vacate, and remand to ensure consistency with its precedent and among the circuits.

[81] (Vol. 11, R. 1682); Pet. App. 118a.

III. The Eleventh Circuit's failure to consider the evidence regarding intent also erodes, to the point of irrelevance, this Court's holdings in *Allen* and *Holbroo*k.

The decision below criticized Mr. Clark for citing *Deck v. Missouri*, 544 U.S. 622 (2005), stating Mr. Clark "argues that prejudice is presumed . . . ."[82] However, it ignored that, throughout his § 2254 petition, briefing, and at oral argument, Mr. Clark brought his claim "pursuant to the clearly established principles of [this Court's holdings in] *Holbrook* and *Allen* . . . ."[83] And, the district court noted properly that the Eleventh Circuit had, before the present day, emphasized the meanings of *Holbrook* and *Allen*, such that "*Elledge* [*v. Dugger*, 823 F.2d 1439, 1451 (11th Cir. 1987)] and the cases it cites—*Allen v. Montgomery*, 728 F.2d 1409, 1413-14 (11th Cir. 1984); *Zygadio v. Wainwright*, 720 F.2d 1221, 1223 (11th Cir. 1983)—reflect that the Eleventh Circuit has framed the inquiry largely as it did in *Deck*."[84] Both *Holbrook* and *Allen* were clearly established long before Mr. Clark's trial. Mr. Clark recognizes that he must meet the *Miller-El* standard and demonstrate a reasonable probability of prejudice. However, for the reasons detailed in the prior sections, that standard has been amply met, as the district court found.[85]

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[82] Pet. App. 5a (*Clark*, 988 F.3d at 1332).
[83] (Doc. 13 at 75-78, Pet. at 65-68; Reply Br. at 12, 14 (relying on *Holbrook*, 475 U.S. at 567 and *Allen*, 397 U.S. at 344)).
[84] Pet. App. 110a.
[85] Pet. App. 114a; *see also* Pet. App. 111a, 113a.

A rather telling "comparison and contrast," which Mr. Clark argued on appeal, but goes unmentioned in the decision below, exists between those jurors who saw the leg brace and those who did not. All three jurors who did not recall the restraints also *did not* believe Mr. Clark intended to kill Mr. Ewing.[86] In contrast, both jurors who saw the leg brace (with one remembering it so vividly he described it as "shackles")[87] *did* believe Mr. Clark harbored a specific intent to kill.[88]

This *alone* creates a substantial claim, particularly given this Court's long held concerns about the deeply prejudicial nature of jurors seeing an accused in physical restraints. *Holbrook*, 475 U.S. at 567; *Allen*, 397 U.S. at 344. Although it incorrectly applied *Martinez*, the district court was correct in finding the underlying claim substantial, noting, "On this record, it is at least fairly debatable that collateral counsel performed below constitutional standards," and "the underlying ineffective-assistance-of-counsel claim is substantial in the sense of having some merit."[89] The district court discussed both factors at length, strongly crediting the underlying validity of the claim.[90]

During the pendency of this appeal, the Eleventh Circuit issued an

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[86] Pet. App. 118a, 121a, and 124a.
[87] Pet. App. 126a.
[88] Pet. App. 126a-127a, 130a.
[89] Pet. App. 114a; *see also* Pet. App. 111a, 113a.
[90] Pet. App. 106a-114a.

opinion bordering on complete disregard for this Court's long-standing concerns about shackling. *Whatley*, 927 F.3d at 1186. Although this Court declined to grant certiorari, Justice Sotomayor, dissenting from that denial, explained that "to ignore entirely the ways in which visible shackling is likely to distort the outcome of a capital sentencing proceeding" was "clearly unreasonable." *Whatley v. Warden*, 593 U.S. ___, 141 S. Ct. 1299, 1302 (2021) (Sotomayor, J., dissenting). Unlike in *Whatley*, where the jurors saw the shackles only during the penalty phase, 927 F.3d at 1183, Mr. Clark's restraints were on and visible throughout the trial, making his case stronger.

For the reasons detailed herein, many of which the district court credited in discussing similar cases, the prejudice here is more palpable than in *Whatley*. Mr. Clark's case, therefore, represents *Whatley* on steroids. Should this Court not intervene, any claim of ineffective assistance for failing to object to physical restraints will be dead-on-arrival in the Eleventh Circuit, rendering *Holbrook* and *Allen* inapplicable in Alabama, Florida, and Georgia.

As an initial matter, the trial court undertook no inquiry into whether physical restraints were necessary, nor did it ensure that the jury would not see the restraints, which two jurors saw.[91] Reasonable postconviction counsel, knowing Mr. Clark had been restrained during a jury trial without any finding

[91] Pet. App. 126a, 130a.

of necessity, would have interviewed the jurors to determine prejudice. As the district court noted: postconviction counsel was "unaware if any jurors actually saw" the restraints, "and there is evidence he did not contact the jurors to find out, even though [new federal] habeas counsel some ten years later located two jurors that recalled the petitioner's leg brace—one of whom still lived at the same address as at the time of the 1999 trial."[92]

As discussed above, this was not a case where "the prisoner had a violent criminal history," "tried to kill two people, presumably trying to leave no witnesses," and where "the shackles were trivial in light of the evidence presented to the jury." *Whatley*, 927 F.3d at 1187. Rather, as the district court addressed, "even the state's expert did not believe [Mr. Clark] entered the store with the intent to kill [Mr.] Ewing."[93] Indeed, not only did the state's expert not believe Mr. Clark *entered the store* with any intent to kill, but he even believed it was ""*equally as possible, or perhaps more so*," that Mr. Clark never had the intent to rob or kill.[94] These factors went unmentioned in the Eleventh Circuit's decision.

And, unlike in *Whatley*, where the jurors saw the shackles only during the penalty phase, 927 F.3d at 1183, Mr. Clark's restraints were on and visible

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[92] Pet. App. 114a (emphasis added).
[93] Pet. App. 112a.
[94] (Vol. 9, Tab #J-18, R. 1299).

throughout the trial, making his case significantly stronger.

CONCLUSION

For the reasons set forth herein, Mr. Clark respectfully requests this Court summarily grant, vacate, and remand. Alternatively, he respectfully requests this Court grant certiorari and order briefing on the merits.

Respectfully submitted,

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