

*In the Supreme Court of the United States*

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CHARLES GREGORY CLARK,

*Petitioner,*

v.

COMMISSIONER, Alabama Department of Corrections

*Respondent.*

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

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**BRIEF IN OPPOSITION**

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January 5, 2022

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## STATEMENT OF THE CASE

### **A. Facts Pertaining to Petitioner's State Court Conviction and Sentence.**

After a nearly 24-hour binge on crack cocaine, Charles Clark left his girlfriend's house at approximately 5:00 a.m. on February 14, 1998, to obtain more money. *Clark v. State*, 896 So. 2d 584, 597-98 (Ala. Crim. App. 2000). He parked at a gas station owned by William Ewing, a man Clark had known for years. Clark waited until Ewing arrived and asked him to turn on the pumps. Clark went into the store, leaving the gas pump Ewing had just turned on for him pumping. Shortly thereafter, Clark left the gas station with a bloody knife, a bag of cash, and a full tank of gas; Ewing was left to die at the gas station with 15 stab wounds (wounds deeper than their length) and 17 cuts (wounds longer than their depth), including stabbing penetrations to Ewing's heart, right chest muscle, sixth rib (just below the heart) and defensive wounds that penetrated to the bone. *Id.* at 598-600; *see also Clark v. Comm'r, Ala. Dep't of Corrs.*, 988 F.3d 1326, 1332-33 (11th Cir. Feb. 25, 2021). As noted by the Eleventh Circuit, Clark "brutally murdered" Ewing and the evidence of his brutal act was "overwhelming." *Clark v. Comm'r, Ala. Dep't of Corrs.*, 988 F.3d 1326, 1328 (11th Cir. Feb. 25, 2021).

Clark was arrested a short distance from Ewing's convenience store. Clark confessed to stabbing Ewing, was indicted for capital murder, and was denied bond. *Id.* at 600-604. Prior to trial, Clark planned an escape, but his plan was foiled when jailers found the necessary handcuff key hidden in his mattress. *Clark*, 896 So. 2d at

627. He was later moved to a new cell block within the jail because he threatened to kill another inmate. *Id.* Additionally, Clark confronted a guard, failed to obey lawful orders, and he fought with other detainees.

### **B. State Court Trial and Direct Appeal.**

Clark's jury found him guilty of murder during a robbery in the first degree, an aggravating factor making him eligible for a sentence of death. Afterwards (but prior to the start of the penalty phase), Clark told his guards that he would not kill himself but that he might run if he got the opportunity. During the penalty phase, the court instructed the jurors about "the gravity of the proceedings" and implored them to "carefully weigh, sift and consider the evidence, and all of it, realizing that a human life [was] at stake." Among other facts, the jurors learned that Clark had stolen a handcuff key prior to trial, that he had told guards he might run if he got the chance, that he had threatened to kill another inmate, that he had at least one confrontation with a guard and failed to obey orders, and that he had been involved in fights while in jail. At the close of the penalty phase, the jury voted 11 to 1 to impose a sentence of death. Six weeks later, the trial court accepted the jury's recommendation and sentenced Clark to death.

Clark appealed his conviction and sentence to the Alabama Court of Criminal Appeals (ACCA), which affirmed. *See Clark v. State*, 896 So. 2d 584 (Ala. Crim. App. 2000). The ACCA ordered, and considered, supplemental briefing on *Ring v. Arizona*, 536 U.S. 584 (2002), before affirming Clark's conviction and sentence. Clark applied for rehearing in the ACCA, but his application was overruled.

Clark unsuccessfully sought certiorari review in both the Alabama Supreme Court and this Court. *See Clark v. Alabama*, 545 U.S. 1130 (2005).

### **C. State Post-conviction Proceedings**

In September 2005, Clark timely filed a 203-page Rule 32 petition for postconviction relief in the Baldwin County Circuit Court. Clark's petition included an allegation that his trial counsel had been ineffective for failing to object to the use of concealed physical restraints – a stun belt and knee brace – as a security measure during his trial. The circuit court held an evidentiary hearing on June 12, 2006, at which time Clark's counsel indicated that they would not present evidence on the physical-restraint ineffective assistance of counsel ("IAC") claim and would instead present evidence on other grounds for relief. The initial-review court ultimately denied relief on July 23, 2013.

Clark appealed some of the denials of his state postconviction relief petition to the ACCA. Although the initial-review court had denied Clark's IAC claim regarding physical restraints worn during trial, Clark chose not to appeal that ruling. The ACCA affirmed the trial court's denial of postconviction relief, deeming Clark's physical-restraint IAC claim abandoned. *See Clark v. State*, 196 So. 3d 285 (Ala. Crim. App. 2015). Clark did not challenge this appellate finding.

After the ACCA overruled Clark's application for rehearing, Clark sought certiorari review in the Alabama Supreme Court. His petition was denied in November 2015.



#### **D. Federal Habeas Corpus Proceedings**

Clark filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Alabama on August 26, 2016, and an amended petition three months later. Although some of his claims had never been presented to any state court and were based on evidence that had never been submitted to any state court, Clark did not request a stay so that he could present the claims and evidence to a state court. After briefing by the parties, the district court denied the petition. The district court denied a certificate of appealability as to all issues. Clark filed a motion to alter or amend the judgment, which the district court denied. The court, however, did grant a COA on the issue of “the Court’s procedural ruling that the [physical-restraint IAC] claim is unexhausted and procedurally defaulted.”

After briefing and oral argument, the Eleventh Circuit affirmed by noting that *even if* Clark was entitled to the benefit of the equitable rule announced in *Martinez*, and *even if* Clark was not required to give the State the first opportunity to consider his collateral IAC claim and new physical-restraint claim evidence, the underlying issue would not present a substantial claim. *Clark*, 988 F.3d at 1330-32. In essence, the lower court avoided the issue identified in the certificate of appealability by finding that Clark’s potentially unexhausted and defaulted claim was not substantial. *See* 28 U.S.C. § 2254(b)(2) (West 2021) (“An application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State”). These proceedings on petition for writ of certiorari follow.

## REASONS FOR DENYING THE WRIT

Clark's petition does not invoke any of the compelling reasons for granting certiorari review set forth in Rule 10 of this Court's rules. To the extent that Clark suggests a circuit split in the second issue presented, the purported circuit split does not exist. The Eleventh Circuit properly concluded that it was unnecessary to reach the application of *Martinez* and the issue of exhaustion because Clark's underlying ineffective assistance of counsel ("IAC") claim plainly lacked merit as is permitted by 28 U.S.C. § 2254(b)(2) (West 2021). That decision does not present a case worthy of this Court's certiorari review.

### **I. The Eleventh Circuit's Decision Complied with *Strickland*,<sup>1</sup> and Clark's Claim to the Contrary is not a Compelling Reason for Exercising Certiorari Review.**

In his state postconviction petition, Clark alleged that his trial counsel was ineffective because Clark was required to wear a concealed stun belt and knee brace restraint during his 1999 trial and his counsel failed to object to this security arrangement. The stun belt was worn beneath Clark's clothing as well as a knee brace designed to prevent Clark from being able to run. Both devices were designed to be concealed and the basis of Clark's claim is that two jurors recalled seeing the knee brace despite the efforts taken to conceal it.<sup>2</sup> Clark does not allege, nor could he, that

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<sup>1</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>2</sup> Although one juror (B. Caprara) described seeing a "leg brace" in her affidavit, another juror's affidavit (D. Barnett) claimed to have seen Clark's legs "in shackles." There is no allegation that Clark was required to wear leg shackles and Clark acknowledges that no shackles were employed in this case. (Pet. Br. at 3.) At a minimum, the juror's description of a leg brace as "shackles" in an affidavit entered more than sixteen years after trial calls into question the accuracy of the juror's recollection.

he was forced to trial while being openly (visibly) restrained or while wearing shackles.

Prior to the state court evidentiary hearing, Clark's retained counsel announced that he would not present any evidence on the physical-restraint IAC claim during the hearing and would instead focus on other aspects of the postconviction petition. The claim was denied by the trial court. On appeal, the Alabama Court of Criminal Appeals observed that the failure to raise or address this issue on appeal resulted in its being "abandoned" from further review. *Clark v. State*, 196 So. 3d 285, 299 (Ala. Crim. App. 2015). Clark did not challenge this finding in his application for rehearing or in his petition for certiorari review to the Alabama Supreme Court.

Clark's initial position before the Eleventh Circuit was that the equitable rule announced in *Martinez v. Ryan*, 566 U.S. 1 (2012), should apply to cases, such as his, where collateral counsel raised an issue in the initial postconviction review proceeding, and then failed to raise or pursue the issue during the subsequent appeal. *See Clark v. Comm'r, Ala. Dep't of Corrs.*, 988 F.3d 1326, 1330 (11th Cir. 2021). The Eleventh Circuit never reached the issue of whether *Martinez* could extend to a case in which state collateral counsel failed to raise an issue on state collateral appeal because the Eleventh Circuit correctly held that Clark failed to "present[] a 'substantial claim' that his trial counsel rendered ineffective assistance." *Id.* at 1328 (quoting *Martinez*, 566 U.S. at 17).

The Eleventh Circuit focused on *Strickland*'s prejudice prong to deny relief as to the procedurally defaulted physical-restraint IAC claim – the issue for which Clark seeks the Court's review – after granting Clark the benefit of two favorable assumptions: (1) that “*Martinez* could excuse Clark's failure to raise his claim *on appeal* from an initial-review collateral proceeding,” and (2) that *Martinez* could override the AEDPA's comity and federalism concerns such that a state prisoner would not have to give a state court the first opportunity to pass on claims and evidence presented in a federal habeas proceeding. *Id.* The lower court took this route because the AEDPA allows the denial of a claim on the merits when doing so is easier than addressing the issue of exhaustion. *See* 28 U.S.C. § 2254(b)(2) (West 2021).

Review of this decision is not warranted for several reasons. First, the Eleventh Circuit's “substantial claim” holding was correct – both because (as the Eleventh Circuit held) Clark cannot show prejudice, but also because his trial counsel performed reasonably. Clark's attack on his trial counsel's failure to raise a physical-restraint argument was a “crystal ball” claim; he faulted his trial counsel for actions taken in 1999 based on this Court's 2005 decision in *Deck v. Missouri*, 544 U.S. 622 (2005). Clark relied on the presumptive prejudice analysis employed in *Deck* as support for his IAC claim in his habeas petition, seeking to have his counsel's actions judged based on their failure to foresee *Deck*.<sup>3</sup> However, the performance of trial

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<sup>3</sup> Before this Court, Clark now insists that he brought his claim pursuant to *Holbrook v. Flynn*, 475 U.S. 560 (1986), and *Illinois v. Allen*, 397 U.S. 337 (1970). His habeas petition, however, cited to these cases as they were discussed and applied by the Court in *Deck*. (Doc. 13 at p. 66 (“In *Deck v. Missouri*, the Supreme Court applied *Holbrook*, explaining that...”)); (Doc. 13 at p. 67 (“Finally, the Court rejected the finding of no prejudice, emphasizing its prior clearly established holding in *Holbrook* that

counsel cannot be judged through “the distorting effects of hindsight.” *Strickland*, 466 U.S. at 669.

To be clear, Clark’s argument is that his trial counsel were deficient because they didn’t object to the use concealed restraints *and* because two jurors later reported having seen the physical restraints despite the reasonable efforts undertaken to conceal them. This is a quintessential use of hindsight. Had Clark’s counsel wished to challenge the use of the concealed physical restraints *prior to* trial, the fact that two jurors would glimpse the knee brace at some point during the trial would not have been an available basis for their legal challenge. Instead, Clark’s counsel would have had to establish that the use of concealed restraints was so inherently prejudicial as to pose an unacceptable threat to his right to a fair trial. *See Fisher v. State*, 587 So. 2d 1027 (Ala. Crim. App. 1991) (quoting *Holbrook v. Flynn*, 475 U.S. at 572). Lacking the benefit of the two juror affidavits, the relevant questions at the time of a pretrial objection would have been “does a concealed knee brace establish an ‘unacceptable threat to his right to a fair trial?’” and “does Clark’s previous escape attempt, his disruptive behavior while in detention, his ‘no bond’ status, and his threat to kill another jail inmate while awaiting trial for a brutal murder provide the trial court the discretion to allow the use of concealed restraints as a security measure?”

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the use of physical restraints is ‘inherently prejudicial.’”); (Doc. 13 at p. 68 (“Mr. Clark’s situation parallels *Deck*.”)).

As to the former question, Clark's habeas petition and subsequent arguments offer no explanation as to how his lawyers would have established an "unacceptable threat to his right to a fair trial" through the use of physical restraints designed to be concealed from view. The two juror affidavits would not have been available to Clark's counsel, and he does not offer any basis upon which his lawyers could have prevailed on this issue. The reality for Clark's lawyers would have been that the use of stun belts worn beneath the clothing was viewed by the Seventh Circuit, in 1997, as being a method of restraint "that minimized the risk of prejudice" to a defendant. *United States v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997). The next year, the Eleventh Circuit found no error in the use of leg shackles where "the district court took great care" to avoid prejudice by employing tablecloths, railings, and padding to prevent the restraints from being visible. *United States v. Mayes*, 158 F.3d 1215, 1226-27 (11th Cir. 1998).

As to the latter question, in 1999 this Court's precedent, the Eleventh Circuit precedent, and Alabama precedent would all have permitted the trial judge to allow the use of physical restraints designed to be concealed from view as a reasonable security precaution when dealing with Clark. Again, Clark was a murder defendant who had been found in possession of a handcuff key, who had threatened to kill another inmate, and who was being held without bond. In short, a court's use of concealed physical restraints under the facts that existed at Clark's trial in 1999 was not the type of issue, legally or factually, that would have required *any* reasonable lawyer to object prior to trial. Nor would any general objection (of the sort described

in Clark's habeas petition) have stripped the trial court of its discretion to employ the restraints.

Though Clark insists he presented this habeas claim under *Allen* and *Holbrook*, rather than *Deck*, not once during the federal proceedings has he explained how his generic incantations of “*Allen*” and “*Holbrook*” in the petition transform those cases into an identifiable theory of his counsel's deficient performance. This Court's holding in *Holbrook* does not help Clark's cause. There, the Court *held* that under the facts in that case the appearance of identifiable security guards – four uniformed state troopers, two deputy sheriffs, and six committing squad officers – did not violate the defendant's rights. The Court noted that a case-by-case approach was required when analyzing the potential prejudice that could result from such measures, but it also found sufficient, legitimate cause for this level of security “in the State's need to maintain custody over defendants who had been denied bail,” such as was the case with Clark. *See Holbrook*, 475 U.S. at 571. Although *Holbrook* discussed the impropriety of forcing a defendant to openly wear prison attire, shackles, or a gag, it said nothing of more subtle security measures such as the beneath-the-clothing stun belt and concealed knee brace employed during Clark's trial.<sup>4</sup>

Another consideration arising in *Holbrook* is the Court's observation that it was much more constrained when reviewing a constitutional challenge to a state

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<sup>4</sup> In fact, reasonable defense counsel could have viewed the use of a concealed stun belt and knee brace as a preferable alternative to the numerous uniformed security personnel placed in close proximity to the defendant in *Holbrook*.

court proceeding, such that it could only “look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant’s right to a fair trial.” *Holbrook*, 475 U.S. at 572. This analysis would not have aided Clark’s counsel with a pre-trial objection, where the trial court’s decision would be made as to restraints designed to be concealed and in the light of Clark’s no-bond status, his prior possession of a handcuff key, and his threat to kill another inmate while awaiting trial for a brutal murder. As such, Clark’s simple citation to *Holbrook* does not advance his IAC claim in a manner that casts doubt on the Eleventh Circuit’s decision.

Similarly, Clark’s reference to *Allen* does nothing to create a valid IAC claim. In *Allen*, the Court held that a trial judge could (1) bind and gag the defendant, thereby allowing her to remain present, (2) cite her for contempt, or (3) remove her from the courtroom until she promises to conduct herself properly, when faced with a disruptive defendant. *Allen*, 397 U.S. at 343-44. A key component of the Court’s analysis in *Allen* was weighing a trial court’s *response* to a defendant’s conduct so as to determine the overall reasonableness of the potentially prejudicial sanction imposed. The holding in *Allen* is far less useful to counsel in cases where concealed restraints are being proactively employed as a security measure rather than as a response to in-court disruptions by the defendant.

Probably for this reason, prior to 1999 Alabama’s appellate court’s generally applied *Allen* only in cases where they were confronted with removal of an unruly defendant, the imposition of visible physical restraints *after* a defendant was warned



against disruptive behaviors, or where a defendant sought a mistrial as the basis of their own outbursts and misconduct. *See, e.g., Ex parte Frazier*, 758 So. 2d 611, 615 (Ala. 1999); *Ex parte Clemons*, 720 So. 2d 985, 993-94 (Ala. 1998); *Ex parte Jackson*, 674 So. 2d 1365 (Ala. 1994); *Mack v. State*, 736 So. 2d 664, 671-72 (Ala. Crim. App. 1998); *Wright v. State*, 432 So. 2d 510, 512 (Ala. Crim. App. 1983). *Holbrook* had been cited by Alabama's courts only once prior to Clark's trial, in the 1991 *Fisher* decision discussed previously.

Clark's petition pleaded no facts (or law) that would establish that his counsel performed unreasonably under the law as it existed in 1999. At the time of his trial, Alabama law allowed a defendant to be restrained with *visible* handcuffs and shackles after repeatedly refusing to heed a judge's orders, improperly approaching witnesses on the witness stand, using abusive and threatening language toward the Court, shoving court personnel, and other misconduct. *See Wood v. State*, 699 So. 2d 965 (Ala. Crim. App. 1995). In another reported decision, a defendant was permitted to be handcuffed throughout trial after attempting to escape on "two or three occasions." *Thomas v. State*, 555 So. 2d 1183, 1184-85 (Ala. Crim. App. 1989). Both of these cases reflected the discretion granted to trial court's to secure and maintain decorum in their courtrooms, and neither of them would have given reasonably competent counsel reason to believe that a pre-trial objection concerning concealed restraints would be fruitful based on the facts known about Clark's status and behavior while in detention.

The Eleventh Circuit correctly decided that *even if* the equitable rule announced in *Martinez* could be extended to Clark's claim, and *even if* his failure to exhaust that claim and the facts upon which it is based could be excused, his IAC claim lacked merit. This highly fact-bound determination is not one that presents a compelling reason for the Court's certiorari review.

## II. The Eleventh Circuit's Decision Did Not Create a Circuit Split.

Clark alleges that the Eleventh Circuit's decision conflicts with decisions of the Third, Sixth, and Ninth Circuits, thereby creating a circuit split. Clark's allegation, however, is based on an obviously mistaken reading (or understanding) of the Eleventh Circuit's decision, this Court's *Martinez* framework, and how other courts of appeal have applied it. Specifically, the Eleventh Circuit's decision was predicated on a prejudice determination as to Clark's underlying IAC claim (i.e., as to his *trial counsel*) while the alleged circuit split Clark identifies is predicated on how the Ninth, Third, and Sixth Circuits treat the issue of prejudice when analyzing prejudice for purposes of *Martinez* (i.e., as to *initial-review collateral counsel*). Because the Eleventh Circuit's prejudice analysis concerned lack of merit of Clark's underlying IAC claim, and the cases cited by Clark address prejudice determinations under the equitable rule of *Martinez* as applied to collateral counsel's performance, there is no conflict between these decisions.

Clark's petition cites *Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc), for its holding that whether a state prisoner was represented by counsel or

proceeded *pro se*, “no showing of prejudice from PCR counsel’s deficient performance is required, over and above a showing that PCR counsel defaulted a ‘substantial’ claim of trial-counsel IAC.” (Pet. at pp. 13-14.) He relies on similar holdings in *Brown v. Brown*, 847 F.3d 502 (7th Cir. 2017), and *Workman v. Superintendent Albion SCI*, 915 F.3d 928 (3d Cir. 2019), to map out the alleged split. (Pet. at pp. 14-15.) Because these cases have no application to the type of analysis performed by the Eleventh Circuit, Respondent can only surmise that Clark’s argument that the lower court “denied the substantiality of Mr. Clark’s claim based upon its determination that Mr. Clark could not demonstrate prejudice” (Pet. at 12), indicates his mistaken belief that the Eleventh Circuit’s prejudice determination was made concerning his initial-review collateral counsel’s performance.

But the Eleventh Circuit affirmed the denial of habeas relief because there was no reasonable probability that any errors by Clark’s *trial* counsel were so serious as to deprive him of a fair trial. *Clark*, 988 F.3d at 1331-33. The court’s decision plainly stated Clark’s claim as being that “his *trial* counsel should have objected [to the restraints] and that the failure to object constituted inadequate assistance” and went on to review whether his “[c]ounsel’s errors [were] so serious as to deprive [him] of a *fair trial*, a trial whose result is reliable.” *Id.* After reviewing the evidence of Clark’s crime, the aggravating circumstances, and the mitigating evidence, the court indicated that its “confidence in the reliability of the *guilty verdict* and in the *jury’s recommendation* of death” was not undermined. 988 F.3d at 1334 (*quoting Jones v. Sec’y, Fla. Dep’t of Corrs.*, 834 F.3d 1299, 1323 (11th Cir. 2016)). Having found that

Clark could not establish the *Strickland* component of prejudice as to his physical-restraint IAC claim, the Court determined that he had failed to present a “substantial” claim of IAC. That analysis *cannot* reasonably be attributed as a discussion of “prejudice” under *Martinez* as to Clark’s initial-review collateral counsel.

That the Eleventh Circuit’s analysis does not create a circuit split is also evident in other decisions of the circuits to which Clark cites. In *Klein v. Superintendent Smithfield SCI*, 844 Fed. Appx. 531, 536-37 (3d Cir. Feb. 26, 2021), for example, the court noted that it need not decide whether a habeas petitioner could satisfy the *Martinez* exception “because, as explained below, we reject this claim on the merits.” *Id.*; see also *Harrison v. Atty Gen. of Penn.*, 795 Fed. Appx. 103, 105 n.3 (3d Cir. 2019) (same). This is the very approach taken by the Eleventh Circuit, below.

Furthermore, Clark’s petition omits a material change in the Ninth Circuit’s application of *Detrich* made evident in numerous other decisions. The holding of the plurality opinion in *Detrich*, on which Clark relies, has been repeatedly distinguished in a manner *adverse to Clark’s position* by subsequent decisions of the Ninth Circuit. Most recently, in *Hooper v. Shinn*, 985 F.3d 594, 627 n.29 (9th Cir. Jan. 8, 2021), the Ninth Circuit explained that the plurality opinion in *Detrich* had been consistently distinguished and that where a state postconviction petitioner is “represented by counsel in the initial-review collateral proceeding” the petitioner is required “to establish ‘cause’ by showing *Strickland* prejudice.” The Ninth Circuit *does not* take the approach suggested in Clark’s petition in cases, like his, where the state prisoner

was represented by counsel during the initial-review collateral proceeding. *See Djerf v. Ryan*, 931 F.3d 870, 880-81 (9th Cir. 2019); *Rodney v. Filson*, 916 F.3d 1254, 1260 & n.2 (9th Cir. 2019). Thus, even if Clark were not mistaken as to the nature of the analysis performed by the lower court, its decision would not conflict with the Ninth Circuit, because the Ninth Circuit “requires a showing that post-conviction counsel was ineffective under the standards of *Strickland*,” and “a petitioner who was represented by post-conviction counsel in his initial-review collateral proceeding must show not only that his procedurally defaulted trial-level IAC claim is substantial but also that there is ‘a reasonable probability that the trial-level IAC claim would have succeeded had it been raised’ by post-conviction counsel.” *Rodney*, 916 F.3d at 1260.

Clark’s assertion of a circuit split between the decision below and the Ninth, Seventh, and Third Circuits is wrong. The Eleventh Circuit’s resolution of Clark’s underlying IAC claim by addressing the issue of *Strickland* prejudice in no way conflicts with the decisions of sister circuits cited in Clark’s petition.

### **III. The Lower Court’s Decision Properly Applied *Strickland* and Does Nothing to Limit or Erode the Court’s holdings in *Allen* and *Holbrook*.**

Clark’s petition next warns that the Eleventh Circuit’s denial of his claim erodes the holdings of *Allen* and *Holbrook* “to the point of irrelevance.” (Pet. Br. at 25.) To support his dire warning, Clark points the Court to Eleventh Circuit decisions in *Elledge v. Dugger*, 823 F.2d 1439, 1451 (11th Cir. 1987); *Allen v. Montgomery*, 728 F.2d 1409 (11th Cir. 1984); and *Zygadio v. Wainwright*, 720 F.2d 1221 (11th Cir.

1983), and argues that they “emphasized the meanings of *Holbrook* and *Allen*.” (Pet. Br. at 25.) Clark, however, does not explain how these cases help his cause as a state prisoner seeking habeas corpus on an ineffective assistance of trial counsel claim in federal court, does not acknowledge that the affidavits he employed below to support his position are irrelevant evidence (i.e., “the distorting effects of hindsight”), and does not address the fact that the affidavits are inadmissible evidence as employed in his petition.

As to the latter matter, Clark’s petition relies on the juror affidavits to discuss the jury’s deliberations and voting as a means of impeaching the verdict. (Pet. Br. at 26.) This is a sufficient basis to deny certiorari review as Rule 606(b) of both the *Federal Rules of Evidence* and the *Alabama Rules of Evidence* forbid such a practice. *See also Warger v. Shauers*, 574 U.S. 40 (2014). The fact that Clark’s third question presented must rely on inadmissible evidence of juror deliberation to be considered illustrates the claim’s lack of merit.

Moreover, Clark’s 1999 trial was before an Alabama court making the Eleventh Circuit decisions cited by Clark irrelevant to his IAC claim. Alabama did not follow Eleventh Circuit decisions as binding precedent in 1999. Instead, Alabama’s trial courts and attorneys used decades of precedent from the state’s Court of Criminal Appeals and Supreme Court (and this Court) from which to draw controlling guidance. To the extent Clark’s claim is predicated on an allegation of ineffective assistance rendered by his trial counsel, those counsel must be judged,

first and foremost, under the precedent of this Court and Alabama’s Unified Judicial System, not by Eleventh Circuit decisions.

Ignoring that deficiency, however, it is far from clear that the Eleventh Circuit decisions cited by Clark add any value to his claim. In *Elledge*, for example, the court discussed “close judicial scrutiny” to determine if there was “an essential state interest” furthered by visible physical restraints “and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed.” 823 F.2d at 1451. Because the physical restrains employed in Clark’s case were not worn in a plainly visible manner, a reasonable lawyer would have read *Elledge* as stating that a concealed stun belt and knee brace were a judicially preferable option to visible shackles when applied to a dangerous inmate posing a flight risk.

Clark’s reliance on *Zygodlo* is equally misplaced. That case indicated that even though constitutional concerns arise when visible shackles are utilized, “[n]evertheless, in some cases, shackles may properly be employed” in order “to prevent an escape and to protect” others, and that a trial judge is granted “reasonable discretion to decide whether to shackle *or otherwise restrain the defendant*.” 720 F.2d at 1223 (emphasis added).

Ultimately, the lower court’s decision does not threaten any prior decisions of the Eleventh Circuit or the holdings of any decision of this Court. In the light of the AEDPA’s limitations on federal review of state prisoner habeas claims, the Eleventh Circuit precedent cited by Clark are barely implicated (if at all) by the lower court’s decision. Truly, certiorari review is not needed to prevent the dire cataclysmic

consequence to the legal landscape predicted by Clark as a result of the lower court's decision.

**III. Certiorari Review is Unwarranted Because Clark Falls Outside of the Scope of *Martinez* and he Failed to Exhaust his IAC Claim in State Court.**

Clark seeks review of a decision reached by the Eleventh Circuit made *only* after that court avoided two thornier issues. First, as noted previously, the lower court assumed “*Martinez* could excuse Clark’s failure to raise his claim *on appeal* from an initial-review collateral proceeding,” even though it conceded there were “reasons to think it doesn’t.” *Clark*, 988 F.3d at 1330 & n.5. Second, the Court assumed that *Martinez* would excuse Clark’s failure to exhaust his claim (i.e., that Clark was not required under the AEDPA to give Alabama’s judiciary the first opportunity to develop a factual record or consider whether the equitable rule announced in *Martinez* should be adopted or applied in state court under the facts of his case). 988 F. 3d at 1330 n.6.

The fact that the lower court’s decision was predicated on these two assumptions is material. “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. Where, as here, an asserted misapplication of a properly stated rule of law was an *alternate* reason a claim could not prevail, such review is even less worthy of the Court’s time and attention.



**CONCLUSION**

For the above-mentioned reasons, the Commissioner prays that this Court will deny the petition for writ of certiorari.

Respectfully submitted,

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January 5, 2022