No. 21-6486

IN THE
Supreme Court of the United States

GARY GREEN,
Petitioner,
v.

BOBBY LUMPKIN, Director. Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Deck v. Missouri*, 544 U.S. 622 (2005), this Court held that visibly shackling a defendant in front of the jury is inherently prejudicial and violates due process unless the state demonstrates a "special need" to justify the shackling. It is undisputed both that Green was shackled and that no such "special need" was demonstrated in the present case. But the visibility of Green's shackles was disputed and resolved against Green after the state habeas court held a live hearing. Under the strictures of 28 U.S.C. § 2254(e)(1), a state court's factual findings are entitled to a presumption of correctness that can only be overcome by clear and convincing evidence. Green failed to produce any additional evidence that he was visibly shackled other than the two jurors who testified before the state court. Did the lower court err in refusing Green a certificate of appealability (COA) when it determined that the district court properly considered itself bound by the factual determination, made by the state courts, that the jury could not see Green's shackles?

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BRIEF IN OPPPOSITION

This is a federal habeas corpus proceeding brought by Petitioner, Gary Green, a death-sentenced Texas inmate. Green was properly convicted and sentenced to death for the murder of his wife and her six-year-old daughter. Green now seeks a writ of certiorari from the Fifth Circuit's denial of a COA to review the district court's denial of his federal habeas petition. Green fails to present a compelling issue for this Court's review. The lower court's denial of a COA is correct.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) summarized the facts of Green's crime as follows:

> [Green's] conviction for capital murder is supported by his own confession. In it, he explained that the week before the offense, he had discovered that [his wife] Lovetta was going behind his back to get their marriage annulled. On the day of the offense, September 21, 2009, Lovetta wrote two letters to [Green], telling him that it was time for them to part ways and that he needed to move out. [Green] felt betrayed by his wife's actions and wrote his own letter in response, detailing his plan to take five lives that night including his own. While Lovetta was reading the letter in the master bedroom, [Green] took knives from the kitchen and went into Jazzmen's[1] bedroom, where he tied her up and put duct tape over her mouth. He then brought Jazzmen into the master bedroom and laid her on the end of the bed. [Green] proceeded to struggle with Lovetta for about an hour and a half, stabbing her

[1] Jazzmen Armstead was Lovetta's six-year-old daughter who Green was convicted of killing in the same criminal transaction as his wife, Lovetta. ROA.4583.

more than twenty-five times. Once Lovetta was dead, [Green] took Jazzmen into the bathroom, filled the bathtub, and held Jazzmen under the water until she died. He stated that Jazzmen struggled so much that he had to turn his head away. He pulled her from the tub and laid her face down onto the floor. Then he took a shower, changed into dress clothes, and went to pick up Lovetta's two sons, Jerome ("J.T.") and Jerrett, from their regular church program.

[Green's] confession was corroborated by physical evidence and by witness testimony, including that of J.T. and Jerrett, who were twelve and ten years old at the time of the offense. According to their testimony, J.T. and Jerrett attended their regular church program that evening, and [Green] picked them up when the program was over. They testified that they were surprised to see him because usually their mother picked them up. J.T. also noticed that [Green] was wearing all black. When they arrived home, [Green] told J.T. to take a shower and instructed Jerrett to put on his pajamas for bed. [Green] then called Jerrett into the kitchen to discuss issues Jerrett was having in school. As Jerrett was explaining the problems, [Green] grabbed a knife held it to Jerrett's throat, and dragged him toward the bathroom. J.T. was still in the bathroom, and he heard his brother calling for help and yelling that [Green] was "going to kill him." J.T. stood at the bathroom door and saw [Green] holding Jerrett by his collar. [Green] threw Jerrett into the bathroom with J.T., came in himself, and locked the door. [Green] then sat on the bathroom counter with three knives beside him and asked the two boys why he should not kill them.

As Jerrett began to plead for their lives, saying they were too little to die and that they would not tell anyone about what had happened, [Green] stabbed him in the stomach. J.T. tried to push [Green] off of Jerrett, but missed. [Green] then told the boys that he was not going to kill them and told J.T. to get dressed because [Green] had something to show them. As they were about to leave the bathroom, [Green] suddenly put the knife up to Jerrett's throat and tried to "screw it in" but Jerrett ducked away and backed up towards the toilet. [Green] paused and then said: "All right. Come on." [Green] led the boys into their mother's room, and when they saw their mother's body, they fell to their knees crying. [Green] explained to J.T. and Jerrett that he had to kill their mother

because she wanted to divorce him and he "loved her to death" and did not want her to leave him. The boys also saw their sister's body in the bathroom. [Green] changed clothes and told J.T. to hand him some pills that were on the dresser in the bathroom. [Green] then threw a cell phone on the bed and instructed the boys to call 911 after he had left. J.T. recalled that [Green] said he was going to kill himself. [Green] made the boys give him a hug before he left.

After [Green] fled the apartment, the boys called 911 and ran to the home of their neighbor, Latasha Bradfield. According to Bradfield's testimony, Jerrett was holding his stomach, and both boys were screaming that [Green] had killed their mother and sister. Bradfield took the phone from Jerrett's hand and spoke with the 911 operator. She then went next door and verified that Lovetta was lying on the floor of the bedroom and that she was not breathing.

Officer James Jones and his partner Officer Alder responded to the 911 call. Officer Jones went into the master bedroom and found Lovetta lying in front of the bathroom door and Jazzmen in the bathroom. The bathroom was covered in blood. Detective Jason Gindratt and Detective Will Vick were also called to the house on the evening of the offense. During their inspection of the crime scene, they noticed that four knives appeared to be missing from the knife block in the kitchen. The knives were later found under the microwave, on the kitchen counter, and under a cushion on the couch. The detectives also found handwritten letters in the middle of the bed in the master bedroom. Lovetta's mother, Margarita Brooks, identified the handwriting as Lovetta's and [Green's]. In Lovetta's letter, she wrote that it was time for her and [Green] to part and that [Green] needed to move out. In [Green's] letter, he expressed his anger toward Lovetta for kicking him out and laid out his plan to murder the entire family. [Green's] letter stated, "You asked to see the monster, so here he is, the monster you made me. Bitch. There will be five lives taken today, me being the 5th."

Around 2:15 a.m., hours after the murders took place [Green], his mother, and his brother all went to a police substation. Officer Troy Smith testified that [Green's] mother told him that her son might have been involved in a murder. After Officer Smith

confirmed that there had been a double homicide, he placed [Green] under arrest.

Homicide Detective Robert Quirk and his partner, Detective Ahearn, were called to the scene of the murders. Upon arriving, they learned that there were witnesses and that a suspect had been identified. After hearing that [Green] had surrendered, they headed to the police station to meet him and conduct an interview. Detective Quirk read [Green] his *Miranda* rights, which [Green] agreed to waive, and then [Green] confessed. [Green] also told the detectives where to find the letters, as well as Lovetta's car, in which he had fled on the night of the murders. When Lovetta's car was searched, a soda can and a nearly empty blister pack of Benadryl, both containing [Green's] fingerprints, were found on the floorboard. Quirk testified that about 26 of the 28 pills were gone from the Benadryl blister pack.

During the interview with Detective Quirk, [Green] was cooperative and answered every question asked of him. [Green] told Quirk that he had a history of mental illness and that he had been in a mental hospital, Timberlawn, one month before the offense. [Green] told Quirk that he thought Lovetta and her children were plotting against him and that he heard voices telling him to commit the murders. [Green] said he took the pills to kill himself so that the family would be back together in heaven. Quirk testified that [Green] seemed dejected and somewhat remorseful.

Forensic evidence was provided by Angela Fitzwater, a forensic biologist, who analyzed fingernail clippings taken from Lovetta. Fitzwater compared the DNA profile taken from the clippings with the known DNA profile taken from a buccal swab from [Green]. She testified that the clippings from the right hand showed two contributors, Lovetta and [Green], and that the clippings from the left hand showed the DNA profile of [Green], which matched in nine areas. She also testified that a sperm-cell fraction obtained from a vaginal swab taken from Lovetta during the autopsy showed [Green] to be the major contributor. Fitzwater was unable to quantify the amount of time that had elapsed between the intercourse and death, but she thought that it was recent.

> Jill Urban, the medical examiner who performed Lovetta's autopsy, classified the manner of death as a homicide. Urban testified that Lovetta had suffered more than twenty-five stab wounds, including one in the right back that had punctured the right lung and one on the back of the left thigh that was eight inches deep. There were stab wounds on Lovetta's elbow and right hand, as well as clusters of stab wounds in the right upper quadrant of her abdomen, on the back of her neck, and on her upper back. The wounds were all consistent with [Green's] confession.
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> Meredith Lann performed the autopsy on Jazzmen and also ruled the manner of death to be a homicide. Lann testified that there was a hemorrhage on the very top of Jazzmen's head and that her eyes contained small burst blood vessels, also known as petechia. Jazzmen's lungs showed pulmonary edema, which Lann explained is the body's reaction to hypoxia, or a low state of oxygen. When examining Jazzmen's face more closely, Lann noticed a small amount of adhesive residue in an L-shape on the left cheek, which was consistent with [Green's] statement that he had placed duct tape over Jazzmen's mouth. There was evidence that Jazzmen's hands and ankles had been bound with duct tape as well. Lann testified that [Green's] confession to drowning Jazzmen was consistent with those findings. The defense presented no evidence during the guilt phase of trial.

ROA.4583-4588; *Green v. State*, No. AP-76,458 slip op. at 2-6 (Tex. Crim. App. Oct. 3, 2012).

II. Course of State and Federal Proceedings

Green was convicted of capital murder for killing his wife Lovetta Armstead, and Lovetta's six-year-old daughter, Jazzmen Armstead. ROA.4582-4655; *Green v. State*, No. AP-76,458 slip op. (Tex. Crim. App. Oct. 3, 2012). Green appealed to the CCA which affirmed his conviction. *Id*. This Court denied Green's petition for a writ of certiorari off direct appeal. *Green v. State*,

133 S. Ct. 2766 (2013). Green also filed a state habeas petition which the CCA denied. ROA.10672-673; *Ex parte Green*, No. WR-81,575-01 (Tex. Crim. App. 2015). Green petitioned the district court for federal habeas relief. But the court denied Green's motions for funding, his federal habeas petition and denied him a COA. ROA.449-456, 4327-4325, 4354-4415. The Fifth Circuit also denied Green's bid for a COA in a per curiam unpublished opinion. Appx. 1.

REASONS FOR DENYING CERTIORARI REVIEW

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10. In the instant case, Green fails to advance a compelling reason for this Court to review his case and, indeed, none exists. The opinion issued by the lower court involved only a proper and straightforward application of established constitutional and statutory principles. Accordingly, the petition presents no important question of law to justify the exercise of this Court's certiorari jurisdiction.

In the court of appeals, as a jurisdictional prerequisite to obtaining appellate review of the constitutional claims raised, Green was required to first obtain a COA from the court of appeals. 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The standard to be applied in determining when a COA should issue examines whether a petitioner "has made a substantial showing of the denial

of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336; *Slack*, 529 U.S. at 483. Green had to demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted); *see also Miller-El*, 537 U.S. at 336. But Green did not meet the standards for obtaining a COA because the arguments he advances do not amount to a substantial showing of the denial of a constitutional right. In the court below, Green sought a COA but the circuit court found his claim unworthy of debate among jurists of reason. Fundamentally, Green cannot show the circuit court's decision to deny COA was in error much less worthy of this Court's review.

Green asserts that because the jury saw him in shackles without a finding by the trial court that the shackles were necessary, fundamental error ensued. Pet. at 9-22. But Green's assertion ignores the explicit factual determination from the state habeas court after a live hearing that the jurors' testimony was not credible. Under 28 U.S.C.§ 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" and can only be rebutted by the applicant demonstrating "clear and convincing evidence" to the contrary. Green has never produced any evidence to support his claim aside from that considered and rejected by the state habeas court. As

the lower court held, "Because we must accept that jurors never saw Green in shackles, his claims related to his shackling must necessarily fail, and reasonable jurists would not debate this conclusion." Appx. at 19.

Green also asserts that the state habeas court's decision was a violation of 28 U.S.C. § 2254(d)(2). Pet. at 10. But as both lower courts explain,

> [D]eterminations of demeanor and credibility . . . are peculiarly within a trial judge's province" on even direct review, *Wainwright v. Witt*, 469 U.S. 412, 428 (1985), and when this axiom stands in conjunction with the additional deference that AEDPA mandates, it sets a very high bar for defeating a state court's in-person credibility determinations based only on a paper record. We may only depart from the state court's credibility findings when there is "clear and convincing evidence" in the record rebutting the presumption that they are correct. 28 U.S.C. § 2254(e)(1).

Appx.at 19. A petitioner who lacks clear and convincing evidence to overcome section 2254(e)(1)'s deference to a factual determination cannot show that an adjudication was factually unreasonable under § 2254(d)(2). Thus, the lower court also affirmed the district's decision that "it was not unreasonable for the state court to discredit the jurors' claims that they were aware of Green's shackles during trial." Appx.at 18. And that "the state court's denial of Green's shackling claims thus neither rested on an unreasonable reading of the evidence nor conflicted with clearly established federal law." Appx.at 19. Green fails to demonstrate the lower court erred in its conclusion much less that this Court is compelled to review his claim.

First, despite Green's assertions that two jurors saw Green's shackles, there is little credible evidence to support Green's claim that the jury saw him shackled. Pet. at 10-11. The district court summarized the evidence before the state habeas court as follows:

> [Green's] lead trial counsel, Paul Johnson, testified during the state habeas corpus proceeding (1) "Sir, I can tell you that absolutely there's no possible way they saw him wearing leg restraints," (2) he believed the only way the jury could have seen [Green's] leg restraints was if the jurors were capable of seeing through the solid wood surrounding the front and sides of the defense bench, which went down to within an inch of the floor, and (3) it was impossible for the jury to have witnessed [Green] being brought into the courtroom because the jury was never in the jury box when [Green] was brought into the courtroom. Another of his trial counsel testified at the state habeas hearing that he made sure [Green's] leg restraints were not visible to the jury, and the bailiffs made sure [Green] was seated when the jury came in or out of the courtroom. [Green's] third trial attorney testified he did not believe it was possible for the jury to have seen [Green] wearing leg restraints because [Green] never walked in or out of the courtroom with the jury in the jury box.
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> Bailiff Tony Lancaster testified during [Green's] state habeas hearing that [Green] wore only leg shackles during trial, was not a special security threat, and was respectful and followed instructions. Lancaster testified [Green] sat approximately twenty to twenty-five feet from the jury box, the prosecution table was situated between the jury box and the defense table, and both tables were covered all the way to the floor in such a way as to obstruct the jury's view of the footwear worn by anyone at the defense table. Lancaster believed it was not possible for someone sitting in the jury box to see [Green's] feet. More importantly, Lancaster testified the jury was not present when [Green] walked into the courtroom, he sat down before the jury was brought into the courtroom, and [Green] did not leave the courtroom until the jury left the jury box.

> [Green] presented the testimony of two of his jurors who had furnished the state habeas court with affidavits stating they had seen [Green] in leg shackles during trial. One of the jurors testified that he saw [Green] in leg restraints once or twice during trial and he saw [Green] in restraints during the punishment phase of trial when [Green] was walking or standing, but he did not discuss the restraints with anyone during deliberations. The other juror testified that he did not recall actually seeing [Green] in restraints but saw that [Green] was not moving easily or comfortably and thought he was restrained.

Appx. at 59-60 (footnote citations omitted). After hearing this testimony, the habeas court found the testimony of the jurors not credible. Appx. at 60 (citing to ROA.9331-32). This finding was adopted by the CCA. Appx. at 61 (citing to ROA.10672-73).

In accordance with AEDPA, the district court noted that it was not permitted to reject the state courts' credibility determination on a cold paper record. Appx. at 61. The court further determined that the state habeas court's determination that the jurors were not credible was reasonable in view of the testimony. Appx. at 62. But, "[m]ore importantly, [Green] has failed to present this Court with clear and convincing evidence showing the state habeas court's credibility finding is erroneous." *Id*. (citing *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007); *and Rice v. Collins*, 546 U.S. 333, 338-39 (2006)). Thus, the district court concluded, "No evidence currently before this Court, much less any clear and convincing evidence, warrants second-guessing this express credibility finding." *Id*. The lower court concluded that, "the district court was

correct that the evidence was not so contrary to the state court's findings that we may overturn them." Appx. at 19.

Indeed, Green presented no evidence to overcome these determinations. Instead, he continues to argue that the trial courts findings are erroneous and strain credibility. Specifically, he argues that it is incredible that the trial judge knew there was a problem with shackling in Dallas County but that everyone in the courtroom except the judge knew Green was shackled. Pet. at 11. But Green overstates his case. The judge not being aware of Green's shackling supports the view that the shackles were not visible at any time. Green still lacks proof of his claim. Therefore, both the lower courts correctly deferred to the state courts' credibility determinations made after a live hearing.

As the lower court concluded,

> In this case, the conflicting evidence stood nearly in equipoise with respect to whether the jurors saw Green's shackles, with two witnesses testifying that jurors were aware of the shackles and several others testifying that that would not have been possible. Resolving this sort of factual conflict is the duty of the state habeas court, who is able to evaluate the demeanor of the various witnesses, and the district court was correct that the evidence was not so contrary to the state court's findings that we may overturn them. Because we must accept that jurors never saw Green in shackles, his claims related to his shackling must necessarily fail, and reasonable jurists would not debate this conclusion.

Appx. at 19 (internal citation omitted). Green fails to demonstrate this conclusion is erroneous much less that it should compel this Court's review.[2]

Finally, to the extent Green argues defects in the state habeas proceedings there is no right to such proceedings in the first instance. As Justice O'Connor has stated:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem [] that that Constitution requires the States to follow any particular federal role model in these proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring); *see also Pennsylvania v. Finley*, 481 U.S. 551, 557 (1989) (states have no obligation to provide collateral review of convictions). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Giarratano*, 492 U.S. at 10. Indeed, this Court has explained that "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of

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[2] In the district court, the Director argued Green's claim was procedurally defaulted because trial counsel failed to make an objection. But the district court did not apply the bar and neither did the lower court. Yet Green makes a cause and prejudice argument to overcome procedural default at the end of his petition. Pet. at 20-22. But since Green's claim was not procedurally barred in either the lower or the district court, there is no need to address a default that was not applied. Green also raised a related ineffective of assistance of trial counsel claim that the Director also asserted was barred but both lower courts essentially ignored the claim and Green is not raising that claim before this Court.

a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Id*.

But more importantly, where a State allows for post-conviction proceedings, the Federal Constitution [does not] dictate[] the exact form such assistance must assume." *Finley*, 481 U.S. at 555, 557, 559; *cf*. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("federal habeas corpus relief does not lie for errors of state law") (internal quotation marks and citation omitted); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003) (infirmities in state habeas proceedings do not state a claim for federal habeas relief); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir. 2001); *Wheat v. Johnson*, 238 F.3d 357, 361 (5th Cir. 2001). Indeed, as the Court has explained, "Federal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). And to the extent Green is alleging errors of state law, "In order for a federal writ to issue, there must be a violation of "the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at 68.

Here Green raises no compelling issue for this Court's review. Green dislikes the outcome of the state habeas hearing but he has failed to show the court fundamentally erred. In fact, he has presented no evidence much less contrary, clear and convincing evidence. Assorted complaints of state law error

or state habeas procedural defects also do not merit this Court's review. A writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny Green's petition for writ of certiorari.

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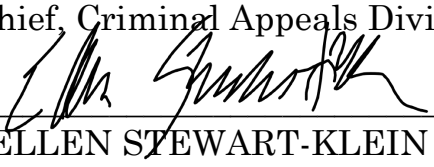

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