No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Clarence Wayne Dixon, Petitioner,

vs.

David Shinn, et al., Respondents.

****CAPITAL CASE****

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

Question Presented No. 1

This Court held in *Deck v. Missouri* that when a trial court, without adequate justification, orders a defendant "to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." 544 U.S. 622, 635 (2005). Rather, "[t]he State must prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Id.* (internal quotations and citations omitted).

In Petitioner Clarence Wayne Dixon's capital case, the lower courts all agreed that Mr. Dixon, who represented himself at trial and sentencing, had been ordered shackled with a stun belt and full-legged steel restraint without adequate legal justification in contravention of *Deck*. The lower courts held, however, that the trial court's erroneous decision to shackle Mr. Dixon throughout his trial could be ignored because Mr. Dixon failed to prove that his shackles were visible to the jurors who convicted and sentenced him to death.

There is wide disagreement among the federal circuit courts of appeal over whether a defendant who is unjustifiably shackled throughout trial bears the burden to prove that his shackles were visible to the jury, or whether the burden to prove otherwise beyond a reasonable doubt falls on the State.

The first question presented is:

1. When a trial court unjustifiably orders a defendant shackled throughout trial contrary to the rule in *Deck v. Missouri*, is it the defendant who bears the burden of proving that the restraints were visible to the jury, or does the State have the burden to prove that the shackles were not visible as part of its burden under *Chapman v. California*, 386 U.S. 18 (1967), to prove beyond a reasonable doubt that the shackling error did not contribute to the verdict?

Question Presented No. 2

During state postconviction proceedings, Mr. Dixon raised a colorable claim that he was denied his Sixth Amendment right to the effective assistance of counsel when his trial lawyers stood silent and facilitated his request to waive counsel at his

capital trial despite evidence, known to them, which demonstrated his incompetency to make that choice—that is, they had evidence that Mr. Dixon's desire to waive counsel resulted from his lack of a "sufficient present ability to consult with his lawyer[s] with a reasonable degree of rational understanding." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

Arizona law mandates a hearing where a postconviction petitioner alleges facts, which, if proved, would entitle the petitioner to relief. Although Mr. Dixon satisfied this requirement, the postconviction court nevertheless resolved numerous disputed issues of fact against him and dismissed his Sixth Amendment claim without affording him the hearing required by law. The Arizona Supreme Court denied discretionary review. In federal habeas proceedings, despite evidence that the state court resolved disputed factual issues without a hearing, both the district court and the court of appeals determined that merits review of Mr. Dixon's claim was precluded as a result of reasonable factual determinations made by the postconviction court under 28 U.S.C. § 2254(d)(2).

The second question presented is:

2. When a petitioner has complied with a state rule which mandates a postconviction hearing on a colorable federal constitutional claim, but the state court dismisses the claim by resolving disputed issues of material fact against the petitioner, is the state court's denial "based on an unreasonable determination of the facts" under § 2254(d)(2), thereby requiring *de novo* federal review of the claim?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption, *supra*. The petitioner is not a corporation.

STATEMENT OF RELATED PROCEEDINGS

State of Arizona v. Clarence Wayne Dixon, No. CR-08-0025-AP (Ariz. May 6, 2011) (direct appeal decision)

State of Arizona v. Clarence Wayne Dixon, No. CR 2002-019595 (Maricopa Co. Superior Ct. July 3, 2013) (denial of postconviction relief)

State of Arizona v. Clarence Wayne Dixon, No. CR-13-0238-PC (Ariz. Feb. 11, 2014) (summary denial of petition for review)

Clarence Wayne Dixon v. Charles L. Ryan, et al., No. 2:14-cv-00258-DJH (D. Ariz. Mar. 16, 2016) (denial of petition for writ of habeas corpus)

Clarence Wayne Dixon v. Charles L. Ryan, et al., No. 16-99006 (9th Cir. July 26, 2019) (affirming denial of petition for writ of habeas corpus)

Clarence Wayne Dixon v. Charles L. Ryan, et al., No. 16-99006 (9th Cir. Oct. 18, 2019) (denial of petition for panel and/or en banc rehearing)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Clarence Wayne Dixon, an Arizona death row prisoner, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the United States District Court for the District of Arizona's denial of his petition for writ of habeas corpus and accompanying requests for evidentiary development.

OPINIONS BELOW

The Ninth Circuit's Opinion affirming the denial of Mr. Dixon's petition for writ of habeas corpus is included in the Appendix at A-1. The Order of the Court of Appeals denying Mr. Dixon's petition for panel and/or en banc rehearing is included in the Appendix at A-2. The Order of the United States District Court denying Mr. Dixon's petition for writ of habeas corpus is included in the Appendix at A-3. The decision of the Arizona Supreme Court affirming Mr. Dixon's conviction and sentence on direct appeal is included in the Appendix at A-4. The state court's denial of Mr. Dixon's postconviction application is included in the Appendix at A-5. The Arizona Supreme Court's summary denial of Mr. Dixon's petition for review of the postconviction court's denial is included in the Appendix at A-6.

STATEMENT OF JURISDICTION

On July 26, 2019, the Ninth Circuit affirmed the United States District Court's denial of Mr. Dixon's petition for writ of habeas corpus. (A-1.) Mr. Dixon timely

petitioned for rehearing from that denial which the Ninth Circuit denied on October 18, 2019. (A-2.) On December 23, 2019, the Honorable Justice Elena Kagan granted Mr. Dixon's request for an extension of time to file his petition for writ of certiorari ("Petition") pursuant to Rules 13(5), 22, and 30 of this Court's Rules, and extended the filing deadline to March 16, 2020. Mr. Dixon now timely files this Petition wherein he asks this Court to review the judgment and order of the Ninth Circuit affirming the denial of habeas relief. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Constitutional Provisions

U.S. Const. amend. V

> [N]or shall any person . . . be deprived of life, liberty, or property without due process of law[.]

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]

Federal Statutory Provisions

28 U.S.C. § 2254(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 the merits in State court proceedings unless the adjudication of the claim—
>
> . . .
>
> (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.

STATEMENT OF THE CASE

A. Factual Background

On January 5, 1978, just two days prior to the crime for which Mr. Dixon was sentenced to death, he was declared not guilty by reason of insanity in another case by former United States Supreme Court Justice Sandra Day O'Connor, then sitting as a Maricopa County Superior Court trial judge. (ER 472.)[1] In that case, where Mr. Dixon had been charged with aggravated assault (*see* ER 408, 440), two court-appointed psychiatrists diagnosed Mr. Dixon with schizophrenia—a form of psychotic disorder—and found him incompetent to stand trial after determining that he was "not able to assist counsel" and was "gravely disabled." (ER 434–37, 472, 474.)

More than two decades later, in November 2002, Mr. Dixon was indicted for

[1] "ER" and "SER" refer, respectively, to the excerpts of record and supplemental excerpts of record that were filed in support of Mr. Dixon's appeal to the Ninth Circuit Court of Appeals. "RER," meanwhile, refers to Respondents' excerpts of record filed below.

the January 7, 1978 murder and sexual assault of Deana Bowdoin based on the discovery of DNA evidence. (*See* ER 634, 989–990.) At the time of his indictment for Ms. Bowdoin's murder, Mr. Dixon was serving seven life sentences for his 1985 convictions arising out of another sexual assault. (*See* SER 006, 015, 017–23, 030–32.) It was in 1995, during Mr. Dixon's incarceration on the 1985 convictions, that the Arizona Department of Corrections collected a DNA sample from Mr. Dixon that ultimately tied him to Ms. Bowdoin's murder. Deputy Maricopa County Public Defenders Vikki Liles and Garrett Simpson were appointed to represent Mr. Dixon on his capital murder charge. Aware of Mr. Dixon's extensive history of mental illness, as well as his prior insanity acquittal, Liles and Simpson noticed an insanity defense. (*See* ER 941.)

Throughout pre-trial proceedings, Mr. Dixon's attorneys were aware of evidence of Mr. Dixon's incompetency—that is, his lack of a "sufficient present ability to consult with his lawyer[s] with a reasonable degree of rational understanding[.]" *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam); *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (internal quotations omitted). In September 2005, driven by delusions that bore no relation to reality, Mr. Dixon demanded that the trial court dismiss his attorneys unless they filed "a motion to suppress the [DNA] evidence according to a claim I embrace." (ER 938.) Against all evidence to the contrary, Mr. Dixon believed that the DNA sample taken from him by the Department of

Corrections in 1995, while he was incarcerated for the sexual assault of a Northern Arizona University ("NAU") student ten years earlier, was inadmissible in his capital case because the NAU police were not a legal entity when they arrested him in 1985. (ER 414.) As Mr. Dixon's trial attorneys were aware, Mr. Dixon's belief was purely delusional and lacked *any* basis in fact: the routine collection of the DNA sample by the Department of Corrections in 1995 had no connection to Mr. Dixon's arrest for the 1985 offenses, and it was the Flagstaff City Police, not the NAU police, that had arrested Mr. Dixon in 1985. There was thus no rational basis upon which to file a motion to suppress the DNA evidence.

Mr. Dixon's trial lawyers were also aware that throughout the 1990s and early 2000s, in his challenges to the 1985 convictions, Mr. Dixon had obsessively, repeatedly, and unsuccessfully litigated the claim that the NAU police wrongfully arrested him when, in fact, they had not arrested him at all. (*See* ER 414–17, 894–95 (Mr. Dixon informing the trial court that between 1991 and 2003 he raised the same claim in three postconviction petitions, six petitions for review, an original habeas petition in the Arizona Supreme Court, a habeas petition filed in a different county, and a special action—all of which were denied), 902.)

Trial counsel did make some effort to rationally communicate with Mr. Dixon, but to no avail. Mr. Dixon was not able to communicate with counsel with a "reasonable degree of rational understanding[,]" *Dusky*, 362 U.S. at 402. The best

evidence of this derives from Mr. Dixon's response to an October 25, 2005 memorandum, which explained in simplistic terms that there was no basis to suppress the DNA evidence. The letter summarized the uncomplicated facts:

> The record from your appeal shows you were arrested by a Flagstaff City Police Officer, *not* an NAU officer. The NAU officer merely drove the victim to the hospital and began the investigation by broadcasting the victim's description(s) of her assailant. The record shows that *you had no interaction with the NAU officer*. Rather, the Flagstaff City Police used the information provided by the NAU officer to locate and arrest you.

(ER 416 (emphasis added).) Mr. Dixon's attorneys also explained to him that:

> Evidence of your DNA was apparently *not* taken by the NAU or Flagstaff police when they arrested you. Instead, ten years after you were imprisoned, the Department of Corrections required you to give a sample of DNA for an identification database which was later used by Tempe Police to allegedly connect you to the 1978 slaying. You now seek to suppress the DNA evidence taken from you in prison in 1995 on the grounds that the NAU Police Department was not legally established and could not act as a police force.

(ER 416 (emphasis added).)

Despite trial counsel's easily understandable explanation as to why the DNA evidence could not be suppressed, Mr. Dixon lacked the mental capacity to rationally comprehend it. On December 5, 2005, at a hearing on Mr. Dixon's request to waive counsel that occurred several weeks after he had received counsel's explanatory memorandum, trial counsel informed the court, in general terms, that they were "in a total impasse" with their client over an issue that "he is adamant that he wants [ ] litigated[,]" but that they could not ethically pursue. (ER 932.) Counsel never

disclosed the reason for the impasse: that Mr. Dixon was determined to frame a defense reliant on imaginary facts which bore no relation to reality—a scenario emblematic of incompetency. Mr. Dixon agreed with counsel's simplistic characterization that there was an impasse, telling the court that "I would like new counsel simply because this claim to my way of thinking is meritorious." (ER 933.) Mr. Dixon told the court that "[his] cooperation would be nonexistent" unless his lawyers filed a motion to suppress and he would represent himself unless he found an attorney willing to file the motion. (ER 934–35.)

Trial counsel had evidence that it was Mr. Dixon's decades-long inability to distinguish fact from fiction that was the driving force behind his decision to waive counsel. Yet they failed either to alert the court to this fact or to request a competency hearing at or before the waiver-of-counsel hearing that occurred on March 16, 2006. (*See* ER 914.) Instead, Mr. Dixon's trial lawyers remained mute when the court asked Mr. Dixon whether his desire to waive counsel was the product of a mere "disagreement with the nature of the way [trial counsel] represented you, maybe as it relates to strategy, maybe as it relates to the kinds of things you wanted to put into evidence, et cetera." (ER 910.) Mr. Dixon answered the court's question affirmatively (ER 910), but his trial lawyers should have known what any objectively reasonable lawyer would have known: Mr. Dixon's decision to waive counsel was not simply the product of a "disagreement" over strategy, but rather was driven by Mr. Dixon's

delusions—a fact which trial counsel later admitted (*see* RER 43 (trial counsel admitting in postconviction affidavit that he should have recognized Mr. Dixon's "unfounded theory" pertaining to "the NAU police" as "obviously delusional behavior")). The trial court allowed Mr. Dixon to represent himself and, unsurprisingly, denied his motion to suppress the DNA evidence.

When the jury trial began, the trial court compelled Mr. Dixon to defend himself throughout his nearly month-long trial while shackled with both an electric-shock belt and a full-legged steel restraint. That decision was made without an individualized determination that an essential state interest justified Mr. Dixon's shackling. *Deck*, 544 U.S. at 624. The trial court cited only "jail policy" as the sole justification for crippling Mr. Dixon in this manner. (ER 687–88, 696–97, 726–28.) The court instructed Mr. Dixon that:

> You will have leg braces and also a stun belt on. That's for security purposes. The leg braces are a common customary practice for all in-custody defendants when they are dressed out. I don't think it's in your best interest for the jury to see you walking up with leg braces on, because they impede your movement. And it's possible some intelligent juror could figure out you're being shackled.

(ER 724.)

Mr. Dixon objected to "the punitive condition" of being ordered shackled and to being hampered in his ability to defend himself in a first-degree murder case in which his life was at stake. (ER 691.) Mr. Dixon tried to explain to the court that he had a non-violent prison history. (ER 692.) He also objected to the false choice the trial court

presented to him: he could remain in his chair or at the podium throughout the proceedings, or have some freedom of movement—as the prosecutor would have—and run the risk of being prejudiced by the jury's sight of his shackles. (ER 725–26.) Although the court acknowledged Mr. Dixon's concern that if "the jury sees you walking in a very stilted fashion, that could be prejudicial" (ER 724, 728), it nonetheless ordered Mr. Dixon restrained based on "jail protocol" for "[e]very in-custody defendant who is dressed out in this court for a trial" (ER 687–88).

On numerous occasions throughout Mr. Dixon's trial the court stated on the record that Mr. Dixon's restraints were visible to the jury. (ER 556, 566–67; ER 667–68.) The court, several times, directed Mr. Dixon not to turn his back to the jury because "you can see the outline of the stun belt, especially when he bends over." (ER 566.) "I just noticed [Dixon] bending over and he was turning and I could see it . . . the more he turns the outline is visible," the court observed of the stun belt (ER 566), adding that "the outline of the stun belt is easily seen" (ER 567–68).[2] Meanwhile, the full-legged metal shackle that was also used to restrain Mr. Dixon was affixed by jail personnel to his left leg on some trial days and to his right leg on others, causing him to limp or shuffle erratically to his right or to his left, thus signaling to the jury that

[2] The conspicuousness of Mr. Dixon's stun belt is further supported by the fact that he was slim in stature and the type of stun belt used by the Maricopa County Sheriff's Office was described as having "noticeable bulk." *See* Amnesty Int'l, *United States of America: Cruelty in Control? The Stun Belt and Other Electro-Shock Equipment in Law Enforcement* 6 n. 18, 26 (June 8, 1999) (internal quotations omitted).

he was in bonds. (ER 667–68.)

At the penalty phase, while still visibly restrained with both devices, Mr. Dixon presented evidence of his lack of future dangerousness as the *only* mitigating circumstance warranting a life sentence. (ER 515–16, 519, 525–26.) During that phase as well, the trial court told Mr. Dixon on the record that his stun belt "protrude[d]" and was "very visible, especially when you bend over." (ER 510–11.) However rather than reevaluate its unjustifiable decision to shackle Mr. Dixon in the first place, the trial court instead told Mr. Dixon that, "I'm concerned for you." (ER 568.) Mr. Dixon was thereafter sentenced to death. (ER 148.)

B. The Mitigation Jurors Never Heard

Mr. Dixon's incompetent choice to waive counsel had a predictable result. Substantial mitigating evidence bearing on Mr. Dixon's lessened moral culpability was never presented to the jurors who sentenced him to death.

Jurors never learned that Mr. Dixon was the third of six children born to Navajo parents at the Navajo Medical Center in Fort Defiance, Arizona in 1955. (ER 159, 164.) Born with inadequate oxygenation, he was a "blue baby" and suffered from a congenital heart condition. (ER 186, 294 ¶ 2.) He was delivered breech, weighing less than six pounds, and spent the first month of his life in an incubator. (ER 182, 370–71.) Mr. Dixon's unhealthy start to life presaged a lifetime of physical and mental health difficulties. (ER 371, 376, 389, 391–92.)

Mr. Dixon's mother, Ella, and father, Wilbur, had their own histories of trauma that impaired their capacity to parent their six children. Alcohol ruined the lives of many in Wilbur's family. At nine years old, and following the early death of his own mother, Wilbur was raised in a boarding school. (ER 219, 221.) Wilbur became an educator within the Navajo community, but he succumbed to drug addiction, had extra-marital affairs, was physically and verbally abusive to his family, and neglected his family's needs. (ER 250, 294 ¶¶ 5–7, 371–72, 453.) Mr. Dixon's mother, Ella, was the granddaughter and niece of Navajo Code Talkers and had six siblings. (ER 162.) As an adult, she worked as a cook for the Bureau of Indian Affairs. (ER 202–04.) Like her children, Ella was abused by Wilbur which included being beaten while pregnant. (ER 294 ¶ 5, 372, 395.) Ella, a submissive wife, often parroted her demeaning husband by calling Mr. Dixon "stupid" and other derogatory names throughout his childhood. (ER 371.)

As a child, Mr. Dixon experienced extreme depravation as well as physical and emotional abuse resulting in depression and suicidal ideations. (ER 371–72, 376–79, 387, 388–90, 392.) He ate dog food to curb his hunger and wore shoes so small that he developed ingrown toenails. (ER 372.) Mr. Dixon was a sickly child who had frequent medical interventions for injuries, illnesses, and heart-related problems. He suffered fatigue as a result of his heart condition and, for years, suffered from cold feet, earaches, nosebleeds, and cramping in his legs and feet following exertion. (ER 186–

200, 294 ¶ 3.) When Mr. Dixon was 12 years old, his doctors recommended surgical correction for his congenital heart condition. Mr. Dixon walked the several miles from the Navajo Nation Indian Reservation to the hospital and had open-heart surgery alone, without family support. (ER 190–93, 372–73.)

Mental illness and substance abuse were also prevalent among Mr. Dixon's family members. Mr. Dixon's brother, Perry, struggled with alcohol and cocaine addiction. (ER 244–45; Dist. Ct. ECF No. 54 (sealed).)[3] His brother, Willard, went to prison on federal drug charges (ER 259–62) and also served time for committing an alcohol-fueled aggravated assault (ER 264–70.) Mr. Dixon's sister, Lota, was diagnosed with a major depressive disorder and, like Mr. Dixon, experienced suicidal ideations for which she was prescribed psychotropic medication. (ER 252–54.)

As a young adult, Mr. Dixon also fell prey to alcoholism and drug addiction. He binged on large quantities of alcohol daily and experienced blackouts. (ER 374.) In 1976, he married a Navajo woman named Geraldine (ER 166, 433) and his struggles with alcoholism and drug use persisted. (*See* ER 374.) The marriage lasted for about two years before ending in divorce. (ER 169–71.)

In 1976, Mr. Dixon gained admission to Arizona State University and moved to

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[3] Citations to documents that appear on the district court and Ninth Circuit dockets will reflect the docket number assigned by the Case Management/Electronic Case Files (CM/ECF) system and will appear as "Dist. Ct. ECF No." or "Ninth Cir. EFC No." followed by the docket number. Citations to the trial transcripts, meanwhile, will appear as "Tr." followed by the date and page number.

Tempe, Arizona. (ER 175–76, 180, 183, 373, 433.) He withdrew the following year after he began to exhibit signs of mental illness and bizarre behaviors that ultimately led to his involuntary commitment to the state hospital. (ER 178, 434–35, 474–75.) In June 1977, when he was 21 years old, he walked up to a woman, commented on the nice evening, and then struck her on the head with a pipe. (ER 434, 442.) Both the victim and the police officer who investigated this incident described Mr. Dixon as "confused, disoriented, and irrational." (ER 433, 437.) It was then that trial judge Sandra Day O'Connor ordered Mr. Dixon to be evaluated by two independent psychiatrists who determined that Mr. Dixon was "definitely gravely disabled," "not now competent to stand trial," and suffered from undifferentiated schizophrenia. (ER 433–35, 437.)

Deemed incompetent to stand trial, Mr. Dixon was committed to the Arizona State Hospital. (ER 474–75.) After being restored to competency (ER 466–69), Judge O'Connor found Mr. Dixon Not Guilty by Reason of Insanity (ER 472). Then, just two days before Deanna Bowdoin's murder on January 7, 1978, Mr. Dixon was released pending civil commitment proceedings, without either supervision or treatment. (ER 472.) The civil commitment proceedings and attendant treatment for Mr. Dixon never ensued. In the end, Mr. Dixon's capital jurors never learned anything about his tragic life history.

C. The Appeal & Postconviction Proceedings

On direct review of Mr. Dixon's conviction and death sentence, the Arizona Supreme Court acknowledged that the trial court's decision to shackle Mr. Dixon throughout trial was error. (A-4 at 10–11.) However the court determined that because Mr. Dixon had failed to prove that his shackles were visible, he failed to establish that his due process rights were violated. (A-4 at 11–13 (noting that Mr. Dixon failed to provide evidence illustrating that jurors saw his presumptively non-visible shackles); A-4 at 12–13 (requiring Mr. Dixon to "show that [the stun belt] was visible to the jury[]" under fundamental error review and finding that "Dixon has not established that the jury actually saw the belt or inferred its presence").)

The Arizona Supreme Court also held in the alternative that any shackling error was harmless—that is, Mr. Dixon could not have been prejudiced by his shackles during the guilt/innocence phase because "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* The Arizona Supreme Court's harmless error analysis did not consider or mention the effect that the sight of Mr. Dixon's shackles might have had on jurors' penalty-phase decision to sentence him to death.

In postconviction proceedings, Mr. Dixon raised a colorable claim that his Sixth Amendment right to the effective assistance of counsel was violated when his attorneys facilitated his waiver of counsel despite indicia known to them that he was

incompetent to do so. (ER 344–58); *see also* Section A, *supra*.

Mr. Dixon supported his ineffective-assistance claim with evidence from trial counsel, who admitted that he should have recognized Dixon's "unfounded theory" pertaining to "the NAU police" as "obviously delusional behavior" (RER 43), as well as from psychologist John Toma, Ph.D., who evaluated Mr. Dixon's competency to waive counsel. (ER 391.) Dr. Toma unequivocally determined that Mr. Dixon was not competent at the time that he waived counsel and elected to represent himself. (ER 391.) Dr. Toma's ultimate conclusion, supported by psychological testing, was that Mr. Dixon had long suffered from a serious "psychotic disturbance" and "difficulties perceiving reality accurately[.]" (ER 388.) Dr. Toma's conclusion that Mr. Dixon was unable to perceive reality was substantiated when Mr. Dixon told Dr. Toma that his DNA had been unlawfully seized by the NAU police in 1985—an expression of the same delusional belief that was known to trial counsel.

Dr. Toma recognized that Mr. Dixon's fixation on the NAU/DNA issue was not the byproduct of a mere strategic dispute with his lawyers. (*See* ER 377.) Rather, Dr. Toma found that Mr. Dixon's behavior was concomitant with an obsession which had its roots in "thought, mood and perhaps perceptual disturbances[]" suggestive of "[a] psychotic disorder (such as Schizophrenia)," as well as paranoia. (ER 387–89, 391.)

The State proffered no expert evidence in the state postconviction proceedings to rebut either Dr. Toma's test results or his ultimate conclusion that Mr. Dixon had

not been competent to waive trial counsel. Dr. Toma's unrebutted findings constituted a colorable showing that there was a reasonable probability that Mr. Dixon would have been found incompetent to waive counsel had his trial attorneys not unreasonably failed to request a competency hearing in light of the available indicia of Mr. Dixon's incompetence. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Arizona law required the postconviction court to determine the colorability of Mr. Dixon's ineffective-assistance claim by first assuming that his factual allegations were true, and by next asking whether the facts alleged and the evidence presented *might* have changed the outcome. *State v. Watton*, 793 P.2d 80, 85 (Ariz. 1990). Pursuant to that standard, Mr. Dixon presented a colorable ineffective-assistance claim that entitled him to a hearing under Arizona law. *See* Ariz. R. Crim. P. 32.8[4] (2013) ("The defendant *shall* be entitled to a hearing to determine issues of material fact[.]" (emphasis added)). But, as detailed *infra*, rather than grant Mr. Dixon a hearing, the postconviction court instead resolved disputed issues of material fact against him and denied relief. (A-5 at 7, 14.)

D. Federal Habeas Proceedings

Mr. Dixon filed his petition for writ of habeas corpus on December 19, 2014. (*See* ER 302.) There, he argued that his Sixth and Fourteenth Amendment rights were violated both as a result of being erroneously shackled throughout trial and due

[4] On January 1, 2020, this rule was revised as Ariz. R. Crim. P. 32.13.

to trial counsel's ineffective failure to request a competency hearing before facilitating his waiver of counsel. (Dist. Ct. ECF No. 27 at 43–54, 98–110.) The United States District Court for the District of Arizona denied relief on both issues. (A-3 at 8–15, 26–30.)

With respect to Mr. Dixon's ineffective-assistance claim, the district court found that the postconviction court did not unreasonably determine that trial counsel was not deficient for failing to challenge Mr. Dixon's competency to waive counsel because "there were not sufficient indicia of incompetence." (A-3 at 12–13.) The district court also concluded that "the PCR court's factual determinations were not objectively unreasonable in light of the state court record." (A-3 at 15.)

As to the shackling claim, the district court found that it was not unreasonable for the Arizona Supreme Court to conclude that Mr. Dixon had failed to prove that the leg brace and stun belt were visible to jurors. (A-3 at 28–30.) In the district court's view, the Arizona Supreme Court also "did not unreasonably apply federal law in finding no prejudice" resulting from Mr. Dixon's erroneous shackling. (A-3 at 30.) The district court dismissed Mr. Dixon's petition without granting evidentiary development or a hearing. (A-3 at 93.)

On appeal to the United States Court of Appeals for the Ninth Circuit, Mr. Dixon again argued that his constitutional rights were violated as a result of his lawyers' ineffective failure to request a competency hearing, and as a result of being

shackled while representing himself at his capital jury proceedings. (Ninth Cir. ECF No. 16 at 33–47, 65–79.) The Ninth Circuit panel affirmed the district court's denial of relief on both issues, finding first that "the record contains no evidence of competency issues" at the time Mr. Dixon waived counsel rendering the postconviction court's denial of Mr. Dixon's ineffective-assistance claim reasonable (A-1 at 20–21), and next that the Arizona Supreme Court had reasonably determined that Mr. Dixon failed to prove "the jury's ability to see [his] restraints" (A-1 at 33–34, 36) thus failing to establish a constitutional violation under *Deck* (A-1 at 33–34). The Ninth Circuit also determined that, in placing the burden on Mr. Dixon to prove that his restraints were visible, the Arizona Supreme Court had not unreasonably applied *Chapman*. (A-1 at 34.)

Mr. Dixon timely petitioned for rehearing from the Ninth Circuit's denial of relief. (Ninth Cir. EFC No. 60.) That petition was denied on October 18, 2019. (A-2.) On December 23, 2019, the Honorable Justice Elena Kagan granted Mr. Dixon's request for an extension of time to petition for certiorari up to and including March 16, 2020.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. There is a wide circuit split with respect to whether a defendant who has been unjustifiably shackled contrary to the rule in *Deck* must also prove the shackles were visible to the jury, or whether, under *Chapman*, it is the State that must prove the shackles were not visible as part of its burden to demonstrate the error's harmlessness.

There is a clear conflict in the federal circuits with respect to the following question: When a trial court unjustifiably orders a defendant shackled throughout trial contrary to the rule in *Deck v. Missouri*, is it the defendant who bears the burden of proving that the restraints were visible to the jury, or does the State have the burden to prove that the shackles were not visible as part of its burden under *Chapman v. California*, 386 U.S. 18 (1967), to prove beyond a reasonable doubt that the shackling error did not contribute to the verdict?

The Ninth Circuit's decision below widens the federal circuit split over this question. In the Sixth, Ninth, Tenth, and D.C. Circuits, a criminal defendant is required to prove that shackles erroneously applied to him throughout trial were visible to the jury in order to establish a federal due process violation. *Adams v. Bradshaw*, 826 F.3d 306 (6th Cir. 2016); *Dixon v. Ryan*, 932 F.3d 789 (9th Cir. 2019); *United States v. Wardell*, 591 F.3d 1279 (10th Cir. 2009); *United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016). In sharp contrast, the Second, Fifth, and Seventh Circuits hold that a criminal defendant need only demonstrate that he was unjustifiably shackled in order to establish a violation of due process; once that showing has been

made, it is the State that must demonstrate the constitutional error was harmless beyond a reasonable doubt. *United States v. Haynes*, 729 F.3d 178 (2d Cir. 2013); *United States v. Banegas*, 600 F.3d 342 (5th Cir. 2010); *Wrinkles v. Buss*, 537 F.3d 804 (7th Cir. 2008).

This Court should grant certiorari to resolve the recurring and conflicting application of *Deck*, thereby ensuring that due process rights are not indiscriminately settled based on the locale of the federal circuit.

A. The Arizona Supreme Court and the Ninth Circuit panel decisions contravened *Deck*.

This Court held in *Deck* that the Constitution "forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase[]" and "permits a State to shackle a criminal defendant only in the presence of a special need" specific to the defendant on trial. 544 U.S. at 624, 626. The Court traced this prohibition's "deep roots in the common law[]" to English jurists' recognition of the need to safeguard a criminal defendant's presumption of innocence, *id.* at 626, and to ensure that he stood trial free from any means of coercion that might interfere with his fair trial right. *Id.* ("If felons come in judgement to answer, . . . they shall be out of irons, *and all manner of bonds*, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will[.]" (quoting 3 E. Coke, Institutes of the Laws of England) (emphasis added)); *see also id.* at 627 ("[O]ne at the trial should have the unrestrained use of his reason, and all advantages, to clear

his innocence. Our American courts adhere pretty closely to this doctrine[.]" (quoting 1 J. Bishop, New Criminal Procedure § 955, p. 572–73 (4th ed. 1895)) (internal quotations omitted)).

The *Deck* rule, plainly stated, protects the fundamental due process right to a fair trial by forbidding the shackling of a defendant before the jury in the absence of a "special need" specific to the defendant on trial. 544 U.S. at 624, 626. The Court did not make the due process protection against routine, unjustified shackling contingent upon whether a criminal defendant could prove that his restraints were visible to the jury. To the contrary, the Court recognized that the trial record would be inadequate to the task of proving the extent to which unlawfully placed restraints would be visible to the jury. *See id.* at 635 ("[T]he practice [of shackling] will often have negative effects but . . . those effects 'cannot be shown from a trial transcript.'" (quoting *Riggins v. Nevada*, 504 U.S. 127, 137 (1992))).

Further, in *Deck* this Court grounded the due process protection against the routine shackling of a criminal defendant, in part, on "fundamental legal principles" having no relation to whether the restraints were visible to the jury. *Id.* at 630. Those foundational principles include: a criminal defendant's **right to a meaningful defense**, *id.* at 631 ("[T]he Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. The use of physical restraints diminishes that right. . . . Indeed, they can interfere with a defendant's

ability to participate in his own defense[.]"); and **the dignified process owed to the criminally accused**, *id.* at 631–32 (finding that "'to have a man plead for his life' in shackles before 'a court of justice,' . . . undermines the 'dignity of the Court'" (quoting *Trial of Christopher Layer*, 16 How. St. Tr. at 99 (statement of Mr. Hungerford)), and that "[t]he courtroom's formal dignity, . . . includes the respectful treatment of defendants[]").

Recognizing the plain contours of the rule against indiscriminate shackling, the Second, Fifth, and Seventh Circuits hold that a criminal defendant's due process rights are violated whenever he is shackled without justification in the presence of the jury. In *United States v. Haynes*, although "the record [wa]s silent as to whether any of the jurors saw the shackles during the trial[,]" 729 F.3d at 190, the Second Circuit nevertheless held that "it was clear error and a violation of the defendant's constitutional right to due process of law to have required the defendant to stand trial in shackles without a specific finding of necessity on the record by the trial judge." *Id.* at 189.

The Seventh Circuit similarly recognized in *Wrinkles v. Buss* that at the time of the defendant's trial, "it was well established that a trial court could not restrain a criminal defendant absent a particularized justification." 537 F.3d at 814. There, a federal habeas petitioner argued that he had received ineffective assistance of counsel when his trial lawyer "did not object to the use of [a] stun belt" to restrain him

throughout trial.[5] The Seventh Circuit agreed. It concluded that "[i]n light of the wealth of caselaw prohibiting the trial court's blanket policy, by standing mute, Wrinkles's counsel failed to provide adequate legal assistance." *Id.* Specifically, the Seventh Circuit determined that counsel's "[f]ail[ure] to object when a trial court presents *two impermissible options*—shackles or a stun belt, neither supported by an individualized justification—cannot be an objectively reasonable tack." *Id.* (emphasis added) (finding that "[c]ounsels' choice *between two unconstitutional options* is not a strategic choice worth deference." (emphasis added)).

The Fifth Circuit has also properly understood the clearly established due process protection against unjustified shackling which *Deck* affords every criminal defendant. In *United States v. Banegas*, the Fifth Circuit held that "when no reasons are given by the trial court[]" in ordering a criminal defendant shackled, "and it is not apparent that shackling is justified, the defendant need not demonstrate actual prejudice on appeal to make out a due process violation[]" under *Deck*. 600 F.3d 342, 345–46 (5th Cir. 2010) (footnote omitted). "[R]ather, the burden is on the government to prove 'beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.'" *Id.* at 346 (quoting *Deck*, 544 U.S. at 635) (footnote omitted). The defendant in *Banegas* had been ordered shackled with

[5] The petitioner in *Wrinkles* asserted ineffective assistance of counsel as cause to excuse the procedural default of a freestanding claim that he was unconstitutionally shackled throughout trial. 537 F.3d at 811–13.

concealed leg irons throughout trial—and at which he represented himself—pursuant to the trial court's policy that "every incarcerated *pro se* defendant is shackled." *Id.* at 345–46.

On appeal, Banegas argued that "his due process rights were violated when he was forced to wear leg shackles in the presence of the jury while representing himself *pro se*." *Id.* at 345. The Fifth Circuit agreed. It found, first, that the trial court's reason for ordering Banegas shackled—i.e. that it was the court's policy for every *pro se* defendant who appeared in that court—was "insufficient to justify shackling a particular defendant during his jury trial, particularly when he represents himself *pro se*." *Id.* at 346.[6] The Fifth Circuit next rejected the government's argument that "because [ ] Banegas has not established, and the record does not show, that the jury could see his leg irons," he failed to establish a federal due process violation. *Id.* at 346–47. The Fifth Circuit construed "[t]he threshold question here" as "which party has the burden of proving or disproving this fact and whether that party has borne that burden." *Id.* at 346. The *Banegas* Court reasoned that:

> Here, the government has the burden of proving whether the leg irons were visible because, under these facts, placing the burden of proof of

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[6] Here, the trial court ordered Mr. Dixon restrained for the same reasons. (ER 724–25 (trial court telling Mr. Dixon that, "[y]ou will have leg braces and also a stun belt on. That's for security purposes. The leg braces are a common customary practice for all in-custody defendants when they are dressed out[]"); *see also* ER 687–88 (trial court telling Mr. Dixon that "[e]very in-custody defendant who is dressed out in this court for a trial, . . . does wear leg braces under their clothes[,]" and "that is a policy, and I'm simply choosing to treat you the same way. I'm simply choosing to follow jail protocol for security reasons regarding in-custody defendants[]").)

> this question on the defendant would contravene the Supreme Court's reasoning in *Deck*. As the Court noted, the record is often devoid of any discussion of shackling. And, despite what the judge might believe or state, there is no way for us to know, solely from the record on appeal, whether the jury could see, or actually saw, Banegas's leg irons during the trial. The rule proposed by the government would significantly alter the burden of proof articulated in *Deck*. That in turn would create the unjust result that, when the record is sparse as to the facts of shackling, the defendant would have to depend on that same sparse record to prove the negative fact of shackle visibility before the government would have to take up its burden of proving the absence of prejudice.

Id. at 347 (footnote omitted). The Fifth Circuit articulated the analysis of *Deck* error as follows:

> The correct rule is that—when the district court does not adequately articulate individualized reasons for shackling a particular defendant, and there is a question whether the defendant's leg irons were visible to the jury—the government has the burden of proving beyond a reasonable doubt that the leg irons could not be seen by the jury as part of its general burden to show, beyond a reasonable doubt, that the shackles did not contribute to the jury verdict.

Id. Applying this rule, the *Banegas* Court concluded that the government had failed to carry its burden and that Banegas was entitled to a new trial. *Id.*

The *Deck* rule is thus clear: whenever a criminal defendant is ordered shackled in the jury's presence without adequate justification, his right to due process is violated and "the defendant need not demonstrate actual prejudice" by, for example, having to prove his shackles were visible, "to make out a due process violation." 544 U.S. at 635. Rather, "[t]he State must prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Id.*

(internal quotations and citations omitted). Were this not the rule, trial courts would be incentivized to shackle defendants throughout trial as a matter of routine, leaving defendants without any plausible means to show whether the restraints were visible to the jury. *See id.* at 635 ("[T]he practice [of shackling] will often have negative effects but . . . those effects 'cannot be shown from a trial transcript.'" (quoting *Riggins*, 504 U.S. at 137)).

In light of the straightforward rule established in *Deck*, the Arizona Supreme Court and the Ninth Circuit erred when they determined that Mr. Dixon's due process rights were necessarily not violated unless he could prove that his shackles were visible to members of the jury. (A-1 at 33–34.)[7] The Arizona Supreme Court on direct appeal explicitly rejected Mr. Dixon's argument that his unjustified shackling throughout trial violated *Deck* since, in the court's view, Mr. Dixon had failed to prove that his shackles were visible. (A-4 at 12–13 (noting that Mr. Dixon failed to provide evidence illustrating that jurors saw his presumptively non-visible shackles); A-4 at 12–13 (requiring Mr. Dixon to "show that [the stun belt] was visible to the jury[]" under fundamental error review and finding that "Dixon has not established that the

[7] The Ninth Circuit's misreading of *Deck* deepens the divide among the lower federal courts. The Sixth, Tenth, and D.C. Circuits join the Ninth Circuit in erroneously requiring that a criminal defendant who is shackled without justification throughout trial prove his restraints were visible to the jury in order to establish a due process violation under *Deck*. *See Adams v. Bradshaw*, 826 F.3d 306, 317 (6th Cir. 2016); *United States v. Wardell*, 591 F.3d 1279 (10th Cir. 2009); *United States v. McGill*, 815 F.3d 846, 895 (D.C. Cir. 2016).

jury actually saw the belt or inferred its presence").)

The Ninth Circuit replicated the Arizona Supreme Court's error on federal habeas review when it determined that the state court had not contravened *Deck* by requiring Mr. Dixon to prove "the jury's ability to see the restraints[.]" (A-1 at 33–34.) The panel turned *Deck* on its head, reasoning that "*whether Dixon was prejudiced* under *Deck* by the jury's ability to see the restraints" was a circumstance "which Dixon must show to succeed on his claim" that his due process rights were violated by being shackled throughout his capital trial. *Id.* (emphasis added). By placing the burden to demonstrate prejudice on Mr. Dixon, the Ninth Circuit explicitly violated *Deck*. 544 U.S. at 635 ("[T]he defendant need not demonstrate actual prejudice to make out a due process violation" when he is ordered shackled in the jury's presence without adequate justification).

B. The state court contravened clearly established law by failing to hold the State to its burden to prove beyond a reasonable doubt that the constitutional violation did not contribute to the jury's penalty-phase death verdict.

The decisions of the Arizona Supreme Court and the Ninth Circuit repudiated *Deck* in still another way. The Arizona Supreme Court held that, even assuming that Mr. Dixon's shackles were visible, any *Deck* error was harmless because "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (A-4 at 13 (internal quotations omitted).) The Ninth Circuit, reviewing the Arizona Supreme Court's harmlessness determination under 28 U.S.C.

§ 2254(d), concluded that the court had properly "place[d] the burden on the government to prove that the jury would have found Dixon guilty absent the error." (A-1 at 32–33 (citing *Deck*, 544 U.S. at 635).) However the Ninth Circuit overlooked that the outcome-determinative harmlessness test applied by the Arizona Supreme Court was "contrary to clearly established federal law" under § 2254(d)(1). *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) (opinion for the Court by O'Connor, J.) ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."). Here, both *Deck* and *Chapman* explicitly reject the outcome-determinative harmlessness test applied by the state court, which employed a different and incorrect rule.

Under *Chapman*, a reviewing court must ask *not* whether a defendant would have been found guilty absent the error—as the Arizona Supreme Court did. Instead, it must ask whether "the State has demonstrated, beyond a reasonable doubt," that the constitutional error "did not contribute to the [defendant's] convictions." 386 U.S. at 25; *see also Brecht v. Abrhamson*, 507 U.S. 619 (1993) (Stevens, J., concurring) (explaining that harmless error analysis asks "not 'were [jurors] right in their judgment, regardless of the error or its effect upon the verdict[,]'" but instead asks "'what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other

men, not on one's own, in the total setting[]'") (quoting *Kotteakos v. United States*, 328 U.S. 750, 764 (1946)). In *Deck*, meanwhile, this Court held that where a defendant is unjustifiably shackled throughout trial "[t]he State must prove beyond a reasonable doubt that the [shackling] error complained of *did not contribute to the verdict obtained*." 544 U.S. at 635 (internal quotations and citations omitted) (emphasis added). In other words, the harmlessness inquiry dictated under *Chapman* and *Deck* required the Arizona Supreme Court to ask not whether Mr. Dixon would have been sentenced to death anyway had he not been visibly shackled, but to instead ask whether the State had proved beyond a reasonable doubt that the constitutional violation did not influence jurors' decision to sentence him to death. Because the state court applied a harmlessness rule that explicitly contradicted *Deck* and *Chapman*, a federal court must review the federal claim *de novo*. *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007); *Lafler v. Cooper*, 566 U.S. 156, 173 (2012).

On *de novo* review, the State has the burden of demonstrating that the constitutional error did not have a "substantial and injurious effect or influence in determining the jury's [death] verdict." *Brecht*, 507 U.S. at 631–32; *see id.* at 641 (Stevens, J., concurring) (explaining that the state has the burden of demonstrating harmlessness). The State is unable to meet this burden.

First, the trial court's own on-the-record statements demonstrate that Mr. Dixon's unconstitutionally placed stun belt and leg irons were visible to members of

the jury. (*See, e.g.*, ER 556 (trial court telling Mr. Dixon not to turn his back to the jury because "you can see the outline of the stun belt, especially when he bends over"); ER 566 (trial court stating "I just noticed [Dixon] bending over and he was turning and I could see it . . . the more he turns the outline is visible[]"); ER 667–68 (Day 5 of Mr. Dixon's trial on which he told the court that he was concerned that jurors can "see that I'm limping," and that the leg brace was being attached to different legs throughout trial); ER 724–25 (trial court telling Mr. Dixon that "I don't think it's in your best interests for the jury to see you walking up with leg braces on, because they impede your movement. And it's possible some intelligent juror could figure out you're being shackled[]").)

Second, it was central to Mr. Dixon's mitigation presentation that he would not present a future danger if confined to prison for life, as evidenced by the fact that he had not exhibited violent propensities throughout his more than two decades in prison. (*See* ER 533; SER 033.) However this defense was belied by the overly excessive security restraints affixed to him and from which it could only be inferred that he did still pose a current and future danger. This obvious inference was explained in *Deck*. "The appearance of the offender during the penalty phase in shackles, . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities still consider the offender a danger to the community . . . [and this is] nearly always a relevant factor in jury decisionmaking, even where the State does

not specifically argue the point." *Deck*, 544 U.S. at 633.

Third, as mentioned above, Mr. Dixon presented evidence of his lack of future dangerousness as the *only* mitigation put forward at the penalty phase in support of a life sentence. The State contested Mr. Dixon's evidence and challenged the testimony of Mr. Dixon's expert that he could be "managed and controlled" by the prison system if sentenced to life without parole. (ER 515–16, 519, 525–26.) The prosecutor explicitly urged the jury *not* to find Mr. Dixon's non-violent 22-year prison record mitigating. (ER 518.) But perhaps the best evidence that the prosecutor had to rebut Mr. Dixon's decades-long prison record of non-violence was the fact that the trial judge had ordered him shackled and, therefore, deemed him to be very dangerous. Although the prosecutor could not say this directly, he had an equally effective means of making the point. On 10 different occasions throughout the penalty phase, the prosecutor asked the jury to consider Mr. Dixon's "body language" and "demeanor" as reasons to reject his plea for mercy. (*See, e.g.*, ER 520–21 (prosecutor misinforming the jury at the penalty phase that, "you do have a jury instruction that tells you to look at [Mr. Dixon's] body language . . . Just because an individual asks you for mercy doesn't mean that that's a mitigating factor. You look at everything else coordinated with it, his body language, his style[]").)[8]

As the jury could plainly see, Mr. Dixon's body language did speak volumes:

[8] In fact, there was no instruction authorizing jurors to consider Mr. Dixon's body language as a sentencing factor. (*See generally* Tr. 01/24/08 at 27–38.)

the leg irons and stun belt severely impaired Mr. Dixon's movements and caused him to limp, move, and walk haltingly. (ER 510–11, 566–68, 667–68.) Here, the repeated references to Mr. Dixon's body language and demeanor was another way of telling the jury that it should consider the multiple forms of restraint that Mr. Dixon was forced to wear throughout the proceedings as evidence that he deserved death. *See Deck*, 544 U.S. at 633 (citing *Riggins*, 504 U.S. at 142 (Kennedy, J., concurring) ("[T]hrough control of a defendant's appearance, the State can exert "a powerful influence on the outcome of the trial.")); *id.* (recognizing that shackling will "almost inevitably affect[] adversely the jury's perception of the character of the defendant . . . [a]nd it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations—considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death").

The State is unable to meet its burden to prove that Mr. Dixon's unconstitutional shackling did not have a "substantial and injurious effect or influence on the jury's [death] verdict." *Brecht*, 507 U.S. at 631–32. The record here demonstrates that Mr. Dixon's shackles operated as "a thumb on death's side of the scale." *Deck*, 544 U.S. at 633 (quotation, alteration, and citation omitted). This constitutional error undermined Mr. Dixon's case for a life sentence by conveying the clear message to jurors that he posed a future danger and was therefore undeserving of mercy. Because the State cannot carry its burden to prove otherwise, this Court

should grant certiorari and reverse.

II. A state court's denial of a well-pleaded federal claim by resolving disputed factual issues without a hearing in contravention of state-law requirements contravenes 28 U.S.C. § 2254(d)(2) and results in a decision based on an unreasonable determination of the facts.

This Court held in *Brumfield v. Cain* that 28 U.S.C. § 2254(d)(2)'s limitation on a federal habeas court's power to review a state prisoner's federal constitutional claim *de novo* is overcome when state law entitles a prisoner to a hearing on his federal claim but the state courts nonetheless deny him one. 135 S. Ct. 2269, 2278–79 (2015). Brumfield, a Louisiana death-row prisoner, raised in state postconviction proceedings a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), that his intellectual disability rendered him ineligible for execution under the Eighth Amendment. *Id.* at 2274.

Under Louisiana law, Brumfield was entitled to a postconviction hearing on his *Atkins* claim only if he "put forward sufficient evidence to raise a reasonable ground to believe him to be intellectually disabled." *Id.* at 2274 (internal quotations omitted). The postconviction court dismissed Brumfield's *Atkins* claim without a hearing after making two dispositive factual findings. *Id.* at 2275. First, the postconviction court found that Brumfield's IQ score of 75 demonstrated that he necessarily "could not possess subaverage intelligence." *Id.* at 2278. Second, the postconviction court held that the record "failed to raise any question" that Brumfield had "impairment . . . in adaptive skills." *Id.* at 2279.

On federal habeas review, this Court held that the postconviction court's denial of Brumfield's *Atkins* claim without a hearing "reflected an unreasonable determination of the facts" under § 2254(d)(2). *Id.* at 2278–79. Key to this Court's holding was the fact that Louisiana law had entitled Brumfield to a hearing on his federal claim before the postconviction court dismissed it. *Id.* at 2281. "Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much," this Court held. *Id.* "Rather, Brumfield needed only to raise a reasonable doubt as to his intellectual disability to be entitled to an evidentiary hearing" under state law. *Id.* And because Brumfield satisfied state-law requirements, this Court held that the postconviction court's denial of his *Atkins* claim "[w]ithout affording him an evidentiary hearing . . . was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Id.* at 2273 (quoting § 2254(d)(2)). This Court remanded Brumfield's case so that he could "have his *Atkins* claim considered on the merits in federal court." *Id.*[9]

[9] While *Brumfield*, a case governed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), dictates the result here for the reasons just discussed, this Court's pre-AEDPA jurisprudence reinforces the conclusion that a state court's denial of a colorable federal claim and its resolution of disputed issues of fact without a hearing is undeserving of federal deference and unreasonable within the meaning of § 2254(d)(2). *See, e.g.*, *Smith v. O'Grady*, 312 U.S. 329, 334 (1941) (holding that "[t]he state court erroneously decided that the [state prisoner's postconviction] petition stated no cause of action. If petitioner can prove his allegations the judgment upon which his imprisonment rests was rendered in violation of due process and cannot stand[]"); *Palmer v. Ashe*, 342 U.S. 134, 135–38 (1951) (holding that the state court

For the same reason that the Louisiana court's rejection of Brumfield's *Atkins* claim without a hearing was an unreasonable factual determination under § 2254(d)(2), the Arizona postconviction court's rejection of Mr. Dixon's ineffective-assistance claim without affording him the hearing to which state law entitled him was also unreasonable. As set forth *supra*, pp. 14–16, Mr. Dixon raised in state court colorable and unrebutted allegations that he was denied his constitutional right to the effective assistance of counsel under *Strickland* when his trial lawyers failed to request a competency hearing prior to his waiver of counsel. Mr. Dixon supported his ineffective-assistance claim with objective evidence of counsel's deficient performance—namely, written lawyer-client communications that demonstrated that Mr. Dixon was not able to communicate with counsel with a "reasonable degree of rational understanding[.]" *Dusky*, 362 U.S. at 402. (ER 416.) Mr. Dixon further supported the showing of deficient performance with an affidavit from trial counsel who admitted that he should have recognized Mr. Dixon's "unfounded theory"

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erred in dismissing state prisoner's postconviction application alleging federal constitutional violation without a hearing and without affording him "any opportunity to offer evidence to prove his allegations[]"); *see also Com. of Pa. ex rel. Herman v. Claudy*, 350 U.S. 116, 120–21, 123 (1956) (holding that where a state postconviction petitioner alleged facts that, if proved, would entitle him to relief, and where there was also "a sharp dispute as to the facts material to a determination of the constitutional questions involved[,] . . . [h]e cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers[]"); *McNeal v. Culver*, 365 U.S. 109, 117 (1961) (holding that a hearing was required on a Florida postconviction petitioner's allegations that he was unconstitutionally denied the assistance of counsel at his trial because it was apparent that the petitioner would be entitled to relief if his allegations were true).

pertaining to "the NAU police" as "obviously delusional behavior" (RER 43), thus giving rise to the need to request a competency determination before Mr. Dixon waived counsel.

Mr. Dixon also raised a colorable claim of *Strickland* prejudice which he supported with unrebutted evidence that there was a reasonable probability that he would have been found incompetent to waive counsel had his trial attorneys not unreasonably failed to request a competency hearing. *Strickland*, 466 U.S. at 694. Mr. Dixon presented a report from expert psychologist Dr. John Toma, Ph.D., who evaluated Mr. Dixon's competency and unequivocally determined that he was not competent at the time that he waived counsel and elected to represent himself. (ER 391.)[10] The State proffered no evidence to rebut Dr. Toma's findings.

Arizona law required the postconviction court to determine the colorability of Mr. Dixon's ineffective-assistance claim by first assuming that his factual allegations were true, and by next asking whether the facts alleged and the evidence presented *might* have changed the outcome. *State v. Watton*, 793 P.2d 80, 85 (Ariz. 1990). Pursuant to this standard, Mr. Dixon presented a colorable ineffective-assistance-of-counsel claim to the postconviction court, as demonstrated *supra*, that entitled him to a hearing. *See State v. Runningeagle*, 859 P.2d 169, 173 (Ariz. 1993) ("The defendant is entitled to an evidentiary hearing only when he presents a colorable

[10] Dr. Toma's well-substantiated findings are also discussed *supra*, at pp. 15–16.

claim—one that, if the allegations are true, might have changed the outcome."); *see also Watton*, 793 P.2d at 85 ("A defendant is entitled to an evidentiary hearing when he presents a colorable claim[.]").

Here, Mr. Dixon made a quintessential showing that the state court decision—rendered without a hearing—resulted from an unreasonable determination of the facts under § 2254(d)(2). The postconviction court: (1) resolved disputed issues of fact without a hearing; (2) applied incorrect legal standards to its factual findings; (3) plainly misstated the record with respect to material factual issues; and (4) ignored evidence that supported Mr. Dixon's entitlement to relief. In view of this, the Ninth Circuit's determination that the postconviction court's rejection of Mr. Dixon's claim was based on reasonable factual findings was patently erroneous and contrary to this Court's clearly established precedent. *See Brumfield*, 135 S. Ct. at 2278–79, 2281–83.

For example, the postconviction court found that it "must have been aware" of all relevant information about Mr. Dixon's mental health at the time it accepted his waiver of counsel. (ER 105.) But that was palpably wrong. For at the time that it accepted Mr. Dixon's waiver, the trial court did not have counsel's 2005 confidential memorandum demonstrating that Mr. Dixon's delusional obsession with the NAU issue was inhibiting rational communication with counsel. Further, the state court's finding that it knew all there was to know is contradicted by trial counsel's postconviction affidavit which only belatedly disclosed counsel's belief that there were

grounds to question Mr. Dixon's competency that he neglected to raise. And, finally, the postconviction court's finding that it must have had all relevant information bearing on Mr. Dixon's mental health when it accepted his waiver of counsel (ER 105) is belied by the evidence that the court did not have—in particular, Dr. Toma's finding that Mr. Dixon's decision to waive counsel was driven by symptoms of psychosis. (*See* ER 387–89, 391.)

The postconviction court next found that trial counsel was not deficient under *Strickland* because they "would have immediately sought a hearing" on Mr. Dixon's competency "*if they believed* for a minute that [his] competence was an issue." (ER 107 (emphasis added).) However this conclusion begs the ultimate factual question which the state court never addressed: did trial counsel unreasonably ignore objective evidence which *should* have caused them to believe that Mr. Dixon's competency was an issue? *Strickland*'s first prong required the postconviction court to frame its factfinding around this question. *Strickland*, 466 U.S. at 687–88. Instead, the postconviction court based its decision on the wholly immaterial issue of what it subjectively believed trial counsel would have done had they recognized Mr. Dixon's incompetency as an issue. In so doing, the postconviction court ignored trial counsel's postconviction affidavit as well as other objective evidence which dispositively substantiated Mr. Dixon's allegation that counsel had in their possession indicia of his incompetence which they failed to act upon. (ER 416; RER 43.)

The postconviction court also found that Mr. Dixon was competent to waive counsel. (ER 107, 113.) But this finding is also patently unreasonable because it ignored Dr. Toma's opposite, uncontroverted, expert conclusion that Mr. Dixon was *not* competent at the time that he waived counsel. (*See* ER 391.) The postconviction court's failure to consider and weigh relevant evidence constitutes an unreasonable determination of fact that disentitles its decision to deference under § 2254(d)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 346–47 (2003) (noting that state-court factfinding processes are undermined where the state court has before it, yet ignores, evidence that supports petitioner's claim). Here, Dr. Toma's incompetency determination was sufficient to support *Strickland*'s prejudice prong and, therefore, could not reasonably be rejected without a hearing. *See Brumfield*, 135 S. Ct. at 2278–79, 2281–83.

Similarly, the postconviction court disregarded Mr. Dixon's past and continued delusional obsession with the NAU issue in its assessment of Mr. Dixon's competency at the time that he waived counsel. (*See* ER 104–07.) Yet Dr. Toma specifically found Mr. Dixon's fixation on the NAU issue relevant to his competency at the time that he waived counsel. (*See* ER 374, 377, 391.) The postconviction court could not reasonably resolve any disputed inferences to the contrary without a hearing.

Finally, the postconviction court found that Mr. Dixon would not have submitted to a competency evaluation had trial counsel requested one. (ER 105, 107.) The state court could not credibly make this finding without a hearing either. It is

just as likely that Mr. Dixon would have agreed to a psychological evaluation based on an irrational belief that he could prove his competency, waive counsel, and then raise his delusional DNA motion based on the imaginary NAU issue. Further, if trial counsel had fully disclosed all of the evidence pointing to Mr. Dixon's incompetency to the trial court—as they should have—there would have been sufficient evidence for the trial court to disallow Mr. Dixon's waiver of counsel and, thus, a reasonable probability that Mr. Dixon would not have been permitted to represent himself. In any event, the postconviction court's finding that Mr. Dixon would not have cooperated with a competency evaluation had counsel requested one was an issue of fact that could not reasonably be resolved without a hearing.

The state court's finding that Mr. Dixon failed to "present[] a material issue of fact or law which would entitle [him] to relief," was plainly the result of an unreasonable determination of the facts under § 2254(d)(2). (ER 114.) The Ninth Circuit's finding to the contrary is in clear conflict with this Court's clearly established precedent. *See Brumfield*, 135 S. Ct. at 2277. Mr. Dixon is entitled to *de novo* review of his federal claim and to a hearing on its merits.

CONCLUSION

Mr. Dixon respectfully requests that this Court grant his petition for writ of certiorari and reverse the order and judgment of the Ninth Circuit Court of Appeals affirming the district court's denial of his petition for writ of habeas corpus.

Respectfully submitted: March 16, 2020.

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