**No.**

IN THE

# Supreme Court of the United States

FREDERICK R. WHATLEY,

*Petitioner*,

*v.*

WARDEN, GEORGIA DIAGNOSTIC & CLASSIFICATION CENTER,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## CAPITAL CASE
## QUESTION PRESENTED

A defendant asserting a claim for ineffective assistance of counsel must show that counsel's "deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This Court has also held that it is "inherently prejudicial" for a defendant to appear before a jury in shackles. *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986).

The circuits are split on the interaction of these bodies of law where a person in state custody brings a habeas petition asserting ineffective assistance because defense counsel failed to object to visible shackling at trial. The Seventh Circuit holds that a state court unreasonably applies federal law, under 28 U.S.C. § 2254(d), if the court fails to account for the inherently prejudicial effect of shackling. By contrast, the Ninth and Eleventh Circuits hold that a state court need not account for this Court's shackling cases when assessing *Strickland* prejudice. That holding led the Eleventh Circuit here to deny a habeas petition by a death row inmate who was forced, at sentencing, to reenact his crime while visibly shackled before the jury, with the prosecutor playing the victim.

The question presented is: Does a state court unreasonably apply federal law when, in determining whether a person suffered prejudice as a result of ineffective assistance of counsel, it disregards this Court's case law recognizing that shackling is inherently prejudicial?

## RELATED PROCEEDINGS

*Whatley v. State*, No. S98P1308 (Ga. S. Ct. Dec. 4, 1998) (affirming conviction on direct appeal).

*Whatley v. Terry*, No. S08A1076 (Ga. S. Ct. Oct. 6, 2008) (affirming denial of state habeas petition).

*Whatley v. Upton*, No. 3:09-cv-0074 (N.D. Ga. Apr. 9, 2013) (granting habeas petition in part and denying it in part).

*Whatley v. Upton*, No. 3:09-cv-0074 (N.D. Ga. Oct. 9, 2013) (denying reconsideration of partial denial of habeas petition).

*Whatley v. Warden, Georgia Diagnostic and Classification Center*, No. 13-12034 (11th Cir. June 20, 2019) (affirming partial denial of habeas petition and reversing partial grant of habeas petition).

*Whatley v. Warden, Georgia Diagnostic and Classification Center*, No. 13-12034 (11th Cir. Apr. 10, 2020) (denying rehearing and rehearing en banc).

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## INTRODUCTION

Frederick Whatley was convicted of murder in connection with an armed robbery in Georgia. During the sentencing phase of his trial, the prosecutor compelled Whatley to stand before the jury, with visible shackles around his arms and legs, and reenact the crime with a toy gun supplied by the prosecutor and the prosecutor play-acting the role of the victim. Whatley's attorney not only failed to object to this spectacle, but also, when calling Whatley to the stand, waved off the *prosecutor*'s concerns about Whatley appearing visibly shackled before the jury, commenting simply, "Well, he's been convicted now." Following a closing argument in which the prosecutor repeatedly asserted Whatley's dangerousness, his likelihood of killing again, and his irredeemably bad character, the jury recommended the death penalty, and Whatley was sentenced to death.

After his argument challenging his needless and visible shackling was rejected on direct appeal because his attorney had failed to object, Whatley brought a state habeas proceeding. He asserted that his attorney's failure to object to his shackling deprived him of effective assistance of counsel. In support of his petition, Whatley invoked a long line of decisions from this Court recognizing that it is "inherently prejudicial" for a criminal defendant to appear before a jury in shackles or other visible restraints, especially in the sentencing phase of a capital trial. *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986); *see also Deck v. Missouri*, 544 U.S. 622, 628 (2005); *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970). The Georgia Supreme Court rejected his claims, distinguishing this

Court's shackling cases as relevant only on direct appeal, and not with respect to a collateral ineffective assistance claim. Pet. App. 278a.

Whatley then brought this federal habeas petition, which a divided panel of the Eleventh Circuit denied. The panel majority held that the Georgia Supreme Court correctly determined that "Fourteenth Amendment due process cases" recognizing the inherently prejudicial effect of shackling "did not apply to Petitioner's Sixth Amendment ineffective assistance claim." Pet. App. 73a. According to the majority, "[t]he Supreme Court of Georgia reasonably concluded that the shackles had little effect on the jury in this case" because "the shackles were trivial in light of evidence before the jury." Pet. App. 80a. In contrast, the dissent explained that the Georgia Supreme Court unreasonably applied federal law by disregarding this Court's case law on the "inherently prejudicial" effect of shackling in determining whether Whatley had shown prejudice under *Strickland*. Pet. App. 94a-95a.

The Eleventh Circuit's decision deepens an acknowledged circuit split on this fundamental issue. Specifically, the circuits are divided over how to address the prejudice prong of the *Strickland* inquiry when, as here, a habeas petitioner asserts a claim of ineffective assistance of counsel based on defense counsel's failure to object to visible shackling at the sentencing stage of a capital trial.

The Seventh Circuit has adopted the position urged by the panel dissenter below: It holds that a state court must account for this Court's shackling

case law in assessing the degree of prejudice resulting from an attorney's failure to object to shackling under *Strickland*. And because of the unique character of sentencing in capital cases, the Seventh Circuit has held that a defendant whose attorney fails to object to needless and visible shackling during a penalty proceeding that results in a death sentence is entitled to resentencing. *See Stephenson v. Neal*, 865 F.3d 956, 959 (7th Cir. 2017); *Roche v. Davis*, 291 F.3d 473, 484 (7th Cir. 2002).

Meanwhile, the Eleventh and Ninth Circuits have explicitly broken with the Seventh Circuit—though the split has prompted dissents in both circuits. Pet. App. 82a; *Walker v. Martel*, 709 F.3d 925, 940 (9th Cir. 2013). In their view, a state court need not account for this Court's decisions recognizing the inherently prejudicial effect of shackling in adjudicating an ineffective assistance claim based on an attorney's failure to object to shackling. This holding has led both circuits to deny habeas petitions brought by individuals sentenced to death following sentencing proceedings in which they were needlessly and visibly shackled. The shackling, these courts have concluded, may be dismissed as "trivial," Pet. App. 80a; *Walker*, 709 F.3d at 931, notwithstanding this Court's recognition that shackling "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." *Deck*, 544 U.S. at 633.

This circuit split warrants certiorari because of its fundamental importance. Unwarranted shackling of the defendant at a capital sentencing hearing is

profoundly injurious and undermines the dignity of the judicial process. In the Seventh Circuit, Whatley's attorney's failure to object to that affront would warrant resentencing, without shackles and with effective assistance of counsel. In the Ninth or Eleventh Circuit, however, his petition would be denied. Such inconsistent results cannot be countenanced, especially in relation to the ultimate penalty of death.

## OPINIONS AND ORDERS BELOW

The Eleventh Circuit's order denying rehearing and rehearing en banc is reported at 955 F.3d 924 and reproduced at Pet. App. 282a-90a. The Eleventh Circuit's decision denying Whatley's habeas petition is reported at 927 F.3d 1150 and reproduced at Pet. App. 1a-95a. The district court's decision granting the habeas petition in part and denying it in part is unreported, available at 2013 WL 1431649, and reproduced at Pet. App. 107a-248a; that same court's denial of reconsideration of the shackling claim, also unreported, is available at 2013 WL 12322087 and reproduced at Pet. App. 96a-106a. The Georgia Supreme Court's decision affirming the state trial court's denial of state habeas relief is reported at 668 S.E.2d 651 and reproduced at Pet. App. 249a-81a.

## JURISDICTION

The Eleventh Circuit entered judgment on June 20, 2019, Pet. App. 1a-95a, and denied a timely petition for rehearing and rehearing en banc on April 10, 2020. Pet. App. 282a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal proceedings, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

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

The federal habeas corpus statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ….

28 U.S.C. § 2254(d)(1).

## STATEMENT OF THE CASE

### *Whatley is represented in a capital trial by a notorious contract public defender*

Frederick Whatley was charged with murder and several other crimes arising out of an armed robbery of a bait shop in Spalding County, Georgia, in 1995. Whatley is Black; Ed Allen, the shop proprietor who Whatley shot, was White. Whatley was represented at trial by Johnny B. Mostiler, who was responsible for the representation of all indigent felony defendants in Spalding County under a lump sum contract with the county that he secured by submitting a low bid. In the year before Whatley's trial, Mostiler handled 661 indigent felony cases with the assistance of a single associate, while simultaneously maintaining his own private practice. D.10-3:495.[1] Mostiler's expert witness fees, investigative expenses, and other litigation costs were paid from the contract sum he received from the county—an arrangement that placed Mostiler's financial interests in conflict with his clients. D.10-3:495-97. Dean Norman Lefstein, a former chair of the American Bar Association's Criminal Justice Section and also an expert in professional responsibility, testified that Spalding County's indigent

[1] Unless otherwise noted, record citations in this petition refer to the district court record below in *Whatley v. Upton*, No. 3:09-cv-00074-TCB (N.D. Ga.), and are in the following form: District Court Docket Number- Attachment Number: page number range. For example, the citation "D.10-3:495" would refer to the Respondent's Notice of Filing at District Court Docket Entry 10, Attachment Number 3, page 495.

defense system was "one of the most appalling systems … that [he] [had] seen." D.10-3:498.

Mostiler's contract did not cover capital cases but, in addition to his massive docket of other criminal and civil cases, he handled capital cases too. The Superior Court routinely appointed him to represent capital defendants, and he invoiced the county separately for those cases on an hourly basis. D.10-3:494-95. Whatley was one of at least four capital defendants Mostiler represented during this time period. D.10-3:495. Mostiler had no co-counsel on Whatley's case, and his billing records show that he spent a total of 158 hours on the case during the two years it was pending, including the 55 in-court hours for the trial itself. D.11-1:1397-99; D.10-3:497. He filed 24 boilerplate motions in the case; none were tailored to the facts of Whatley's case, and only a few cited any law. D.6-3:325-37; D.6-4:338-443; D.10-3:497. He retained no independent ballistics or crime scene expert.

Mostiler's other capital clients fared no better. Jurors testified that they observed Mostiler sleeping during the trial of one capital defendant, who was later executed. *Fults v. Upton*, No. 3:09-CV-86-TWT, 2012 WL 884766, at *15 (N.D. Ga. Mar. 14, 2012). Mostiler was also alleged to have used racial slurs to refer to his own clients, allegedly saying of one, who was also later executed, "[t]he little n****r deserves the death penalty." *Osborne v. Terry*, 466 F.3d 1298, 1316 (11th Cir. 2006). And Mostiler failed to obtain a mental health evaluation for another capital client, even though in postconviction proceedings the State's expert measured the client's IQ at 68, below the threshold for intellectual disability. That client was

also convicted and sentenced to death; his case is currently pending before the Eleventh Circuit with a certificate of appealability on his claim that Mostiler provided ineffective assistance of counsel. *See Pye v. Warden*, No. 18-12147 (11th Cir.).

***Mostiler does not object as Whatley is forced to reenact his crime before the jury, while visibly shackled, with the prosecutor playing the victim***

Whatley was tried in January 1997. He was chained in "cuffs and leg irons" throughout the trial. D.7-5:948. The judge never made a finding that Whatley posed a threat to courtroom security or that any other state interest justified the shackling.

During the guilt phase, a curtain around the table where Whatley was seated prevented the jury from seeing that he was shackled. Pet. App. 82a. At one point, Whatley asked to be repositioned so that he could see photographic evidence being introduced. D.7-5:973-74. The trial judge deferred to the sheriff in deciding whether to remove the shackles so that Whatley could see the evidence against him. When the sheriff indicated that he "was not in favor of taking those shackles off," the judge concluded, "if you're uncomfortable with it, just leave them on. We'll just have to do the best we can." D.7-5:974-75.

The shackles were plainly visible to the jury during sentencing. When Mostiler called Whatley to the stand to testify, it fell to the *prosecutor* to ask whether it was appropriate for Whatley to appear before the jury shackled. The prosecutor suggested that the judge should "take the jury out before he takes the

stand," noting his concern with "the shackles on him." D.7-9:1412. Whatley's own attorney, Mostiler, dismissed the prosecutor's concerns, volunteering, "Well, he's been convicted now." *Id*. The judge acceded, concluding, "He's been convicted," and ordered Whatley to take the stand. *Id*. Whatley "stood up from the defense table and shuffled to the witness stand, revealing to the jury that he was restrained by leg shackles." Pet. App. 82a; *see* Pet. App. 24a.

From the stand, Whatley apologized to the victim's family. He testified that he was homeless at the time of the crime and believed the robbery would be "noncomplicated" and provide him money to get back to his daughter in Washington, D.C. D.7-9:1436-37. He made clear that he never intended to hurt anyone, and said he felt deep remorse. D.7-9:1436. He testified that he did not fire any shots until after the victim drew his own gun. D.7-9:1438; *see* Pet. App. 251a-55a.

During cross-examination, the prosecutor asked Whatley to step down from the witness box. D.7-10:1478. Mostiler did not object. Whatley "complied, with the shackles around his ankles yanking his legs together as he moved." Pet. App. 82a. The prosecutor handed Whatley a toy pistol, stating, "I hope you'll understand why I don't want to give you a real gun." D.7-10:1478. The prosecutor then directed Whatley to "show this jury how you held a gun on Ed Allen and told him to give you that money." D.7-10:1479. Mostiler again did not object. Whatley, dragging the chains with him, ambled around the courtroom reenacting his crime at the prosecutor's direction, with the prosecutor playing the role of the shooting victim. D.7-10:1478-79 ("You pretend I'm Ed Allen. You pull

the gun on me and show them how you did it."). Mostiler remained mute throughout.

The next day, "with the image of Mr. Whatley re-enacting the murder fresh in everyone's mind," the prosecutor argued to the jury in closing that the death penalty was necessary because Whatley remained dangerous. Pet. App. 83a. The prosecutor argued that he "should be given the death penalty because he's dangerous, he has had a history of violence"; suggested that he would "kill a guard if that guard stands between him and freedom"; and contended that the death penalty was necessary to "keep him from ever committing a crime again." D.7-11:1527, 1534-35. The prosecutor also asserted that "he's never going to get any better than what you've seen right now." D.7-11:1535. The jury recommended the death penalty, and Whatley was sentenced to death in January 1997.

***The Georgia Supreme Court holds on direct appeal that Whatley cannot obtain relief on the shackling issue because Mostiler invited the error***

Whatley appealed his conviction to the Georgia Supreme Court, urging among other things that the trial court deprived him of "his rights to due process" by allowing the jury "to observe him in shackles." D.8-1:56-57. The court affirmed Whatley's conviction and sentence. It concluded that Whatley forfeited his challenge to the visible shackling because "it was the prosecutor … who voiced concerns over the [shackles]," only to have Mostiler wave them off. *Whatley v. State*, 509 S.E.2d 45, 52 (Ga. 1998). Whatley sought certiorari based on the trial judge's qualification, at voir

dire, of a juror who had admitted to racial prejudice, but this Court denied certiorari. *Whatley v. Georgia*, 526 U.S. 1101 (1999).

***The Georgia Supreme Court holds on collateral appeal that Whatley cannot show prejudice resulting from his visible shackling***

Whatley next filed a state habeas petition, contending, as relevant here, that Mostiler's failure to object to his visible shackling before the jury deprived him of effective assistance of counsel. Whatley also argued Mostiler was ineffective for making virtually no effort to develop mitigating evidence to present to the jury at sentencing—evidence including Whatley's abandonment by his mother, a drug addict, as a young child, and his subsequent reunion with her in Washington, D.C., which accelerated his descent into chronic drug and alcohol dependence. The trial court held an evidentiary hearing in July 2002, by which time Mostiler had died. D.9-14. The state habeas court ultimately denied relief. D.14-14.

The Georgia Supreme Court affirmed. Pet. App. 249a-81a. With regard to the ineffective assistance of counsel claim, the court assumed that Mostiler's failure to object to Whatley's visible and unjustified shackling constituted deficient attorney performance under *Strickland*, given that Georgia case law at the time of the trial strongly disapproved of the practice. Pet. App. 277a-78a. The court also acknowledged that, "[o]n direct appeal where unconstitutional shackling has occurred, there is a presumption of harm that can be overcome only upon a showing by the State that the shackling was harmless beyond a

reasonable doubt." Pet. App. 278a. In the context of a collateral challenge involving claims of ineffective assistance of counsel, however, the court stated that "the petitioner is entitled to relief only if he or she can show that there is a reasonable probability that the shackling affected the outcome of the trial." *Id*. The Georgia Supreme Court perfunctorily rejected Whatley's argument that his attorney's failure to object to visible shackling prejudiced his sentencing: "In view of the balance of the evidence presented at his trial, we conclude as a matter of law that Whatley cannot show that his trial counsel's failure to object to his shackling in the sentencing phase in reasonable probability affected the jury's selection of a sentence." *Id.* Nowhere in its brief discussion did the Georgia Supreme Court attempt to reconcile that determination with this Court's cases holding that visible shackling is inherently prejudicial.

Whatley again sought certiorari, arguing that he had been deprived of effective assistance of counsel because Mostiler had failed to properly develop mitigating evidence before sentencing. This Court again denied certiorari. *Whatley v. Terry*, 556 U.S. 1248 (2009).

***A divided Eleventh Circuit panel holds on federal habeas review that Whatley's visible shackling was "trivial"***

Whatley sought federal habeas relief under 28 U.S.C. § 2254. The district court determined that habeas relief was warranted because Mostiler was ineffective in failing to perform a basic investigation into mitigating evidence prior to sentencing. Pet. App.

196a-200a. But, the court concluded, Whatley was not deprived of effective assistance of counsel based on Mostiler's failure to object to Whatley's visible shackling because Mostiler "could have had a number of valid reasons for declining to object to his client being seen in restraints during the penalty phase." Pet. App. 209a. The court, however, did not identify any such reason. *See* Pet. App. 96a-106a (denying reconsideration motion).

The Eleventh Circuit reversed, holding unanimously that habeas relief was not warranted on Whatley's mitigation claim but splitting on the shackling issue. Pet. App. 1a-95a. All members of the panel, like the Georgia Supreme Court, assumed that Mostiler's failure to object to Whatley's visible shackling constituted "deficient performance" under the first prong of the *Strickland* framework. 466 U.S. at 687. The panel divided, however, over how to assess the state court's application of the second *Strickland* prong, which requires "that the deficient performance prejudiced the defense." *Id.* In particular, the panel disagreed over whether this Court's shackling precedents inform what weight the shackling error should be accorded in the *Strickland* prejudice analysis.

Judge Tjoflat, writing for the panel majority, concluded that the Georgia Supreme Court properly "held that Fourteenth Amendment due process cases did not apply to Petitioner's Sixth Amendment ineffective assistance claim." Pet. App. 73a. Hence, the state court had not unreasonably applied federal law in failing to account for this Court's shackling cases in assessing *Strickland* prejudice. The state court

could reasonably conclude "that the shackles had little effect on the jury in this case" because, the majority asserted, "the shackles were trivial in light of evidence before the jury." Pet. App. 80a.[2]

Judge Jordan dissented. He agreed with the majority that Whatley's ineffective assistance claims had to be evaluated under the *Strickland* actual prejudice standard. Pet. App. 85a-88a. But he diverged from the majority because, in his view, in applying the *Strickland* actual prejudice standard, a state court must also take into account this Court's shackling case law. The Georgia Supreme therefore erred in failing to "take th[e] inherently prejudicial effect" of shackling "into account" when it conducted its *Strickland* analysis. Pet. App. 90a. He concluded that that error, coupled with the Georgia Supreme Court's failure to "consider the fact that Mr. Whatley had to re-enact the murder in front of the jury in shackles" and "to account for the prosecutor's focus on future dangerousness in asking for the death penalty," combined to "render[] its prejudice determination unreasonable under § 2254(d)(1)." Pet. App. 94a-95a. Judge Jordan therefore "would grant Mr. Whatley partial habeas relief and require the state to provide him a new sentencing hearing." Pet. App. 95a. Subsequently, the Eleventh Circuit denied rehearing and rehearing en banc, with Judge Martin dissenting. Pet. App. 283a.

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[2] Judge Tjoflat, in a single-judge order, had initially summarily denied a certificate of appealability on the shackling-ineffectiveness claim. Whatley moved for reconsideration, and the panel promptly granted a certificate of appealability.

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the circuits are divided on whether state courts must account for this Court's shackling case law in assessing the degree of prejudice resulting from an attorney's failure to object to visible shackling at a capital sentencing proceeding. The Eleventh Circuit's decision is wrong on an issue of profound significance, and the division of authority leads to unacceptably divergent outcomes in death penalty cases.

### I. The Circuits Are Divided On Whether State Courts Must Account For The Inherently Prejudicial Effect Of Shackling In Adjudicating Ineffective Assistance Claims.

#### A. The Seventh Circuit holds that state courts must account for this Court's decisions recognizing the inherently prejudicial effect of shackling.

The Seventh Circuit has issued several decisions in the precise procedural posture at issue here—where a state prisoner on death row brings a federal habeas petition, asserting claims for ineffective assistance of counsel based on an attorney's failure to object to needless and visible shackling. *Stephenson*, 865 F.3d at 959; *Stephenson v. Wilson*, 619 F.3d 664, 668 (7th Cir. 2010); *Roche*, 291 F.3d at 484. In these decisions, the Seventh Circuit has made clear that this Court's "jurisprudence regarding the effects of shackling" informs the assessment of *Strickland* prejudice, and that a state court unreasonably applies federal

law when it disregards "the extreme inherent prejudice associated with shackling." *Roche*, 291 F.3d at 482, 484.

In the context of the penalty phase of a capital case, the Seventh Circuit's analysis reflects that shackling undermines the "*individualized* determination on the basis of the character of the individual and the circumstances of the crime," *Zant v. Stephens*, 462 U.S. 862, 879 (1983), that capital sentencing requires. As this Court has recognized, visible shackling during the sentencing phase "almost inevitably affects adversely the jury's perception of the character of the defendant." *Deck*, 544 U.S. at 633. 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." *Id.*

Accordingly, the Seventh Circuit has twice held that, when a habeas petitioner asserts ineffective assistance based on an attorney's failure to object to shackling during the sentencing stage of a capital case, "the extreme inherent prejudice associated with shackling" required resentencing. *Roche*, 291 F.3d at 484. "The possibility that the defendant's having to wear the stun belt … contaminated the penalty phase of the trial," the Seventh Circuit recently explained, "persuades us to reverse the district court's denial of [his] petition for habeas corpus and to remand with directions to vacate his sentence." *Stephenson*, 865 F.3d at 959.

In the Seventh Circuit, therefore, a habeas petition in these circumstances turns on whether the restraints were, in fact, visible to the jury. *Wrinkles v. Buss*, 537 F.3d 804, 815 (7th Cir. 2008). The death sentence may be upheld only if the state court made a factual finding that the jury did not see the restraints. *Id*. at 823. In the absence of such a finding, the state court must "hold a new penalty hearing before a jury without" the restraints. *Stephenson*, 865 F.3d at 959.

### B. The Ninth and Eleventh Circuits hold that a state court need not account for this Court's shackling cases in assessing *Strickland* prejudice.

On the other side of the split, the Eleventh and Ninth Circuits have reached the opposite conclusion. They hold that, in assessing *Strickland* prejudice, a state court need not account for this Court's shackling cases because they "[do] not apply to [a] Sixth Amendment ineffective assistance claim." Pet. App. 73a. Thus, whereas the Seventh Circuit holds that a state court cannot reasonably apply federal law without accounting for the "extreme inherent prejudice associated with shackling," *Roche*, 291 F.3d at 484, the Ninth and Eleventh Circuits both hold that the prejudicial effects in this context may properly be dismissed as "trivial" and having "little effect on the jury." Pet. App. 80a; *Walker*, 709 F.3d at 944.

The split results in a clear divergence in outcomes: Whereas the Seventh Circuit has twice held that defendants sentenced to death following a proceeding at which they were shackled are entitled to resentencing, the Ninth and Eleventh Circuits have

repeatedly denied habeas petitions and allowed death sentences to remain in place under materially identical circumstances. *See* Pet. App. 71a-81a (decision below); *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1320 (11th Cir. 2016); *Walker*, 709 F.3d at 944; *Marquard v. Sec'y for Dep't of Corr.*, 429 F.3d 1278, 1312 (11th Cir. 2005).

In both the Ninth and Eleventh Circuits, this analysis has prompted vigorous dissents. In dissenting from the Ninth Circuit's *Walker* decision, Judge Gould explained that the majority's error derived from its mistaken holding that cases establishing the inherently prejudicial effect of visible shackling can be dismissed simply because a case arises on collateral review of an ineffective assistance claim, rather than on direct review of a due process claim. Just because "cases in which due-process claims are directly raised … cannot establish per se rules of prejudice in the *Strickland* context" does not mean that those cases "should be rendered irrelevant." *Walker*, 709 F.3d at 947 (Gould, J., concurring in part and dissenting in part). Rather, "[d]ue-process cases discussing the degree of prejudice resulting from an underlying error that is the consequence of an attorney's deficiency are persuasive because they help [courts] assess an error's significance." *Id.* (Gould, J., concurring in part and dissenting in part). Thus, Judge Gould explained that a state court could not reasonably apply federal law while disregarding this Court's case law establishing the inherently prejudicial effects of visible restraints in capital sentencing proceedings. *Id.* at 951 (Gould, J., concurring in part and dissenting in part).

Judge Gould urged the Ninth Circuit to instead adopt an approach that, like the Seventh Circuit's, distinguishes between the guilt and sentencing phases of a capital proceeding. As to the guilt phase, a state court might reasonably apply *Strickland*'s prejudice requirement and conclude that the evidence "was just too strong to think that [the petitioner] was convicted because he was shackled." *Id*. at 945 (Gould, J., concurring in part and dissenting in part). But, Judge Gould explained, the Ninth Circuit erred by "tolerat[ing] shackling absent justifications in a penalty-phase context where shackling is inherently unfair to a defendant's legitimate prospect that a jury will show mercy and favor life over death." *Id*. at 948 (Gould, J., concurring in part and dissenting in part). He therefore would instead "hold that the death-penalty phase of a capital trial, where jurors have an unconstrained right to prevent death and show mercy in light of unbounded mitigation factors, cannot be properly held while a defendant is shackled before the court and jury without adequate findings and justification for the shackling." *Id*. at 951 (Gould, J., concurring in part and dissenting in part).

The decision below was likewise divided. Judge Jordan explained in his dissenting opinion that, in assessing *Strickland* prejudice for purposes of an ineffectiveness of counsel claim in a habeas proceeding, the panel majority and the Georgia Supreme Court erred in disregarding case law establishing that shackling is "inherently prejudicial," because those cases "speak[] directly to [the]" issue of prejudice resulting from an attorney's failure to object to shackling. Pet. App. 90a.

This split among the circuits is clear and judicially acknowledged. In articulating his dissenting stance, Judge Jordan cited the Seventh Circuit's decisions in *Roche* and *Stephenson*. Pet. App. 91a. Judge Gould's *Walker* dissent likewise discussed the Seventh Circuit's decision in *Roche* at length, which he pointed out "is not distinguishable from the present case." 709 F.3d at 950 n.1. And notably, the Eleventh Circuit majority made no attempt to distinguish the Seventh Circuit's cases, instead simply asserting that they are "just two out-of-Circuit cases," and suggesting that one might be wrong because it "doesn't even mention the role the AEDPA deference plays in federal review of state habeas proceedings." Pet. App. 80a. With two courts having weighed in on this side of the issue, and with judges on both the Ninth and Eleventh Circuit panels having thoroughly aired the issue in separate dissents, there is no need for further percolation. This Court's intervention is warranted.

## II. The Split In Authority Concerns A Recurring Issue Of Exceptional Importance And This Case Is An Ideal Vehicle For Resolving It.

The question presented is of fundamental importance. "[T]he death penalty is unique 'in both its severity and its finality.'" *Monge v. California*, 524 U.S. 721, 732 (1998) (quoting *Gardner v. Florida*, 430 U.S. 349, 357 (1977)). Indeed, "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

At his capital sentencing, Whatley was chained in cuffs and leg irons as he was paraded about the courtroom by the prosecutor, who directed Whatley to reenact the underlying crime as he played the part of the shooting victim. His shackles "evoke[d] the dehumanizing specter of slavery, and [was] far from the law's promise of respect owed to each individual, including the accused." *United States v. Brantley*, 342 F. App'x 762, 770 (3d Cir. 2009) (citing *Allen*, 397 U.S. at 350-51 (Brennan, J., concurring)). The Constitution requires that "[f]rom beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect." *Wellons v. Hall,* 558 U.S. 220, 220 (2010). Whatley's sentencing trial lacked those fundamental qualities.

As shown above, the circuits apply fundamentally inconsistent frameworks to the question presented. These opposing approaches lead to directly divergent outcomes, in the exact circumstances presented here. In the Seventh Circuit, Whatley would have been entitled to a resentencing proceeding, at which he would not be shackled without proper reason. Because he is in the Eleventh Circuit, however, his habeas petition was denied. Such inconsistencies are intolerable where so much is at stake.[3]

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[3] The three circuits to have squarely addressed the question presented account for well over one-half of the prisoners on state death rows in the country. States in the Seventh, Ninth, and Eleventh Circuits account for 1,528 of the 2,537 individuals on state death rows as of April 1, 2020. *See Death Row U.S.A.*, Spring 2020, NAACP Legal Defense and Educational Fund, Inc., available at https://tinyurl.com/y3jb7z8e.

Additionally, the issue is recurrent. Apart from the decisions of the Seventh, Ninth, and Eleventh Circuits, two other circuits have also addressed ineffective assistance of counsel claims in these circumstances; they were able to avoid answering the question presented only because the petitioner failed to show that the jury saw the restraints. *See Sigmon v. Stirling*, 956 F.3d 183, 203 (4th Cir. 2020); *Ramirez v. Stephens*, 641 F. App'x 312, 325 (5th Cir. 2016).

Finally, this case is an ideal vehicle for resolving the split. The question presented was squarely raised and resolved at each stage of the proceedings. *See* Pet. App. 277a-78a (Georgia state court); Pet. App. 209a-11a (district court); Pet. App. 71a-80a (Eleventh Circuit). There are no factual disputes that could interfere with the Court's assessment of the legal question presented. In particular, there is no question that Whatley's arm and leg shackles were visible to the jury during the sentencing phase of the trial, when he was compelled to stand in the well of the courtroom and reenact the underlying crime before the jury, with the prosecutor role-playing the part of the shooting victim. Pet. App. 277a-78a. And a ruling in Whatley's favor would certainly matter: It would require that he be resentenced free of the prejudice of visible shackles.

## III. The Eleventh Circuit's Decision Is Wrong.

The petition should be granted because the decision below is incorrect. Habeas relief requires a showing that a state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

Court of the United States." 28 U.S.C. § 2254(d). A state court decision unreasonably applies the law where it "unreasonably refuses to extend [a legal] principle to a new context where it should apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000).

The state court and the Eleventh Circuit failed to reasonably apply *Strickland*. This Court has made clear that, for *Strickland* purposes, "the concept of prejudice is defined in different ways depending on the context in which it appears." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017). Indeed, "the *Strickland* Court cautioned that the prejudice inquiry is not meant to be applied in a 'mechanical' fashion." *Id.* (quoting *Strickland*, 466 U.S. at 696). "For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on 'the fundamental fairness of the proceeding.'" *Id.* (quoting *Strickland*, 466 U.S. at 696); *see* Pet. App. 92a-95a (Jordan, J., dissenting).

This Court's shackling decisions address "the degree of prejudice resulting from an underlying error that is the consequence of an attorney's deficiency." *Walker*, 709 F.3d at 947 (Gould, J., concurring in part and dissenting in part). They emphasize that shackling is "a thumb on death's side of the scale," *Deck*, 544 U.S. at 633, is "inherently prejudicial," *Holbrook*, 475 U.S. at 568, and is "an affront to the very dignity and decorum of judicial proceedings," *Allen*, 397 U.S. at 344. The principle that "forbid[s] routine use of visible shackles" has been recognized in this Court's case law going back half a century, and indeed "has deep roots in the common law," tracing back to Blackstone. *Deck*, 544 U.S. at 626; s*ee Allen*, 397 U.S. at 344 ("[N]o

person should be tried while shackled and gagged except as a last resort."); *Holbrook*, 475 U.S. at 568-69 (shackling "should be permitted only where justified by an essential state interest specific to each trial"); *see also* Pet. App. 277a-78a (discussing Georgia precedent).

The facts of this case graphically underscore how visible shackling undermines the capital sentencing process. Whatley's shackles were apparent at sentencing when he "shuffled to the witness stand," and they were dramatically displayed to the jury when he was compelled to "come down into the well of the courtroom" to reenact the murder with a toy gun and the prosecutor assuming the role of the victim. Pet. App. 82a. That display was followed, the very next day, by a closing argument that repeatedly emphasized Whatley's alleged future dangerousness and irredeemably bad character—the very attributes that this Court has said visible shackling conveys to a jury. *See Deck*, 544 U.S. at 633.

Under these circumstances, as the panel dissenter below noted, "[i]t is 'reasonably probable' that at least one juror's decision was tipped in favor of death due to counsel's failure to object, and that sufficiently undermines confidence in the outcome." Pet. App. 95a. As Judge Jordan explained, "[t]he jury found two statutory aggravating circumstances: (1) the crime was committed while Mr. Whatley was engaged in the commission of an armed robbery; and (2) Mr. Whatley committed the crime after escaping from a place of lawful confinement (Mr. Whatley had walked away from a halfway house). These statutory aggravators, while serious, are not the worst of the

worst," and the circumstances here would, at a minimum, have allowed for mercy. Pet. App. 93a; *see also Walker*, 709 F.3d at 949, 951 (Gould, J., concurring in part and dissenting in part) (the inquiry entails whether absent the improper shackling "just one juror" may have opted to "extend mercy" and "spare[] [the defendant] the death penalty," a question that is "inherently unknowable with certainty").

The only way that a state court, confronted with all of these facts, could nevertheless conclude that Whatley failed to show a prejudicial counsel error "sufficient to undermine confidence in the outcome" of the sentencing proceeding, *Strickland*, 466 U.S. at 694, was by disregarding this Court's cases recognizing the inherently prejudicial effect of visible shackling during sentencing. And that is what the Georgia Supreme Court did: Its rejection of the prejudice aspect of Whatley's shackling claim ultimately rested on a single, conclusory sentence. Pet. App. 278a.

Likewise, the Eleventh Circuit could deny habeas relief in these circumstances only by agreeing with the Georgia Supreme Court that this Court's shackling cases are inapposite in this context. That allowed it to conclude that the Georgia Supreme Court reasonably applied federal law, and that the shackles had a "trivial" effect on the sentencing proceeding—in contravention of this Court's longstanding recognition that shackling is "inherently prejudicial," *Holbrook*, 475 U.S. at 568, and "inevitably undermines the jury's ability to weigh accurately all relevant considerations when determining whether the defendant deserves death." *Deck*, 544 U.S. at 623.

The Eleventh Circuit's decision in this case sanctions a profound injustice to the petitioner and an equally profound injury to the judicial system. It allows a death sentence to be carried out, even though that sentence was the product of a deeply flawed process, in which Whatley's attorney sat silently by as his client's constitutional rights were blatantly and gratuitously violated. Because of the magnitude of this error, and because another circuit has made the same error, this case warrants this Court's review.

## CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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