No. 20-363

IN THE

Supreme Court of the United States

FREDERICK R. WHATLEY,

Petitioner,

v.

WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR PUBLIC DEFENSE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association for Public Defense ("NAPD") is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of legal services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and a diversity of traditional and holistic practice models.

In addition, NAPD hosts annual conferences and webinars where discovery, investigation, cross-examination, and prosecutorial duties are addressed. NAPD also provides training to its members concerning zealous pretrial and trial advocacy and

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1 Pursuant to Supreme Court Rule 37.2, the parties were provided proper notice and consented to the filing of this brief. Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made a monetary contribution to the brief's preparation or submission.

strives to obtain optimal results for clients both at the trial level and on appeal.

Accordingly, NAPD has a strong interest in the issues raised in this case and fully supports the grounds for certiorari identified by Petitioner.

SUMMARY OF THE ARGUMENT

This case involves the intersection and application of two legal doctrines—structural error and ineffective assistance of counsel. The case raises the issue of how those doctrines apply to the "inherently prejudicial" impact of the visible shackling of a defendant during the penalty phase of a capital case. *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986).

"The two doctrines are intertwined; for the reasons an error is deemed structural may influence the proper standard used to evaluate an ineffective-assistance claim premised on the failure to object to that error." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017).

Petitioner Frederick Whatley was sentenced to death in Georgia after the prosecutor directed him to reenact the crime for which he had been convicted in visible shackles "armed" with a toy gun during the penalty phase of the trial. Whatley's attorney failed to object to Whatley's visible shackling or to the forced reenactment of the crime. Had Whatley's attorney objected to the shackling and had the trial court overruled that objection, Whatley's sentence would have been overturned on direct appeal pursuant to

Deck v. Missouri, 544 U.S. 622 (2005). Because Whatley's attorney failed to object, however, the error was not reviewable on direct appeal.

Whatley sought habeas relief on the grounds that his lawyer provided ineffective assistance of counsel. To succeed on such a claim, under *Strickland v. Washington*, the Petitioner must demonstrate (1) that his trial "counsel's performance was deficient" and (2) that it "prejudiced [his] defense." 466 U.S. 668, 687 (1984). After the Georgia Supreme Court denied the habeas petition, a divided Eleventh Circuit panel, applying Georgia procedural law, found that the "trivial" shackling episode during the penalty phase did not satisfy the *Strickland* standard for demonstrating prejudice resulting from Whatley's counsel's error in allowing this to occur without objection. *See Whatley v. Warden*, 927 F.3d 1150, 1185–86 (11th Cir. 2019).

Whatley seeks certiorari on the grounds that the federal circuits are divided on whether state courts must take into account the Court's shackling cases in assessing the degree of prejudice resulting from an attorney's failure to object to the visible shackling of a defendant at a capital sentencing. Whatley asserts that the habeas court unreasonably applied federal law when it ignored this Court's established precedent that the visible shackling of a criminal defendant is *per se* prejudicial and that no further showing of prejudice is required to establish ineffective assistance of counsel under *Strickland*.

Amicus curiae agrees with Whatley's position that

the visible shackling of defendant during the penalty phase of a capital case is inherently prejudicial and that prejudice should be presumed on ineffective assistance of counsel claims. *Amicus curiae* writes separately to highlight two additional reasons why the Court should grant Whatley's petition.

First, the Court should take the opportunity presented by this case to clarify the framework for establishing prejudice for structural errors that render a trial fundamentally unfair under *Weaver*. The visible shackling of a criminal defendant in the penalty phase of a capital case, absent compelling concerns about courtroom safety, should be deemed a "structural error" under *Weaver* because the effects of the error are "too hard to measure" and because such an error "always result[s] in fundamental unfairness" to the defendant. *Weaver*, 137 S. Ct. at 1908.

Next, the Court should expressly adopt for purposes of capital cases the principle it recognized in *Weaver*, which is that relief must be granted under *Strickland* if the structural error rendered the trial proceedings at issue fundamentally unfair, *even if* the defendant cannot objectively demonstrate a reasonable probability of a different outcome. *Weaver*, 137 S. Ct. at 1911.

With that clarified framework in place, the Court should find that the visible shackling of Whatley during his sentencing was a structural error that rendered the jury's imposition of the death penalty fundamentally unfair or otherwise unreliable. Accordingly, Whatley was prejudiced *per se* by his

counsel's ineffective assistance.

Alternatively, because of manner by which the presence of visible shackles were placed on Whatley—an African American man—while Whatley was compelled to reenact the crime, coupled with the prosecutor's emphasis on Whatley's future dangerousness during his closing argument in the penalty phase, the Court should find that Whatley's *habeas corpus* writ should succeed under the traditional *Strickland* prejudice standard, *i.e.* that there is a reasonable probability that at least one juror would not have agreed to the death penalty had the error not occurred. *See Strickland*, 466 U.S. at 694.

For these additional or alternative reasons, the Court should grant Whatley's petition.

ARGUMENT

I. The shackling of a criminal defendant, clearly visible to the jury during the penalty phase of a capital case, constitutes structural error under *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

It is well established that a "trial error" is an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 307–08 (1991).

A structural error, however, cannot be deemed

"harmless beyond a reasonable doubt." *Weaver*, 137 S. Ct. at 1907 (citing *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967)). This is because a structural error "'affect[s] the framework within which the trial proceeds.'" *Id.* (quoting *Fulminante*, 499 U.S. at 310); *see also* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791, 1799 (2017) ("[T]o address the serious concern that nearly ubiquitous use of a harmless error rule focusing on the outcome of the trial denigrates important constitutional protections that promote values other than the reliability of guilty verdicts, we will need to look for solutions elsewhere.").

"The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver*, 137 S. Ct. at 1907. Structural errors are those that "defy analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309. For structural errors, "the government is not entitled to deprive the defendant of a new trial by showing that the error was 'harmless beyond a reasonable doubt.'" *Weaver*, 137 S. Ct. at 1910 (quoting *Chapman*, 386 U.S. at 24). Thus, categorization of an error that occurs during a criminal trial as either a "structural error" or "trial error" is often outcome determinative.

In *Weaver*, the Court found at least "three broad rationales" for deciding that an error is structural and not amenable to harmless error analysis. *Id.* at 1908. Two of those categories are relevant here.

A. The error presented here is structural because it is impossible to measure its effects.

A structural error is one in which "the effects of the error are simply too hard to measure" such as when "a defendant is denied the right to select his or her own attorney," and "the precise 'effect of the violation cannot be ascertained.'" *Id.* (quoting *U.S. v. Gonzales-Lopez*, 548 U.S. 140, 149 n.4 (2006)). "Because the government will, as a result, find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' . . . the efficiency costs of letting the government try to make the showing are unjustified." *Id.* (quoting *Chapman*, 386 U.S. at 24).

The error of the visible shackling of a criminal defendant during the sentencing phase of a death penalty case is a structural error because "the effects of the error are simply too hard to measure." *Id.* In *Deck*, the Court explained that the practice of shackling "will often have negative effects, but—like 'the consequences of compelling a defendant to wear prison clothing' or of forcing him to stand trial while medicated—those effects '*cannot be shown from a trial transcript*.'" *Deck*, 544 U.S. at 635 (quoting *Riggins v. Nevada*, 504 U.S. 127, 137 (1992)) (emphasis added).

The effects of shackling at the penalty phase in a death penalty case are particularly difficult to measure. "Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the 'severity' and 'finality' of the sanction, is no less important than the decision about guilt." *Deck*, 544 U.S. at 632 (quoting

Monge v. California, 524 U.S. 721, 732 (1998)). Because jury decision-making during the penalty phase "allows for more individual variation in the reasoning for the decision than is permitted in the guilt phase," it is impossible to conclude that the unconstitutional shackling of the defendant did not contribute to the jury's verdict. Linda E. Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 Ga. L. Rev. 125, 146–47 (1993); *see also Satterwhite v. Texas*, 486 U.S. 249, 260 (1988) (reversing a defendant's death sentence after finding it "impossible to say beyond a reasonable doubt that [the State's] expert testimony on the issue of [the defendant's] future dangerousness did not influence the sentencing jury").

The nature of the decision in the penalty phase is markedly different from the decision in the guilt phase. Carter, 28 Ga. L. Rev. at 148. In the guilt phase of a capital case, the jury or judge must reach a decision on whether certain facts exist. *Id.* The factfinder is ultimately asked whether each element of the crime exists or not. *Id.*

The jury or judge in the penalty phase, however, must do more. The jury or judge must balance the aggravating and mitigating circumstances presented during the penalty phase to determine the appropriate sentence for the defendant. *Id.* In Whatley's case, the jury was in effect asked to "make a value judgment whether one group of facts (aggravating circumstances) [was] greater, the same

as, or less than another group of facts (the mitigating circumstances)." *Id.* at 149.

Because each individual juror must make his or her own inherently unquantifiable value judgment in the penalty phase on the question of whether the defendant lives or dies, it is impossible to determine the prejudicial impact of the visible shackling—and in this case, the forced reenactment of the crime while Whatley was in shackles—on each juror.

This Court has recognized the difficulty in assessing certain types of attorney errors that occur during the sentencing phase of a death penalty case. In *Buck v. Davis*, 137 S. Ct. 759 (2017), the defendant's attorney called a psychologist to testify to his opinion on the issue of the future dangerousness of the defendant. *Id.* at 767. The psychologist testified that the defendant would probably not engage in violent conduct. *Id.* He also acknowledged, however, a finding contained in his report that one of the factors pertinent in assessing a person's propensity for violence was his race, and that the African-American defendant in that case was statistically more likely to act violently because of his race. *Id.*

The Court concluded that Buck's attorney rendered ineffective assistance in allowing the psychologist to take the stand with such an obviously inflammatory finding in his report. *Id.* at 775 ("No competent defense attorney would introduce such evidence about his own client."). The Court also found prejudice under *Strickland* resulting from the error, in part, because of the difficulty in assessing the

impact of the attorney's error. "When a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value." *Id.* at 777. "The effect of [the offending] testimony on Buck's sentencing cannot be dismissed as '*de minimis*.'" *Id.*

The deleterious effects of allowing the jury to see a shackled defendant during a death penalty sentencing are similarly indeterminable. Trial counsel's failure to object to the defendant's visible shackling during the penalty phase should be considered a structural error.

B. The error here is structural because it always results in fundamental unfairness to the defendant.

The visible shackling of a criminal defendant during the sentencing phase of a death penalty case is a structural error because it results in fundamental unfairness to the defendant. *See Deck*, 544 U.S. at 633 (holding that the "appearance of the offender during the penalty phase in shackles . . . inevitably undermines the jury's ability to weigh accurately all relevant considerations"); *Holbrook,* 475 U.S. at 568 (stating that shackling is "inherently prejudicial").

In *Weaver*, the Court explained that an error may be structural "if the error always results in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. Such fundamentally unfair errors include the denial of a right to an attorney, *id.* (citing *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963)); the failure

to provide the jury with a reasonable doubt instruction, *id.* (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)); a biased judge, *id.* at 1911 (citing *Tumey v. Ohio,* 273 U.S. 510, 535 (1927)); and the exclusion of grand jurors on the basis of race, *id.* (citing *Vasquez v. Hillery,* 474 U.S. 254, 261–64 (1986)). When one of those errors is present, "the resulting trial is always a fundamentally unfair one." *Id.* at 1908.

Similarly, the error presented here is always fundamentally unfair. In *Deck*, the Court explained that "[t]he 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 consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. . . . It also almost inevitably affects adversely the jury's perception of the character of the defendant." *Deck*, 544 U.S. at 633 (citing *Zant v. Stephens,* 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring in the judgment)).

Moreover, the shackling error when combined with the forced reenactment of the crime in front of the jury during the penalty phase of a capital case will most certainly result in a fundamentally unfair proceeding. If the mere "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 consider the offender a danger to the

community," *id.*, it follows that the addition of the forced reenactment of the crime with Whatley in shackles compounded the fundamental unfairness of the proceeding.

II. The Court should adopt the assumption it made in *Weaver* that prejudice is established when a structural error renders the trial fundamentally unfair, *even if* the convicted person cannot show a reasonable probability that the outcome of the proceeding would have been different but for the error.

The question becomes what showing of prejudice is required to prevail on an ineffective assistance of counsel claim for a structural error that undermines the fundamental fairness of a proceeding.

In *Weaver*, the Court explained that "the concept of prejudice is defined in different ways depending on the context in which it appears." *Weaver*, 137 S. Ct. at 1911. "In the ordinary *Strickland* case, prejudice means 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). Yet "the prejudice inquiry is not meant to be applied in a 'mechanical' fashion." *Id.* (quoting *Strickland,* 466 U.S. at 696). The "ultimate inquiry" on an ineffective assistance of counsel claim is "'the fundamental fairness of the proceeding.'" *Id.* (quoting *Strickland,* 466 U.S. at 696).

The *Weaver* Court assumed "[f]or the analytical purposes of [the] case" that "under a proper

interpretation of *Strickland*, even if there is no showing of a reasonable probability of a different outcome, *relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair*." *Id.* (emphasis added). "In light of the Court's ultimate holding, however," the Court in *Weaver* determined that it need not decide that question at that time. *Id.*

In *Weaver*, the Court recognized that when certain types of structural errors are present, prejudice to the defendant must be presumed. *See id.* at 1911 ("Neither the reasoning nor the holding here calls into question the Court's precedents determining that certain errors are deemed structural and require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process. . . . [T]his opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review."); *id* at 1911–12 (collecting cases and citing Murray, 130 Harv. L. Rev. at 1813, 1822 ("'eclectic normative objectives of criminal procedure' go beyond protecting a defendant from erroneous conviction and include ensuring 'that the administration of justice should reasonably appear to be disinterested'") (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 869–870 (1988))).

This presumption of prejudice for certain types of structural errors is not without precedent. Most

recently in *Garza v. Idaho*, 139 S. Ct. 738 (2019), the Court determined that prejudice was presumed when trial counsel failed to timely file a notice of appeal in a case in which defendant agreed to a plea waiver. *See id.* at 749–50.

The Court similarly found that prejudice was presumed when counsel for a criminal defendant conceded the guilt of the defendant to the jury over the objection of his client who maintained his innocence. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018) ("To gain redress for attorney error, a defendant ordinarily must show prejudice. . . . Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.") (citing *Strickland*, 466 U.S. at 692).

The Court also presumed prejudice when trial counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984). In such a case, "there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.*

Moreover, an appellate court cannot determine the prejudice caused by a structural error that renders a trial, or in this case a penalty phase, fundamentally unfair, because the structural error prevented the jury from ever reaching a valid result in the first place. *See, e.g., Neder v. United States*, 527 U.S. 1, 34 (1999) (Scalia, J., dissenting); Linda E. Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The*

Supreme Court's "No Harm, No Foul" Debacle in Neder v. United States, 28 Am. J. Crim. L. 229, 232 (2001) (explaining that certain structural errors result in "flawed verdict[s]" which are "comparable to proceedings in which there is a verdict by an inadequate beyond a reasonable doubt instruction, a biased judge, or the absence of counsel. In each instance, the defendant is denied a right that casts the entire proceedings as fundamentally flawed.").

Here, the Court should grant the Petition and hold that visible shackling of a criminal defendant during sentencing is a structural error resulting in "fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair and open judicial process," *Weaver*, 137 S. Ct. at 1911, such that prejudice resulting from trial counsel's failure to object to visible shackling should be presumed under *Strickland*, even if there is no showing of a reasonable probability of a different outcome.

III. The shackling of a criminal defendant during the penalty phase of a capital case is a structural error in which prejudice is presumed under *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court has characterized shackling as an "inherently prejudicial practice." *Holbrook*, 475 U.S. at 568. "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the

very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Illinois v. Allen,* 397 U.S. 337, 344 (1970).

When shackling occurs, it must be subjected to "close judicial scrutiny," *Estelle v. Williams,* 425 U.S. 501, 503–04 (1976), to determine if there was an "essential state interest" furthered by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been used. *Holbrook,* 475 U.S. at 568–69.

The sight of visible restraints "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. Indeed, a "'jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision.'" *Whatley*, 927 F.3d at 1191 (J. Jordan, concurring in part and dissenting in part) (quoting *Elledge v. Dugger*, 823 F.2d 1439, 1450 (11th Cir.), *opinion withdrawn in part on denial of reh'g*, 833 F.2d 250 (11th Cir. 1987)).

As Judge Jordan explained in his dissenting opinion, the Seventh Circuit has twice presumed prejudice under *Strickland*. *Id.* at 1192 (citing *Roche v. Davis*, 291 F.3d 473, 484 (7th Cir. 2002) (granting habeas relief under § 2254(d) on an ineffective assistance of counsel claim because "the extreme

inherent prejudice associated with shackling," along with "the considerable mitigating evidence," established a reasonable probability that the outcome would have been different if counsel had not failed to object to shackling the defendant at sentencing); *Stephenson v. Neal*, 865 F.3d 956, 959 (7th Cir. 2017) ("The possibility that the defendant's having to wear [a visible] stun belt—for no reason, given that he had no history of acting up in a courtroom—contaminated the penalty phase of the trial persuades us to reverse the district court's denial of Stephenson's petition for habeas corpus [claiming ineffective assistance of counsel.]")). *Cf. Kanter v. Barr*, 919 F.3d 437, 469 (7th Cir. 2019) (Barrett, J., dissenting) (arguing that while a legislature can ban "dangerous" felons from owning guns, it cannot constitutionally ban all felons from owning guns).

The Court should grant Whatley's writ of certiorari and hold that the shackling of a criminal defendant in the sentencing phase of capital case is a structural error that renders the proceeding fundamentally unfair, and when such an error occurs, prejudice under *Strickland* should be presumed.

IV. In the alternative, Whatley should prevail under *Strickland*'s prejudice analysis.

Even if the Court declines to adopt the premise that prejudice should be presumed under *Strickland* when a defendant is visibly shackled during the penalty phase of a capital case, the Court should nevertheless overturn the lower court's decision

because Whatley established prejudice under a traditional *Strickland* analysis.

To prevail on his ineffective assistance of counsel claim, Whatley must show that there is a reasonable probability that, but for his shackled reenactment during his sentencing, his sentence would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Whatley, an African-American man, was forced to reenact his crime in shackles, wielding a toy pistol during the penalty phase of his capital case. Whatley's attorney did not object to this spectacle. Indeed, the attorney's conduct during the penalty phase is utterly indefensible; and no marginally competent defense counsel would have sat passively by as this scene unfolded.

Decades of research has shown the pernicious effect of implicit bias during the sentencing phase of trials. The visible shackling of an African-American male forced to reenact his crime during the penalty phase of a capital crime very likely exacerbated that bias.

Thus, there is a reasonable probability that but for Whatley's forced demonstration during the sentencing phase of his trial while in shackles, at least one juror—which is all that was required—would have chosen not to impose the death penalty.

A. The presence of shackles, particularly on an African-American defendant, with an accompanying message of future dangerousness, impermissibly infected the penalty phase of the trial.

Whatley was tried in January 1997. He was chained in "cuffs and leg irons" throughout the trial. D.7-5:948.[2] The shackles were plainly visible to the jury during sentencing. When Whatley's attorney called Whatley to the stand to testify, the *prosecutor* asked whether it was appropriate for Whatley to appear before the jury shackled, suggesting that the judge should "take the jury out before he takes the stand" and noting his concern with "the shackles on him." D.7-9:1412.

Not only did Whatley's attorney not object to his shackling during the sentencing phase, when the prosecutor raised the issue, Whatley's attorney specifically permitted it stating, "Well, he's been convicted now." D.7-9:1412. Even if Whatley's attorney had objected to the shackling, that objection would likely have been overruled as evidenced by the judge's comment after the prosecutor raised the issue of Whatley's shackling. The judge stated, "He's been

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[2] 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.

convicted." *Id.*

Whatley then "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.

To make matters worse, during cross-examination, the prosecutor asked Whatley to step down from the witness box. D.7-10:1478. Whatley's attorney 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. Whatley's attorney did not object. Whatley complied, dragging the shackles with him, and reenacting his crime at the prosecutor's direction, with the prosecutor playing the role of the shooting victim. D.7-10:1478-79.

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.

After deliberating just ninety minutes, the jury recommended the death penalty, and Whatley was sentenced to death. Resp. Br. 31.

B. The prosecutor's reenactment of the crime, involving a shackled African-American man, magnified the impact of well established effects of implicit bias on the jury during the penalty phase of the trial.

"[Implicit biases] can be activated by racial cues present in the environment, including another person's skin color, age, gender, and accent. Where blacks are concerned, even thinking about crime may be sufficient to activate [implicit biases]. This is because the association between blacks and crime is so pervasive that it has become bidirectional--thoughts of criminality unconsciously activate thoughts of blacks, and reciprocally, thoughts of blacks activate thoughts of crime." L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626, 2630 (2013).

Moreover, implicit bias has a particularly injurious effect in death penalty cases. The "race-of-defendant discrimination appears mostly to play out during the penalty phase of a capital trial and not at the stage where prosecutors decide whether to pursue a case capitally." Justin D. Levinson, Robert J. Smith &

Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 531 (2014) (citing Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 Mich. St. L. Rev. 573, 577 (2011)); *see also* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Cal. L. Rev. 945, 966 (2006) ("[A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans."); David C. Baldus, George Woodworth, David Zuckerman & Neil Alan Weiner, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638, 1715, 1738 (1998) ("[The problem of arbitrariness and discrimination in the administration of the death penalty is a matter of continuing concern and is not confined to southern jurisdictions" and that in certain jurisdictions "race effects" "primarily emanate[d] from jury decisions.").

When "primed"[3] by the sight of an African American man in shackles, implicit biases are more likely to be activated and lead jurors to consider the

[3] "'Priming refers to the incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context.'" Richardson & Goff, 122 Yale L.J. at 2635 n.41 (quoting John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. Personality & Soc. Psychology 230, 241-42 (1996)).

defendant as potentially dangerous. *See Holbrook*, 475 U.S. at 569 (noting that "shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large"); *Deck*, 544 U.S. at 633 ("The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking . . . .").

In one study, a researcher activated implicit biases by subliminally priming subjects with words associated with blacks, such as slavery. Afterwards, the researcher asked subjects to read a vignette about a racially unidentified male and to rate his ambiguous behaviors on a number of traits. The results established that implicit biases made the subjects more likely to rate his behaviors as hostile. *See* Richardson & Goff, 122 Yale L.J. at 2633 (citing Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychology 5 (1989)); *see also* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 Law & Human Behavior 483, 485 (2004).

Thus, it is reasonably likely that the sight of Whatley, an African-American man, in shackles reenacting his crime "primed" the jury to consider Whatley more dangerous than they would have

otherwise.

C. It is reasonably probable that but for the forced reenactment of the crime while shackled, at least one juror would have refused to return a verdict imposing the death penalty.

Whatley can show prejudice under a traditional *Strickland* prejudice analysis. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

When evaluating the prospect of Whatley's future dangerousness, the jury was left with the image of Whatley, an African-American man in shackles, reenacting his crime. Based on the volumes of research summarized *supra*, it is reasonably probable that the shackled demonstration by Whatley triggered the implicit bias of the jury, which in turn, caused them to improperly weigh the aggravating factor of his future dangerousness. While it is impossible to say with certainty how and to what extent this display triggered the jury's biases, it is reasonably probable that it did so.

Thus, Whatley can establish prejudice. Had the jury not witnessed Whatley's shackled display during his sentencing, it is reasonably probable that at least one juror would have chosen mercy over death.

CONCLUSION

For these reasons and the reasons asserted by the Petitioner, this Court should grant Whatley's petition for writ of certiorari.

Respectfully submitted,

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