No. 20-363

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Frederick Whatley was sentenced to death following a proceeding in which his attorney was so deficient that he waved off *the prosecutor's* concern that Whatley should not appear before the jury in shackles—and then sat by mutely while Whatley was paraded before the sentencing jury, visibly shackled, to reenact his crime using a toy gun, with the prosecutor playing the role of victim. The Georgia Supreme Court rejected Whatley's state habeas petition, regarding this Court's long line of decisions recognizing that it is "inherently prejudicial" for a criminal defendant to appear before a jury visibly shackled as inapplicable to an ineffective assistance of counsel claim. The Eleventh Circuit rejected Whatley's federal habeas claim for the same reason: It held—notwithstanding this Court's longstanding recognition that shackling is inherently prejudicial, and its specific determination in *Deck v. Missouri*, 544 U.S. 622, 633 (2005), that shackling "inevitably undermines" capital sentencing—that the effect of Whatley's shackling could properly be dismissed as "trivial." Pet. App. 80a.

As the petition explains, that holding implicates a clear, judicially acknowledged circuit split: The Ninth Circuit has agreed with the Eleventh Circuit that, because this Court's shackling cases arise in a different procedural context, they are inapplicable to ineffective assistance claims asserted on collateral review. The Seventh Circuit has reached the opposite conclusion, holding that, in determining whether an attorney's "deficient performance prejudiced the defense" under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), state courts must account for this Court's

shackling cases. And based on that holding, coupled with the unique characteristics of capital sentencing, the Seventh Circuit has held that a defendant who is sentenced to death after a proceeding in which he was visibly and needlessly shackled is entitled to resentencing.

The Warden denies a split. He attributes this clear divergence in reasoning and outcome to the courts' application of different standards of review. That is incorrect: All of the decisions arise in the exact same procedural posture—ineffective assistance claims that were first addressed on the merits in state habeas proceedings and then reviewed in federal habeas proceedings governed by the Antiterrorism and Effective Death Penalty Act (AEDPA).

On the merits, the Warden's argument relies on misstating Whatley's position. The Warden contends that Whatley's argument depends on "replac[ing] *Strickland*'s 'actual' prejudice standard" with a "'presumed' prejudice standard." BIO 14. But that is not the position that Whatley advocates. Whatley does not contest that his ineffective assistance claim is ultimately governed by the *Strickland* standard. Nor does he argue for a generalized presumption of prejudice. Whatley's argument is that, in applying the *Strickland* prejudice standard, courts must account for this Court's cases recognizing that shackling is inherently prejudicial. And because of the unique character of capital sentencing, coupled with this Court's holding that shackling "inevitably undermines" the capital sentencing process in ways that are "unquantifiable and elusive," *Deck*, 544 U.S. at 633, a state court cannot reasonably apply federal law to conclude

that there is no reasonable probability that a defendant's needless and visible shackling did not affect the outcome of a capital sentencing.

The decision below allows the state to carry out a death sentence even though Petitioner's constitutional rights were indisputably violated, and it does so in a setting that presents a square circuit conflict. Certiorari is warranted.

ARGUMENT

I. The Circuits Are Split On The Applicability Of This Court's Shackling Cases To Ineffective Assistance Claims.

The circuits are split on the question presented: Whether a state court must account for this Court's precedents recognizing the inherently prejudicial effects of visible shackling when it adjudicates a claim that an attorney was ineffective in failing to object to such shackling.

A. As outlined in the petition (Pet. 15-17), the Seventh Circuit has held that, in applying the *Strickland* prejudice standard, state courts must account for the "extreme inherent prejudice associated with shackling." *Roche v. Davis*, 291 F.3d 473, 484 (7th Cir. 2002); *see also Stephenson v. Neal*, 865 F.3d 956, 959 (7th Cir. 2017) ("*Stephenson II*"). This holding leads to a distinction between the court's treatment of ineffective assistance claims at the guilt versus sentencing phases of a capital trial: Even though shackling is inherently prejudicial, the Seventh Circuit holds that a state court might nevertheless reasonably conclude

that, due to "overwhelming evidence of" the defendant's guilt, there was no "'reasonable probability' that … the result of the guilt phase of [the] trial would have been different." *Roche*, 291 F.3d at 484; *see also Stephenson v. Wilson*, 619 F.3d 664, 673 (7th Cir. 2010) ("*Stephenson I*"). Crucially, however, the same is not true of the sentencing phase, given its focus on the defendant's dangerousness and character and the difficulty of predicting how a jury would have weighed the balance of "aggravating circumstances" and "mitigating circumstances" in the absence of the "extreme inherent prejudice associated with shackling." *Roche*, 291 F.3d at 484. Based on that analysis, the Seventh Circuit has twice held that a defendant sentenced to death following a sentencing proceeding in which the defendant's attorney failed to object to visible and unjustified shackling is entitled to a resentencing. *See id.*; *Stephenson II*, 865 F.3d at 959.

Meanwhile, the Ninth and Eleventh Circuits have rejected that analysis (*see* Pet. 17-20). They adopt the contrary position urged by the Warden here: They conclude that, because an ineffective assistance of counsel claim is governed by the *Strickland* prejudice standard—not the presumption of prejudice recognized in *Deck*—that means this Court's decisions recognizing the inherently prejudicial effect of shackling have no bearing on an ineffective assistance claim. The result is that the Ninth and Eleventh Circuits have both concluded that the effects of visible shackling on a capital sentencing proceeding may properly be dismissed as "trivial" and having "little effect on the jury," Pet. App. 80a; *Walker v. Martel*, 709 F.3d 925, 931 (2013). As dissenters in both the Ninth and

Eleventh Circuits have acknowledged, there is an irreconcilable conflict between these two approaches. *See* Pet. App. 90a-92a; *Walker*, 709 F.3d at 950 (Gould, J., concurring in part and dissenting in part).

B. The Warden asserts that no split exists because the courts applied different standards of review. He claims that the Seventh Circuit "conducted de novo review of ineffective-assistance restraint claims," whereas the Ninth and Eleventh Circuits analyzed those claims "through the lens of [28 U.S.C.] § 2254(d)," *i.e.*, under AEDPA. BIO 15; *see* BIO 3.

That argument misreads the Seventh Circuit's decisions. *Roche*—the first of the Seventh Circuit decisions to conclude that courts must account for the "extreme inherent prejudice associated with shackling," 291 F.3d at 484—clearly was decided under AEDPA. The case turned on "whether the Indiana Supreme Court's conclusions with respect to Roche's ineffective assistance of counsel claims resulted from 'an unreasonable application of' *Strickland*." 291 F.3d at 481 (citing § 2254(d)); *see also Stephenson v. State*, 864 N.E.2d 1022, 1033 & n.3 (Ind. 2007) (expressly recognizing that *Roche* applied AEDPA). The Seventh Circuit's *Stephenson* decisions were likewise decided under AEDPA: The first specifically cited *Roche* and made explicit that the court's review of the ineffective assistance claim was governed by § 2254(d), *Stephenson I*, 619 F.3d at 667, 674; the second *Stephenson* decision rejected the district court's application of that standard on remand, 865 F.3d at 958.

There is no reason why the Seventh Circuit would have applied a standard other than AEDPA. The Warden contends that, in *Roche*, "[w]hen it came to the penalty phase, the Seventh Circuit was not constrained by the § 2254(d) standard," because the Indiana Supreme Court "*did not address the penalty phase of Roche's trial*." BIO 19-20. But that characterization is not a fair reading of the state court's decision, *see Roche v. State*, 690 N.E.2d 1115, 1123 (Ind. 1997), and the Warden's assertion also overlooks this Court's instruction that "§ 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). The Indiana Supreme Court unequivocally rejected Roche's ineffective assistance claim on the merits. *Roche*, 690 N.E.2d at 1123. The same was true in *Stephenson*, 864 N.E.2d at 1038. As we have shown, therefore, the crucial distinction between the Seventh Circuit on one hand and the Ninth and Eleventh Circuits on the other is not the standard of review, but rather the Seventh Circuit's recognition that proper application of the *Strickland* prejudice standard must take into account this Court's shackling decisions.

C. The Warden further argues that there is no split because the Seventh Circuit's decisions—like those of the Ninth and Eleventh Circuits—"analyzed the prejudice prong of the ineffective assistance claims under *Strickland*'s actual prejudice standard—not *Deck*'s presumed prejudice standard." BIO 19. But that argument simply sidesteps the circuit split: The question presented is not whether a claim for ineffective assistance based on an attorney's failure to object to shackling is governed by the *Strickland* prejudice standard. The question, rather, is

whether a state court must account for the Court's shackling decisions in applying the *Strickland* standard. The Seventh Circuit's affirmative answer to that question stands in direct conflict with the opposite answer given by the Eleventh and Ninth Circuits.

II. The Eleventh Circuit's Resolution Of The Question Presented Is Wrong.

The Warden's defense of the decision below on the merits likewise relies on a misstatement of Whatley's position. He contends that Whatley's argument turns on showing "that the state court's refusal to use the presumed prejudice standard from *Deck* was an unreasonable application of this Court's precedent." BIO 29. Unless Whatley can show that the state court should have "'borrow[ed]' the 'presumed' prejudice standard applicable on direct appeal to replace *Strickland*'s 'actual' prejudice standard," he argues, Whatley's argument fails. BIO 14.

That is not Whatley's argument, nor is it the position adopted by the Seventh Circuit. The Seventh Circuit's decisions are plainly and by their terms based on the *Strickland* prejudice standard. *See Roche*, 291 F.3d at 483-84; *Stephenson I*, 619 F.3d at 670-71; *Stephenson II*, 865 F.3d at 959. And the Seventh Circuit clearly has not adopted a generalized presumption of prejudice for all ineffective assistance claims based on an attorney's failure to object to shackling. On the contrary, in both *Roche* and *Stephenson* the court upheld the defendants' convictions, determining that a state court could reasonably account for the inherently prejudicial effects of shackling while still concluding that there was no

reasonable probability that the outcome of the guilt phase of the trial would have been different absent the shackling. *See Roche*, 291 F.3d at 483-84; *Stephenson II*, 865 F.3d at 958; *see also Walker*, 709 F.3d at 945 (Gould, J., concurring in part and dissenting in part) (agreeing with the Ninth Circuit majority that, notwithstanding the inherently prejudicial impact of shackling, the defendant failed to show a "likelihood that a responsible jury would have acquitted" him).

Where the Seventh Circuit's approach splits from the approach adopted by the Ninth and Eleventh Circuits is in its distinction between the guilt phase and the sentencing phase of a capital trial. That distinction derives from the unique character of capital sentencing. Capital sentencing involves an "individualized decision," where the sentencer may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). And this Court's decision in *Deck* directly addresses the ways in which shackling contaminates that open-ended process. The Court held that, because "[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," and "almost inevitably affects adversely the jury's perception of the character of the defendant," visible shackling during trial "thereby inevitably undermines the jury's ability to weigh accurately all relevant consid-

erations—considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death." 544 U.S. at 633.

The Warden's insistence that *Deck* may be disregarded, simply because this case arises in a different procedural posture on collateral review, conflicts with this Court's admonition that "the concept of prejudice is defined in different ways depending on the context in which it appears," and that the *Strickland* "prejudice inquiry is not meant to be applied in a 'mechanical' fashion." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (quoting *Strickland*, 466 U.S. at 696). Instead, courts conducting the *Strickland* prejudice inquiry must account for this Court's holding that shackling "inevitably undermines" capital sentencing in ways that are "often unquantifiable and elusive," and "cannot be shown from a trial transcript." *Deck*, 544 U.S. at 633, 635. That requirement leads to the conclusion that the "possibility that the defendant's having to" be visibly restrained "contaminated the penalty phase of the trial" necessitates resentencing. *Stephenson II*, 865 F.3d at 959; *see also Walker*, 709 F.3d at 951 (Gould, J., concurring in part and dissenting in part) ("I would 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.").

At the very least, a court cannot deny a federal habeas petition on the reasoning offered here. Notwithstanding this Court's acknowledgment that "the

use of shackles can be "a thumb on death's side of the scale," *Deck*, 544 U.S. at 633 (internal citations, quotations, and alterations omitted), the Eleventh Circuit in its analysis failed to make any distinction between the guilt phase and the sentencing phase of the trial, and concluded that the Georgia Supreme Court reasonably applied federal law in denying Whatley's ineffective assistance claim because "the shackles were trivial in light of evidence before the jury." Pet. App. 80a.

The dismissal of the effect of shackling as "trivial" is in direct contradiction to this Court's longstanding recognition that shackling is inherently prejudicial, particularly in a capital case that is not uniquely aggravated. Even allowing for the possibility that there might be circumstances in which a state court could reasonably conclude that the inherent prejudice resulting from shackling at a capital sentencing proceeding was outweighed by other factors, a court may not reject the effect of shackling as "trivial."

III. The Question Presented Is Of Exceptional Importance And Outcome-Determinative In This Case.

Nowhere in his brief in opposition does the Warden contest the importance of the question presented. Nor does the Warden dispute that the question presented was squarely raised and preserved at each stage of the proceedings (*see* Pet. 22). Nor does the Warden make any other argument that this case is not a proper vehicle for resolving the question presented.

Indeed, the case presents an ideal vehicle, because the facts of Whatley's sentencing starkly illustrate how shackling inevitably undermines capital sentencing. The shackling that occurred here was truly shocking. During his sentencing, Whatley was required to stand before the jury, while shackled, and, using a toy gun supplied by the prosecutor, reenact the crime, with the prosecutor play-acting the role of the victim. Pet. App. 82a. Needless and visible shackling is intrinsically damaging and dangerous—and antithetical to any fair assessment of a capital sentence—because of the way it short-circuits the jury's ability to assess the defendant's whole character. As one juror observed in another case, "the shackles seemed like a short lead on a vicious dog." *Walker*, 709 F.3d at 948 (Gould, J., concurring in part and dissenting in part). The shackled reenactment of the crime that occurred here was seemingly designed to highlight this dehumanization. And the spectacle was exacerbated by the racial component at play. *See United States v. Brantley*, 342 F. App'x 762, 770 (3d Cir. 2009) (shackling "evokes the dehumanizing specter of slavery"); *see also* NAPD *Amicus* Br. 21-24. Indeed, the prosecutor's closing argument in support of the death sentence emphasized Whatley's dangerousness and ostensibly irredeemably bad character—the precise factors that this Court determined shackling impedes a jury's ability to accurately assess. *Deck*, 544 U.S. at 633; *see* Pet. 10, 24.

In light of these facts, therefore, there is at the very least a significant probability that Whatley would not have been sentenced to death were it not for his needless and visible shackling. The Warden argues it would be "not unreasonable for the state court

to determine there was no prejudice under *Strickland*'s standard," even if the state court had properly accounted for the inherently prejudicial effects of shackling. BIO 31. But the aggravating circumstances the Warden recites—the fact that Whatley had a prior criminal history and had run away from a halfway house at the time of the crime, coupled with his insistence that he had no intention to shoot the victim and that he did not shoot him at close range, BIO 30-31—confirm that the death penalty was not a foregone conclusion. As Judge Jordan noted, Whatley is not "the worst of the worst," and one cannot reasonably conclude that there is no reasonable probability that even one juror might have opted for mercy in the absence of Whatley's unjustified shackling in this case. Pet. App. 93a, 95a.

Unless this Court grants certiorari, Petitioner will be put to death on the basis of a proceeding that was fundamentally unfair and indisputably violated his constitutional rights, all because his attorney inexplicably and utterly ineptly acceded to this distortion of our judicial system. Because the Eleventh Circuit's decision allowing this execution to proceed is erroneous, and reflects a division in the circuits, it warrants this Court's review.

CONCLUSION

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

Respectfully submitted,

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