No. _____
(CAPITAL CASE)

IN THE

Supreme Court of the United States

CEDRIC RICKS,

Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPT. OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Jeremy Schepers*
Supervisor, Capital Habeas Unit
Federal Public Defender's Office
Northern District of Texas
525 South Griffin Street, Ste. 629
Dallas, Texas 75202
214-767-2746
214-767-2886 (fax)
jeremy_schepers@fd.org

Naomi Fenwick
Assistant Federal Public Defender
Texas Bar Number 24107764
naomi_fenwick@fd.org

Kathryn Hutchinson
Assistant Federal Public Defender
Texas Bar Number 24078707
katy_hutchinson@fd.org

Counsel for Petitioner
**Counsel of record*

QUESTIONS PRESENTED

Petitioner was seen shackled by the jury during the punishment phase of his capital murder trial and the State relied on the jury's exposure to Petitioner in shackles to argue for a death sentence: "You saw him walk back to counsel table this morning with shackles on." ROA.8262. In state habeas proceedings, the state court defaulted the claim on the basis that it could have been raised on direct appeal. In proceedings arising under 28 U.S.C. § 2254, Petitioner argued that his visible shackling violated his due process rights and that he could overcome any procedural default because the state court ruling was inadequate. The federal district court denied the claim on the merits only. Petitioner accordingly sought a certificate of appealability, arguing that reasonable jurists could debate the district court's merits adjudication of the shackling claim. In a published opinion and over a dissent, the United States Court of Appeals for the Fifth Circuit denied a certificate of appealability based on its determination that the shackling claim was procedurally defaulted. Judge Higginson would have granted a certificate of appealability on the shackling claim.

1. Rather than assess whether reasonable jurists could debate the district court's resolution of the claim, can a circuit court deny a certificate of appealability by assessing in the first instance whether there exist other independent grounds on which the claim could be denied?

2. Can a certificate of appealability be denied notwithstanding a circuit judge's vote to grant it?

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the case caption.

LIST OF RELATED CASES

371st Judicial District Court, Tarrant County, Texas

Texas v. Ricks, Cause No. 1361004R

Texas Court of Criminal Appeals

Ricks v. Texas, No. AP-77,040, 2017 WL 4401589 (Tex. Crim. App. Oct. 4, 2017) (direct appeal)

Ex parte Ricks, No. WR-85,278-01, 2020 WL 6777958 (Tex. Crim. App. Nov. 18, 2020) (state habeas)

United States District Court for the Northern District of Texas

Ricks v. Lumpkin, No. 4:20-cv-1299, 2023 WL 8125338 (N.D. Tex. Nov. 22, 2023)

United States Court of Appeals for the Fifth Circuit

Ricks v. Lumpkin, No. 23-70008, 120 F.4th 1287 (5th Cir. 2024)

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PETITION FOR A WRIT OF CERTIORARI

Cedric Ricks petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit").

OPINIONS BELOW

The Fifth Circuit's November 4, 2024 opinion is attached as Appendix A. The district court's September 26, 2023 order is attached as Appendix B.

STATEMENT OF JURISDICTION

The Fifth Circuit entered its judgment on November 4, 2024. Petitioner's petition for rehearing en banc was denied on December 16, 2024. On February 28, 2025, the Court extended the time to file this petition to April 15, 2025. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, which provide in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V.
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[] by an impartial jury[.]" U.S. Const. amend. VI.
>
> "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV.

The case also involves 28 U.S.C. § 2253(c), which states in relevant part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
> >
> > . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

I. Petitioner was shackled at trial and the State relied on the jury having seen him shackled to argue that he should be sentenced to death.

Petitioner was shackled during his capital murder trial, the jury saw him shackled, and the State relied on the jury's exposure to Petitioner in shackles to argue for a death sentence. Despite a pretrial motion prohibiting Petitioner's visible shackling, he was shackled and wore a shock belt throughout trial. *See* ROA.7789.[1] Nothing in the record indicates why he was placed in shackles and a shock belt; the trial court never made any findings in a written order, at the pretrial hearing, or at trial.

During the punishment phase, Petitioner elected to testify and, after he testified, the court told him "[y]ou may step down, sir." ROA.8219. He accordingly walked back to counsel's table in the presence of the jury. *See* ROA.8262. Defense counsel did not ask the court for the jury to be excused before Petitioner walked back to counsel's table, nor did the court order the jury excused.

The State then relied on Petitioner's shackling to argue that he was a future danger:

> **The answer to Special Issue Number 1, undoubtedly, should be yes.** This man is a continuing threat wherever he is to whoever he is around. And you know in the general population of the Tarrant – of the Texas criminal justice system that he'll be out in general population running around free, going to chow, getting his email, watching his TV, on a lot less restrictive setting than he's in in the Tarrant County Jail right now.
>
> **You saw him walk back to counsel table this morning with shackles on.** Everywhere he goes in the Tarrant County jail, he's shackled and handcuffed. He's not going to be like that in the penitentiary. It's a different setting. It's completely different.

ROA.8262 (emphases added). Trial counsel did not object to the State's closing, nor did they raise the issue with the court. Ultimately, Petitioner was shackled both during the guilt/innocence phase

[1] ROA refers to the record on appeal in the Fifth Circuit.

and punishment phase, the jury saw Petitioner shackled at punishment, and the State relied on that fact to prove its punishment phase case for death.

II. State habeas proceedings.

Following affirmance of his conviction and sentence by the Texas Court of Criminal Appeals ("TCCA"), ROA.11531, Petitioner filed an application for state habeas corpus relief. Among other claims, he alleged that his visible shackling at the punishment phase violated his federal due process rights. ROA.10119–24. He also alleged that trial counsel's failure to object to his visible shackling constituted ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments. ROA.10125–26.

The convicting court did not hold a hearing on any of Petitioner's allegations and adopted the State's findings of fact and conclusions of law recommending that relief be denied as to all claims. ROA.12078. The TCCA declined to review the merits of Petitioner's shackling claim "because Applicant failed to raise [it] on direct appeal." ROA.12093. The TCCA also held that Petitioner had failed to establish that trial counsel had rendered ineffective assistance of counsel by failing to object to his visible shackling. ROA.12093. The TCCA denied state habeas corpus relief. ROA.12094.

III. Federal habeas proceedings.

Petitioner timely filed an initial petition for writ of federal habeas corpus and amended petition for writ of federal habeas corpus. ROA.150, 399. He re-urged both the shackling claim and the related ineffective assistance of counsel claim. ROA.443–50, 450–54. As to the former, Petitioner argued that the procedural rule on which the TCCA relied did not rest on an adequate state ground such that the federal district court could adjudicate the shackling claim on the merits. ROA.449–50. In support of this argument, Petitioner identified a recent case in which the TCCA extensively analyzed a freestanding shackling claim also raised for the first time in state habeas. *Id.* (citing *Ex parte Chavez*, 560 S.W.3d 191, 200–03 (Tex. Crim. App. 2018)). In that case,

although the TCCA noted that "[i]t is undisputed that no claim associated with shackling was raised on appeal, and the parties and the habeas court appear to agree that defense counsel did not obtain an adverse ruling at trial," the TCCA nevertheless addressed the merits of the defendant's freestanding shackling claim. *Chavez*, 560 S.W.3d at 200. It so held because "Applicant's complaint about the trial court's conduct also serves as part of his ineffective-assistance-of-counsel claims, and ineffective assistance claims are ordinarily cognizable on habeas." *Id.* at 200–01. Petitioner emphasized that this was precisely the posture of his case in state habeas: he asserted a freestanding shackling claim that was not raised on direct appeal and an ineffective assistance of counsel claim based on trial counsel's failure to object to his shackling at trial. Thus, the TCCA's refusal to decide the merits of Petitioner's identical freestanding shackling claim stood in direct contravention to its actions in *Chavez*.

The district court denied Petitioner federal habeas corpus relief on all claims on September 26, 2023. ROA.1344. The district court denied the shackling claim on the merits, finding that "any exposure of Rick's shackles to the jury was an invited error." ROA.1356; *see id.* ("[W]hile Ricks knew he was not supposed to be seen in front of the jury with shackles, he got up on his own volition after testifying and walked back to the defense table before anyone in the courtroom could object or intervene."). The district court also found that, "even if this error were not attributable to Ricks's actions," he had failed to show that the jury seeing him shackled had had a substantial and injurious effect upon the jury's verdict. ROA.1357. The district court reached this conclusion without addressing any of the arguments made by Petitioner on harm, including the State's reliance on his shackling to urge the jury to return a death sentence. It concluded that "the claim is thus meritless." *Id*. It also failed to engage with Petitioner's argument that he returned to counsel table because the trial court directed him to do so.

Petitioner timely filed a Motion to Alter or Amend Judgment on the ground that the district court had erred factually in finding that the jury's exposure to Petitioner in shackles was invited error. ROA.1376–77. He emphasized that he had been told by the trial court to step down from the witness stand and return to counsel's table in the presence of the jury. *Id.* He therefore had not invited any error by abiding by the trial court's order. *Id.* Petitioner also argued that the district court had failed to engage with any of his arguments establishing harm. ROA.1377–78. He noted that, for example, the district court did not engage at all with the State's reliance on his visible shackling to argue to the jury that he was a future danger and should therefore be sentenced to death. The district court denied Petitioner's motion. ROA.1393.

In accordance with the procedure set out in 28 U.S.C. § 2253(c) and its "straightforward" application to a claim denied on the merits, Petitioner sought a certificate of appealability from the Fifth Circuit on the shackling claim on the ground that "reasonable jurists would find the district court's assessment of the constitutional claim[] debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). As a capital case, Petitioner's motion for certificate of appealability was referred to a three-judge panel of the Fifth Circuit. *See* 5th Cir. Loc. R. 27.2.3 (Dec. 2024). The panel split two to one in denying a certificate of appealability on the shackling claim. *Ricks v. Lumpkin*, 120 F.4th 1287 (5th Cir. 2024). The panel rested its denial on procedural default: "We find this claim procedurally defaulted." *Id.* at 1291. It did not address the debatability of the district court's merits resolution of the claim.

Judge Higginson dissented in part and would have granted a certificate of appealability on the shackling claim. *Id.* at 1291–92 (Higginson, J., concurring in part, dissenting in part). He also disagreed with the majority's procedure for denying a certificate of appealability based on its determination that the shackling claim was procedurally defaulted:

> [T]he federal district court, whose opinion we are reviewing, did not dismiss the claim on procedural grounds, but instead resolved the claim on the merits. We are tasked with addressing whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We are not tasked with assessing, in the first instance and on the limited briefing before us, whether there exist other independent grounds on which the district court could have denied [Petitioner's] claim, as a basis for us to deny a COA.

Id. at 1292. The Fifth Circuit also denied Petitioner's timely filed petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's published opinion announces a new procedure for assessing a motion for a certificate of appealability: a circuit court may deny a certificate of appealability based on any ground regardless of whether that ground was assessed by the district court whose opinion the circuit court is reviewing. Such a rule, in effect, permits a circuit court to leapfrog the process under 28 U.S.C. § 2253(c) and instead conduct the type of *de novo* review only appropriate at the merits stage of an appeal. This Court's precedent, however, makes clear that at the certificate of appealability stage, a circuit court's only task is to assess the debatability of the district court's adjudication of a claim.

Relatedly, the Fifth Circuit's opinion entrenches a circuit split that has concerned members of this Court: whether—as in the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, a certificate of appealability can be denied "notwithstanding a circuit judge's vote to grant it." *Shockley v. Vandergriff*, 604 U.S. __, 2025 WL 951149, at *3 (2025) (Sotomayor, J., joined by Jackson, J., dissenting from denial of certiorari). Either issue independently warrants review, but their combination in Petitioner's case emphasizes the urgent need for the Court's intervention: under the Fifth Circuit's procedure, to obtain a certificate of appealability, a petitioner must persuade at least a majority of a panel of the court that the claim upon which he seeks a certificate of

appealability would not fail for any reason whatsoever, including a basis not relied on by the district court. This is surely well beyond the scope of the inquiry under 28 U.S.C. § 2253(c).

I. The Fifth Circuit's new rule that a certificate of appealability may be denied for any reason regardless of whether that reason was assessed by the district court flouts 28 U.S.C. § 2253(c) and this Court's precedent.

This Court has made clear that the decision of whether or not to issue a certificate of appealability turns on the rulings and reasons the *federal district court* identifies in denying a constitutional claim. Thus, a circuit court may issue a certificate of appealability if reasonable jurists could debate that resolution of the claim. This Court placed this focus on the federal court's resolution of a habeas claim over twenty years ago in *Slack v. McDaniel*, 529 U.S. 473 (2000). Holding that certificates of appealability could issue when the federal district court relied on procedural grounds to dismiss a petition, this Court rejected the contention that "a state prisoner who can demonstrate he was convicted in violation of the Constitution and who can demonstrate that the district court was wrong to dismiss the petition on procedural grounds would be denied relief." *Id.* at 483. As the foregoing makes clear, the decision of whether to grant a certificate of appealability depends on the *federal district court*'s resolution of that claim. Indeed, "[a]t the COA stage, *the only question* is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims[.]'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (emphasis added) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

This Court then delineated how federal appellate courts should assess whether a certificate of appealability may issue depending on whether the federal district court dismissed a claim based on procedural grounds versus the merits. *See Slack*, 529 U.S. at 484. "Where a district court has rejected the constitutional claim on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* But when the district court

denies a claim based on procedural grounds, whether a certificate of appealability should issue "has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." *Id.* at 484–85. Thus, "[w]hen the district court denies a habeas petition on procedural grounds," circuit courts assess whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

As this distinction makes clear, a reviewing court's sole task is to assess how the federal district court disposes of a federal claim. Nowhere does *Slack* suggest—and this Court has never held—that circuit courts should disregard entirely the district court's disposition of a claim and instead assess "whether there exist other independent grounds on which the district court could have denied" a claim. *Ricks*, 120 F.4th at 1292 (Higginson, J., concurring in part, dissenting in part). *Tennard v. Dretke*, 542 U.S. 274 (2004), underscores this point. In *Tennard*, this Court granted certiorari to determine whether a certificate of appealability should issue for a claim that the petitioner brought pursuant to *Penry v. Lynaugh*, 492 U.S. 302 (1989). *Tennard*, 542 U.S. at 276. Concluding that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong, *id.*, this Court faulted the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA" and for "invoke[ing] its own restrictive gloss on *Penry I*" "[r]ather than examining the District Court's analysis of the Texas court decision." *Id.* at 283. This Court further noted that the standard the Fifth Circuit used to evaluate petitioner's *Penry* claim "has no foundation in the decisions of this Court" and was "inconsistent" with the Supreme Court precedent. *Id.* at 284, 285.

Here, in denying Petitioner's motion for a certificate of appealability, the Fifth Circuit essentially created a new rule for evaluating whether a claim is substantial under § 2253 that flies in the face of *Slack* and its progeny. That the district court denied the claim on the merits cannot be contested: the district court concluded its assessment of Petitioner's shackling claim by finding that "[t]his claim is thus meritless." ROA.1357. The Fifth Circuit recognized as much in noting that the district court "rejected" Petitioner's shackling claim "for two central reasons: Ricks exposed his shackles to the jury on his own, and Ricks failed to provide any evidence showing that the exposure of the shackles or the trial court's actions amounted to a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Ricks*, 120 F.4th at 1291 (quoting *Hatten v. Quarterman*, 570 F.3d 595, 604 (5th Cir. 2009)). Yet without citing *Slack*, or even invoking its debatability language, the Fifth Circuit denied a certificate of appealability because it independently determined that the claim was procedurally defaulted. Acknowledging Judge Higginson's dissent—and in particular the fact that Judge Higginson "contends that we should not deny the COA based on procedural default, because the district court reached the merits of this claim, without addressing procedural default," *id.*—the court nevertheless held that it was "aware of no legal basis for granting a COA on a claim that is destined to fail due to procedural default." *Id.* But that legal authority is § 2253(c) and its application as explained in *Slack* to a claim denied by the district court on the merits. *See Slack*, 529 U.S. at 484. Regardless, the Fifth Circuit then denied a certificate of appealability based on a procedural determination never even considered by the federal district court. By doing so, the Fifth Circuit fashioned a new rule for evaluating a motion for a certificate of appealability that stands in flat contradiction to decades of this Court's precedents.

That the Fifth Circuit contravened *Slack* in denying Petitioner a certificate of appealability is particularly troublesome where, as here, Petitioner advanced a substantial argument in the federal district court as to why the procedural bar invoked by the TCCA was not adequate as a matter of federal law. Although the TCCA held that Petitioner's shackling claim was procedurally defaulted because it could have been raised on direct appeal, *Ex parte Ricks*, 2020 WL 6777958, at *1, Petitioner argued that the rule on which the TCCA relied was not adequate as a matter of federal law. ROA.449–50. In support, Petitioner pointed out that just two years before the TCCA defaulted Petitioner's shackling claim, the TCCA considered a freestanding shackling claim on the merits in state postconviction proceedings—even though it could have but was not raised on direct appeal—because the applicant had raised the freestanding shackling claim alongside an ineffective-assistance-of-trial-counsel shackling claim in state postconviction. *See id.*; *Ex parte Chavez*, 560 S.W.3d 191 (Tex. Crim. App. 2018). But neither the district court nor the Fifth Circuit even acknowledged Petitioner's argument as to why he could overcome the default.

II. The circuit split on whether a certificate of appealability can be denied notwithstanding a circuit judge's vote to grant it should be resolved to conform with 28 U.S.C. § 2253(c).

A. The courts of appeals are split on whether a certificate of appealability can be denied notwithstanding a circuit judge's vote to grant it.

A prisoner seeking a certificate of appealability pursuant to 28 U.S.C. § 2253(c) "must prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Miller-El,* 537 U.S. at 338 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). The Third, Fourth, Seventh, and Ninth Circuits have interpreted § 2253(c) to mean that a certificate of appealability must issue even where a single circuit judge votes to grant it. 3d Cir. L.A.R 22.3 (2011) ("[I]f any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue."); 4th Cir. Loc. R. 22(a)(3) (2024) ("If any

judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue."); *Thomas v. United States*, 328 F.3d 305, 309 (7th Cir. 2003); 9th Cir. G. O. 6.3(b) ("Pursuant to 28 U.S.C. § 2253(c), a request to grant or expand a certificate of appealability may be granted by any one Judge on the assigned panel."), 9th Cir. G. O. 6.3(g)(1) ("Any judge participating may vote to grant relief and so order.").

By contrast, the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have interpreted § 2253(c) as permitting a circuit court to deny a certificate of appealability even where a circuit judge votes to grant it. *See, e.g.*, *Ricks*, 120 F.4th at 1291; *Wellborn v. Berghuis*, 2018 U.S. App. LEXIS 22931, at *1–2 (6th Cir. Aug. 16, 2018) *Williams v. Kelley*, 858 F.3d 464, 475 (8th Cir. 2017); *United States v. Ellis*, 779 F. App'x 570, 572 (10th Cir. 2019) *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1235, 1237 (11th Cir. 2015). As well as dividing the circuits, the practice of denying a certificate of appealability even where a circuit judge votes to grant it has been of concern to members of this Court. *See Shockley*, 2025 WL 951149, at *1–2 (Sotomayor, J., joined by Jackson, J., dissenting from denial of cert.); *Johnson v. Vandergriff*, 600 U.S. --, 143 S. Ct. 2551 (Mem), 2552 (2023) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from denial of cert.).

B. The Fifth Circuit's and other circuits' practice of denying a certificate of appealability notwithstanding a circuit judge's vote to grant it is at odds with the plain language of 28 U.S.C. § 2253(c) and as interpreted by this Court.

28 U.S.C. § 2253(c) makes clear that "a circuit justice or judge"—singular—can grant a certificate of appealability. As members of this Court have observed, the use of the singular here is significant because cases are generally resolved by multiple judges: for example, a "majority of the number of judges authorized to constitute a court or panel thereof," 28 U.S.C. § 46(d), or by the appropriate "court of appeals." *See, e.g.*, *id.* §§ 2349(b), 2342; *Shockley*, 2025 WL 951149, at *2 (Sotomayor, J., dissenting). Congress appears to have distinguished the certificate of

appealability procedure, including by "condition[ing] the right to appeal on a single judge's vote." *Id.*

Permitting an appeal based on a single circuit judge's vote is also consonant with the showing required to obtain a certificate of appealability: "that reasonable jurists could debate whether (or, for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484 (internal quotation omitted). If anything, a dissenting vote from the denial of a certificate of appealability only underscores that reasonable jurists *do* debate the district court's resolution of an issue. *See Shockley*, 2025 WL 951149, at *2 (Sotomayor, J., dissenting) ("When one or more jurists believes a claim has sufficient merit to proceed, that itself 'might be thought to indicate that reasonable minds could differ . . . on the resolution' of the relevant claim." (quoting *Johnson*, 600 U.S. --, 143 S. Ct. at 2553 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting))).

The practice of denying a certificate of appealability even where—as established by a dissenting vote to grant a certificate of appealability—reasonable jurists do debate the district court's adjudication of a petitioner's claim is especially troubling in the Fifth Circuit. There, the local rules permit a single judge to rule on an application for a certificate of appealability "except for death penalty cases where a three-judge panel must act." 5th Cir. Loc. R. 27.2.3 (Dec. 2024). In other words, whereas a non-capital petitioners need only obtain a single vote, a capital petitioner must obtain at least two votes to be granted a certificate of appealability in the Fifth Circuit. In combination, this local rule and practice of requiring a majority significantly raises the burden for capital petitioners. The Fifth Circuit's procedure thus runs afoul of this Court's clear instruction

that "whatever procedures are employed at the COA stage should be consonant with the limited nature of the inquiry." *Buck*, 580 U.S. at 117.

The Court should resolve this circuit split to align the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits' procedures with that of the Third, Fourth, Seventh, and Ninth Circuits, in accordance with the plain language of 28 U.S.C. § 2253(c) and as interpreted by the Court. Where reasonable jurists *do* debate a district court's adjudication of an issue—including where a single judge disagrees with a majority of a panel of that circuit—a certificate of appealability should issue. Moreover, whether a petitioner can obtain a certificate of appealability where such a debate arises, as it did here, should not depend on geography.

III. This case is an ideal vehicle for addressing the questions presented.

A. Petitioner raised a substantial shackling claim.

Petitioner raised a substantial shackling claim: the State's closing argument at the punishment phase establishes that he was shackled, that the jury saw him shackled, and that the State then relied on that fact to argue for a death sentence. *See* ROA.8262. Petitioner's shackling claim exemplifies the precise dangers the Court identified when it held that visible shackling "undermines the presumption of innocence and the related fairness of the factfinding process" in violation of a defendant's constitutional rights. *Deck v. Missouri*, 544 U.S. 622, 630 (2005). Not only was Petitioner shackled without justification, but worse, the State explicitly referenced this unjustified shackling in arguing to the jury that Petitioner would be a future danger. *See* ROA.4288, 8262. "In *Deck*, the Supreme Court stated that visible shackling during the punishment stage 'implies' that the defendant is a continuing threat to the community; here, the State went even further an explicitly made that argument to the jury." *Ricks*, 120 F.4th at 1292 (Higginson, J., concurring in part, dissenting in part) (quoting *Deck*, 544 U.S. at 633).

The Court has long held that "no person should be tried while shackled and gagged except as a last resort" because "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant[.]" *Illinois v. Allen*, 397 U.S. 337, 344 (1970). This is because "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." *Id.* Visible shackling affects the punishment phase of a trial because "[a]lthough the jury is no longer deciding between guilt and innocence, it is deciding between life and death" and "[t]hat decision, given the severity and finality of the sanction, is no less important than the decision about guilt." *Deck*, 544 U.S. at 632 (cleaned up).

The visible shackling of a defendant during the punishment phase takes on particular significance where the State seeks death. In such circumstances, the Court has cautioned that the appearance of shackles "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community[.]" *Deck*, 544 U.S. at 633. This is the precise determination that a Texas jury must make in a capital case. *See* Tex. Code Crim. Proc. art. 37.071, § 2(b)(1) (requiring the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"). Visible shackling "almost inevitably affects adversely the jury's perception of the character of the defendant" such that "the use of shackles can be a thumb on death's side of the scale." *Deck*, 544 U.S. at 633 (cleaned up).

What transpired at Petitioner's trial underscores the concerns of visible shackling without justification that the Court identified in *Deck*. Despite the trial court's pretrial order that he remain in street clothes and unshackled during his trial, ROA.1631, Petitioner was shackled at trial, ROA.4288 (reminding Petitioner that he was "restrained"). The trial record contains no reason, let alone a compelling security interest, justifying his shackling. *See Deck*, 544 U.S. at 632. The jury

nevertheless witnessed Petitioner shackled when he was directed by the trial court to return to counsel table from the witness stand after testifying in his own defense at the punishment phase. ROA.8219.

Although the absence of any stated reasons justifying his shackling alone violated Petitioner's constitutional rights, the State compounded this violation by emphasizing his shackling to the jury in closing argument to argue that he should get the death penalty. ROA.8262. This argument makes plain that the State not only emphasized Petitioner shackling to the jury; it relied on the very stereotypes and prejudices that the Court warned about in *Deck* to argue for a death sentence. *See Deck*, 544 U.S. at 633; *see also Ricks*, 120 F.4th at 1292 (Higginson, J., concurring in part, dissenting in part). This violation of Petitioner's Fifth, Sixth, and Fourteenth Amendment rights is a substantial claim. *See Deck*, 544 U.S. at 634–35.

B. Reasonable jurists could surely debate the district court's resolution of Petitioner's claim.

The district court denied Petitioner's substantial shackling claim on the grounds that (1) the jury's exposure to Petitioner shackled was invited error and (2) he failed to demonstrate that he was harmed by the jury seeing him shackled. ROA.1356–57. It is perhaps telling that the majority did not address the debatability of either ground in rejecting a certificate of appealability. By contrast, Judge Higginson—who did examine the district court's adjudication—readily concluded that "reasonable jurists could disagree as to the lower court's assessment of the merits of [Petitioner's] due process claim." *Ricks*, 120 F.4th at 1292 (Higginson, J., concurring in part, dissenting in part).

Reasonable jurists could debate the district court's finding that the jury's exposure to Petitioner shackled was invited error:

> When Ricks concluded his testimony during the punishment stage, the state trial court judge directed, "you may step down, sir," which is what Ricks did. From that

> interaction, the district court concluded that Ricks chose to stand up and to return to the defense table of his own volition before any party could object. While Ricks did step down from the witness chair of his own physical volition, he did so in response to an instruction from the trial judge. Whether that behavior constitutes invited error that precludes relief is one that reasonable jurists could surely debate.

Ricks, 120 F.4th at 1292 (Higginson, J., concurring in part and dissenting in part). This is because that doctrine does not apply in a situation where, as here, Petitioner followed a direct court order. *See* COA Mot. at 58–60.

Likewise, reasonable jurists could debate the district court's conclusory finding that Petitioner had failed to show harm. Not only did the jury see Petitioner shackled, "the State affirmatively chose to remind the jury of what they saw during its closing argument of the penalty stage[.]" *Ricks*, 120 F.4th at 1292 (Higginson, J., concurring in part, dissenting in part). It also "directly tied [Petitioner's] visible shackling to why the jury should find in the affirmative to Special Issue Number 1" (the future dangerousness special issue). *Id.* The State weaponized Petitioner's visible shackling to make its case for future danger, and therefore death. The district court, however, did not engage with any arguments, let alone the State's reliance on the jury's exposure to Petitioner shackled, in finding that Petitioner had not shown that he was harmed. *See* ROA.1357.

Because the district court did not address whether the shackling claim was procedurally defaulted, Petitioner did not brief this issue before the Fifth Circuit. But, as Petitioner argued in the federal district court, any determination that the shackling claim was procedurally defaulted was far from a foregone conclusion. The state court rejected the shackling claim because it could have been raised on direct appeal. Yet, in at least one other case, the state court did adjudicate a shackling claim raised for the first time in state habeas. *Chavez*, 560 S.W.3d at 200–03. The state court's rule was therefore inadequate as a matter of federal law and should not bar the federal

district court's merits adjudication of Petitioner's shackling claim. These arguments, however, were not squarely before the Fifth Circuit and were not addressed by the majority.[2] Its determination thus underscores that it not only heightened Petitioner's burden to obtain a certificate of appealability by requiring that he demonstrate that his claim would not fail for *any* reason; it placed Petitioner in the position of having no opportunity to brief an issue upon which the Fifth Circuit's decision ultimately turned.

CONCLUSION

The Court should grant the petition. Following either summary reversal or plenary review, it should remand with instructions to the Fifth Circuit to grant a certificate of appealability on the shackling claim.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender

*/s/ Jeremy Schepers**
Jeremy Schepers
Supervisor, Capital Habeas Unit
jeremy_schepers@fd.org

Naomi Fenwick
Assistant Federal Public Defender
naomi_fenwick@fd.org

Kathryn Wood Hutchinson
Assistant Federal Public Defender
katy_hutchinson@fd.org

Office of the Federal Public Defender
Northern District of Texas
525 South Griffin Street, Suite 629
Dallas, Texas 75202
214.767.2746
214.767.2886 (fax)

[2] Out of an abundance of caution, he included a footnote addressing procedural default in his motion for a certificate of appealability. *See* COA.Mot. at 58 n.8.

Counsel for Petitioner
**Counsel of record*

Dated: April 15, 2025