No. 25–6315

In the Supreme Court of the United States

JASPER PHILLIP RUSHING,
Petitioner,

v.

STATE OF ARIZONA,
Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION(S) PRESENTED FOR REVIEW

A jury found Petitioner Jasper Rushing guilty of the first-degree murder of Shannon P. and found the existence of three aggravating factors. They sentenced Rushing to death. The Arizona Supreme Court remanded Rushing's case for resentencing because the trial court failed to give a parole ineligibility instruction. At his resentencing, Rushing represented himself and waived all mitigation. During the resentencing, Rushing waived the right to appear in civilian clothing. He also appeared in visible restraints, which he did not object to. The Arizona Supreme Court held, under Arizona law, that Rushing did not object to the visible restraints and the visible restraints did not constitute reversible error under Arizona's fundamental error standard.

The questions presented are:

1. Is the Arizona Supreme Court's decision supported by the independent and adequate state law grounds that Rushing failed to object and did not meet Arizona's standard for fundamental error?

2. Did the Arizona Supreme Court, applying Arizona law, correctly hold that Rushing failed to object to his visible shackling?

3. If Rushing failed to object to his visible shackling, did the Arizona Supreme Court correctly hold that any error did not compel reversal?

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INTRODUCTION

Jasper Rushing, who was sentenced to death for brutally murdering and mutilating his cell mate, failed to object and acceded to his visible shackling during his capital penalty phase retrial. Nonetheless, the Arizona Supreme Court reviewed his visible shackling claim under Arizona's fundamental error standard, which is similar to federal plain error review. The Arizona Supreme Court held that the trial court erred in not making case-specific findings to support the shackling, but that Rushing could not demonstrate prejudice because he failed to challenge the State's aggravation case based on two horrific murders or present any mitigating evidence. The Arizona Supreme Court's decision was correct and rested on fact-specific determinations of Arizona law. And because the court's decision is adequately supported by state law grounds that are independent of federal law, this Court is without jurisdiction to review the questions presented. The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

In August of 2010, Rushing and Shannon P. were incarcerated in the Lewis Prison Complex and were housed together in the same cell. On September 10, Rushing killed Shannon. *State v. Rushing* (*Rushing I*), 404 P.3d 240, 244, ¶ 2 (Ariz. 2017).

A little before 1:00 p.m., a prison guard went to Rushing and Shannon's cell to deliver lunch. *Id.* Rushing put his face towards the food trap and told the officer that the officer should alert the prison authorities. *Id.* at ¶4. Rushing stated "I think I just killed my cellie." *Id.* The officer did not believe Rushing at first but Rushing stated "No … I beat him up and I think I killed him." *Id.* The officer used his flashlight to look into the cell and saw Shannon on the bed with a large slash across his throat. *Id.* The officer asked Rushing about the location of the weapon used to cause Shannon's injuries. *Id.* Rushing said he used "a razor blade he had on the sink." *Id.* The officer called for help and attempted to place handcuffs on Rushing. *Id.* at ¶5. Before the officer could do this, Rushing asked the officer if he could have a sip of coffee first. *Id.* The officer refused but Rushing still drank his coffee before allowing the officer to put him in handcuffs. *Id.* at ¶5. During this exchange, Shannon was unconscious but still alive. *Id.* at ¶6.

After officers removed Rushing from the cell, they discovered the extent of Shannon's injuries. *Id.* When officers entered the cell, Shannon was unconscious but alive. Shannon's "face had been smashed in ... like he had been bludgeoned. His no[se] was flattened out against his head." *Id.* In addition to these injuries,

Rushing slashed Shannon's throat and severed Shannon's penis. *Id.* The officers found the severed penis on the cell floor. *Id.* Shannon did not regain consciousness and died while en route to the hospital. *Id.*

When officers removed Rushing from the cell, they asked him what weapons he used to inflict Shannon's injuries. Rushing stated that "he used 'rolled up magazines to beat [Shannon] unconscious and then used a razor blade with a small handle to cut his neck and to cut off the penis.'" *Id.* at 245, ¶9. Officers later found these weapons in the cell. *Id.* at 244, ¶7. Rushing made a club using a sock, a paperback book, and a sheet. *Id.* To slash Shannon's throat and sever his penis, Rushing used a disposable razor that he wrapped in cellophane to act as a handle. *Id.*

The state charged Rushing with one count of first-degree murder and alleged three aggravating circumstances: Rushing had a previous conviction where a sentence of life in prison had been imposed, under A.R.S. § 13–751(F)(1); "Rushing committed the offense in an especially heinous or depraved manner," under A.R.S. § 13–751(F)(6); and "Rushing committed the offense while in the custody of the state department of corrections," under A.R.S. § 13–751(F)(7)(a). *Id.* at ¶8. The jury convicted Rushing and sentenced him to death.

The Arizona Supreme Court affirmed Rushing's convictions and the aggravating circumstances, but vacated the death sentence and remanded the case for a new sentencing hearing. *Id.* at 243–44, ¶1. The court remanded the case because the trial court failed to give the jury a parole ineligibility instruction after

Rushing requested one, as required by *Simmons v. South Carolina*, 512 U.S. 154 (1994) and *Lynch v. Arizona*, 578 U.S. 613 (2016). *Id.* at 249–51, ¶¶ 36–44.

At his resentencing, "Rushing waived his right to counsel and his right to present mitigating evidence after the trial court ensured that he waived these rights knowingly, intelligently, and voluntarily." Pet. Appx., at 6a, ¶5. "At a pretrial status conference, Rushing informed the court he wanted to wear his orange jail-issued jumpsuit rather than dress in civilian clothes." *Id.* at ¶6. The trial court advised Rushing to reconsider his decision because "the jury might react negatively." *Id.* Rushing stated that he understood the potential harm of wearing jail attire "but said it would feel disingenuous to wear street clothes after twenty-five years in custody." *Id.* The trial court found Rushing waived his right to dress in civilian clothing knowingly, intelligently, and voluntarily. *Id.*

At the same pretrial conference, the parties discussed the issue of the type of restraint Rushing would have at trial. *Id.* at 7a, ¶7. "A sheriff's deputy stated Rushing would wear a standard leg brace and might also wear an 'FTO belt.'" *Id.* The officer did not describe the FTO belt. *Id.* at n.2. The trial court "observed that Rushing had never misbehaved in his courtroom, and Rushing said he would remain at the defense table throughout trial." *Id.* at ¶7. Rushing did not object to the proposed restraints.

At a later pretrial conference, the court and the parties again discussed the issue of restraints. *Id.* at ¶8. The trial "court noted that the sheriff's office planned to cuff Rushing's left hand to a chain connected to a leather waist belt while leaving

his right hand free." *Id.* The trial court asked Rushing "Are you okay with that" and Rushing stated "that's fine." *Id.* at 54a.

On the first day of trial, the State requested that the trial court make specific findings concerning the need for the restraints. *Id.* at 7a, ¶10. "The judge initially responded that the restraints were Rushing's own choice, apparently considering them part of his jail garb." *Id.* The trial court asked, "[d]o you object in any way to how you're being secured at this time, Mr. Rushing?" *Id.* at 37a. Rushing responded that "I do feel as though it's arbitrary based on the color of the clothing. But I also don't want to turn it into an appellate issue. I'm trying to get through this without any appellate issues." *Id.* After Rushing made this statement, the court stated the restraints were necessary because of clear security concerns, Rushing's prior first-degree murder conviction, and the pending capital case. *Id.* The court noted that Rushing had his right hand free to take notes. *Id.* The court concluded by asking Rushing, "[d]o you object to any of the other restraints that are currently on you?" *Id.* Rushing responded "[n]o." *Id.*

The resentencing commenced after this exchange. Consistent with his desire to represent himself, Rushing declined to make an opening statement, present mitigating evidence, cross examine witnesses, present rebuttal evidence, allocute, or make a closing argument. *Id.* at 6a, ¶5. The jury was therefore left with three powerful and unrebutted aggravating circumstances, including the prior jury's

especially heinous or depraved finding.[1] *See Rushing I*, 404 P.3d at 249, ¶35 (finding sufficient evidence to support especially heinous or depraved aggravating circumstance based on "evidence that Rushing inflicted gratuitous violence by severing Shannon's penis after Rushing knew or should have known he had inflicted a fatal injury.")

On appeal, the Arizona Supreme Court rejected Rushing's argument that he objected to the use of visible restraints at trial. *Id.* at 8a, ¶13. The court held that "[d]espite multiple opportunities, Rushing never objected to the restraints. His statement about arbitrariness was an observation, not an objection—further clarified by his follow-up comment, 'I don't want to turn it into an appellate issue.'" *Id.* Under Arizona law "a defendant need not use the word 'objection,' [but] he must show a clear intent to object to give the prosecutor and the court a chance to develop the record and rectify possible error." *Id.* (citing *State v. Teran*, 510 P.3d 502, 509–10, ¶¶25–26 (Ariz. App. 2022)). The court held that Rushing did not clearly indicate his intent to object because "Rushing … stated he was 'fine' with the restraints at the pretrial conference and reaffirmed at trial he had no objection." *Id.*

Rushing's failure to object to the visible restraints meant that, under Arizona law, the court would review the claim for fundamental error. *Id.* Applying Arizona's fundamental error standard, the court first determined whether the trial

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[1] In Arizona, the jury must sentence the defendant to death if it finds one or more statutory aggravating factors and then determines that "there are no mitigating circumstances sufficiently substantial to call for leniency." A.R.S. § 13-751(E).

court committed an error in its shackling decision. *Id.* at 8a–9a, ¶15. The court concluded that the trial court erred by making insufficient factual findings to support its shackling decision. *Id.* at 9a–11, ¶¶16–22.

The court next determined whether the error amounted to fundamental error under Arizona law. *Id.* at 11a, ¶¶23, 25. On appeal, "Rushing primarily argue[d] that the visible restraints constituted fundamental error under the third prong of *Escalante*'s second step." Pet. Appx. at 11a, ¶23. Under Arizona's third category of fundamental error review, which requires the defendant to show the error "was 'so egregious that [Rushing] could not possibly have received a fair trial ...." *Id.* (quoting *State v. Escalante,* 425 P.3d 1078, 1085, ¶ 21 (Ariz. 2018)). His argument relied on the holding in *Deck v. Missouri,* 544 U.S. 622 (2002), where this Court held that visible shackles cause inherent prejudice because the practice "undermines the presumption of innocence and the fairness of the factfinding process by suggesting to the jury that the defendant is a danger to society." *Id.* (citing *Deck,* 544 U.S. at 630, 635). The Arizona Supreme Court rejected this argument, holding that a shackled defendant can receive a fair trial and the error did not require automatic reversal. *Id.* at ¶¶23–24. This is because *Deck* held that a preserved visible shackling claim does not require reversal if the error is shown to be harmless beyond a reasonable doubt. *Id.* at ¶24. This necessarily means that an unpreserved shackling error does not require automatic reversal. *Deck's* holdings, the court held, "are inconsistent with Rushing's argument that visible shackling is 'so egregious' that a new trial is always required." Pet. Appx. at 11a, ¶24.

Rushing also alleged fundamental error by asserting that the shackling went to the foundation of his case. *Id.* at ¶25. This type of fundamental error requires a separate showing of prejudice. *Id.* The Arizona Supreme Court concluded that, regardless of whether the shackling went to the foundation of his case, Rushing had not shown prejudice from the error, i.e., that without the visible restraints, "a reasonable jury could have plausibly and intelligently recommended a life sentence." *Id.* at 12a, ¶28 (citing *Escalante*, 425 P.3d at 1087, ¶¶ 29–31).

Rushing argued that the visible shackles prejudiced him because they "undermined his ability to humanize himself through demeanor and presence." *Id.* at 12a, ¶26. The court rejected this claim. *Id.* At the resentencing, Rushing did not present any mitigating evidence. *Id.* at ¶27. "He appeared before the jury in jail-issued clothing, which signaled dangerousness even without restraints. … He chose not to address the jury or even speak by cross-examining witnesses, raising objections, or presenting mitigating evidence."[2] *Id.* at 12a, ¶27. (citation omitted). Besides brief answers to the trial court's questions, Rushing remained silent throughout the resentencing. *Id.* "Through his choices, Rushing had already placed a 'thumb [on] death's side of the scale,' and the restraints did not add meaningful weight." *Id.* (quoting *Deck*, 544 U.S. at 633).Given the complete lack of mitigating evidence and Rushing's "convictions for two horrific murders," the Arizona Supreme

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[2] The court also held that the jury had instructions not to consider Rushing's jail garb, which they reasonably could have interpreted to include the visible shackles. Pet. Appx. at 12a, ¶27.

Court could "not conclude that the partial restraint of one hand or the sound of shackles, assuming they existed, created any separate prejudice." *Id.*

Rushing could not demonstrate that he was prejudiced by the presence of visible shackles because he failed to rebut the State's case for death in any meaningful way and failed to establish that he was entitled to leniency. The Arizona Supreme Court's conclusion in this regard is consistent with state law and does not offer a compelling reason for this Court to grant review.

REASONS FOR DENYING THE PETITION

This Court grants certiorari "only for compelling reasons," and Rushing has presented no such reason. Sup. Ct. R. 10. Rushing has failed to demonstrate either that the Arizona Supreme Court "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," or that it "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(b), (c).

Rather, Rushing asks this Court to correct purported errors in the Arizona's Supreme Court's application of Arizona law. He contends that the state court erred in its factual determinations when it held he did not object to the shackling at trial. Pet. at 7–14. He also alleges that the Arizona Supreme Court erred when it applied the Arizona fundamental error standard rather than the federal plain error standard. *Id.* at 15–19. In the alternative, Rushing asks this Court to correct the Arizona Supreme Court's application of its fundamental error standard, but general error correction does not offer a compelling reason for certiorari review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *see also* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling

reasons' ... that govern the grant of certiorari"). And besides the suitability of certiorari for error correction, Rushing has failed to identify any error committed by the Arizona Supreme Court. Because Rushing seeks only error correction, and because the Arizona Supreme Court's disposition of Rushing's claim on state-law grounds presents a jurisdictional bar to this Court's review, certiorari is not warranted.

I. THE ARIZONA SUPREME COURT APPLIED AN INDEPENDENT AND ADEQUATE STATE GROUND THAT BARS FEDERAL REVIEW.

Because Rushing did not object to his visible shackling at trial, the Arizona Supreme Court reviewed his claim on direct appeal under Arizona's fundamental error framework. Because fundamental error review under Arizona law presents an independent and adequate procedural bar, and because the lower court's application of fundamental error did not run afoul of this Court's precedents in either *Davis* or *Douglas*, this Court is without jurisdiction to review Rushing's claim.

A. Arizona's fundamental error standard of review.

In Arizona, an appellate court considers an unpreserved trial error for fundamental error. *State v. Henderson*, 115 P.3d 601, 607, ¶19 (Ariz. 2005). Under fundamental error review, the defendant must first prove an error exists. *State v. Escalante*, 425 P.3d 1078, 1085, ¶21 (Ariz. 2018). Then, if trial error exists, the "appellate court must decide whether the error is fundamental. In doing so, the court should consider the totality of the circumstances." *Id.* Fundamental error exists if the defendant can show either that "(1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3)

the error was so egregious that he could not possibly have received a fair trial." *Id.* (emphasis in original). To receive relief under the first two categories, the defendant must show both that the error was fundamental and that the error caused prejudice, which is a "showing that without the error, a reasonable jury could have plausibly and intelligently returned a different verdict." *Id.* at 1087, ¶31. "[T]o satisfy prong three, the error must so profoundly distort the trial that injustice is obvious without the need to further consider prejudice." *Id.* at 1084, ¶20 (citing *Sheppard v. Maxwell,* 384 U.S. 333, 355–57 (1966); *Rideau v. Louisiana,* 373 U.S. 723, 724 (1963)).

B. The Arizona Supreme Court's holding was both adequate to support the judgement and independent of federal law.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). That is because "[w]hen this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do." *Id.* at 730 (emphasis in original).

1. *The Arizona Supreme Court's holding was adequate to support the judgment and rested on a firmly established and regularly applied rule.*

"[A]dequacy is itself a federal question." *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quotation marks omitted). First, "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character,

[the Court's] jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corporation v. Muller*, 296 U.S. 207, 210 (1935). If "[t]he case, in effect, was disposed of before the federal question said to be involved was reached," then the state question is adequate to support the judgement and there is no federal jurisdiction. *Id*. at 211.

Aside from sufficiency to sustain the state court ruling itself, adequacy asks whether a state procedural bar is firmly established and regularly followed, which is a prerequisite to preclude federal review. *Walker v. Martin*, 562 U.S. 307, 316, (2011). To be firmly established, the state procedural bar must have a history of use within the state prior to the case at issue. *Johnson v. Lee*, 578 U.S. 605, 608 (2016) (per curium). The state satisfies the regularly-followed requirement when the state routinely applies the procedural bar when considering the claim. *Id*.

The Arizona Supreme Court's decision in this case was based on two determinations of state law: first, that Rushing failed to object to his shackles, and second, that Rushing's unpreserved claim was subject to fundamental error review under Arizona law rather than *Chapman* harmless error review. These holdings were independent of the federal question: whether the trial court erred in shackling Rushing without making adequate case-specific findings. Indeed, the Arizona Supreme Court agreed with Rushing on that federal question, *see* Pet. Appx. at 10a, ¶19, and that holding is undisputed in this Court. But even with that favorable federal ruling, Rushing was unable to show fundamental error, the remainder of which is a state law question. *See id*. at 82-83, ¶¶ 23-29.

Wainwright supports the conclusion that these are state law questions. The holding in that case shows that states are not even required to allow criminal defendants an opportunity to seek reversal for fundamental error (or plain error) when they failed to object below. *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977). Thus, any additional avenue for relief that states choose to offer defendants is a creature of state law, not the U.S. Constitution, except for the federal question of whether federal constitutional error occurred in the first place.

In general, "a party usually cannot raise error on appeal unless a proper objection was made at trial." *State v. Bible*, 858 P.2d 1152, 1175 (Ariz. 1993). Accordingly, a defendant is required to object to an alleged trial error to preserve it for harmless error review, and failing to object at trial forecloses relief for all but fundamental error. *See Henderson*, 115 P.3d at 607, ¶ 18 ("[f]undamental error review… applies when a defendant fails to object to alleged trial error."); *Escalante*, 425 P.3d at 1083, ¶ 12.

Arizona applies the same standard to shackling claims, and has long required a defendant to make a contemporaneous objection to preserve those claims of error on appeal, which the Arizona appellate courts have consistently applied. *State v. Dixon*, 250 P.3d 1174, 1180, ¶ 24 (Ariz. 2011) (defendant preserved harmless error review for one form of restraint by objecting at trial but waived all but fundamental error review for a different restraint for his failure to object); *State v. Nelson,* 633 P.2d 391, 396 (1981) (defendant waived all but fundamental error for his failure to object to restraints used at trial); *State v. Mills*, 995 P.2d 705, 708–09, ¶ 13 (Ariz.

App. 1999) (defendant did not object to hidden restraints and waived issue on appeal). This Court has outlined the important state interests served by requiring defendants to make contemporaneous objections at trial. *Wainwright*, 433 U.S. at 88–90.

Arizona applied its contemporaneous objection rule to Rushing's claim, finding he failed to comply with the rule and waived review for all but fundamental error. Pet. Appx., at 8a, ¶¶13–14. Arizona's fundamental error standard is also well-established. *See e.g., Escalante*, 425 P.3d at 1083, ¶ 12; *Henderson*, 115 P.3d at 607, ¶ 18; *Bible*, 858 P.2d at 1175. *See also Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996) ("Under Arizona law, fundamental error review does not prevent subsequent procedural preclusion."); *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997) (raising federal claim under Arizona's fundamental error review framework does not constitute fair presentation); *Woratzeck v. Lewis*, 863 F. Supp. 1079, 1095 (D. Ariz. 1994), *aff'd sub nom. Woratzeck v. Stewart*, 97 F.3d 329 (9th Cir. 1996) ("Brought to its logical conclusion, Petitioner's contention [that fundamental error review is not an independent and adequate ground for default] would eliminate the utility of Arizona's procedural rules and virtually eradicate the doctrine of procedural default in Arizona.")

2. *The Arizona Supreme Court's holding was independent of federal law.*

Rushing may argue that Arizona's fundamental error standard is so interwoven with federal law that it should not be considered independent, such as the fundamental error standard this Court described in *Ake v. Oklahoma*, 470 U.S.

68 (1985). In *Ake*, Oklahoma found that the defendant waived his claim that he had a constitutional right to a psychiatrist because the defendant did not make repeated requests. 470 U.S. at 74. This Court held that Oklahoma's waiver rule did not bar federal review because, under Oklahoma law, the "waiver rule does not apply to fundamental trial error" and "federal constitutional errors are 'fundamental.'" *Id.* at 74–75. "Thus, the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." *Id.* at 75.

Arizona's fundamental error standard is different, because not every constitutional error (state or federal) is fundamental. Instead, in addition to showing that constitutional error occurred, the defendant must show that the error is so significant to fall under one of *Escalante's* three categories, and if it falls within the first or second category, he must also show prejudice. *See Escalante*, 425 P.3d at 1083, ¶13 (the three categories are that the error (1) "goes to the foundation of the case," (2) "takes from the defendant a right essential to his defense," or (3) is "of such magnitude that the defendant could not possibly have received a fair trial"); *id.* at 1085, ¶21 (prejudice). And here, as noted, the Arizona Supreme Court's decision to affirm the sentence was based on Rushing's inability to show fundamental error or prejudice, *see* Pet. Appx. at 11a-12a, ¶¶ 23-28, even after holding that error had occurred, *id.* at 9a-11a, ¶¶ 16-22.

Thus, the Arizona Supreme Court's decision, based on Rushing's waiver and inability to show fundamental error, meets all the prongs of the adequate and independent state ground and a federal court cannot review the claim.

C. Rushing's assertion that Arizona's application of its contemporaneous objection rule violated *Davis v. Weschler*, 263 U.S. 22 (1923) and *Douglas v. State of Ala.*, 380 U.S. 415 (1965) lacks merit.

Rushing asserts that the Arizona Supreme Court's application of Arizona's objection rule violates this Court's precedents in *Davis v. Weschler*, 263 U.S. 22 (1923) and *Douglas v. State of Ala.*, 380 U.S. 415 (1965). Pet. at 9–10. But neither of these cases supports Rushing's argument that Arizona's run-of-the-mill objection rule somehow violates the Constitution.

In *Davis*, a railroad was under the control of the federal government when the plaintiff in the civil suit suffered a personal injury. 263 U.S. at 23. Because the railroad was under federal jurisdiction, the venue for bringing the suit fell under General Order 18–A, which required that "all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose." *Id.* at 23. The plaintiff did not abide by the order and filed his cause of action in Missouri. Missouri held that the requirements of General Order 18–A only concerned "the venue of the action and was waived by the appearance of" the civil defendant. *Id.* at 24. This Court held that the state's local practice could not defeat the rights provided by General Order 18–A, and reversed the judgment. *Id.*

Rushing cites *Davis* for the rule that "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Pet. at 9–10 (quoting *Davis*, 263 U.S. at 24). True enough. But here, Rushing did not "plainly and reasonably" assert his federal rights—instead, he waived them by not objecting to the shackling at trial.

In *Douglas*, the state separately tried two defendants for the crime of assault with the intent to murder. 380 U.S. at 416. The state secured a guilty verdict on the first defendant and forced the first defendant to testify at the second defendant's trial. *Id.* The second defendant's lawyer objected three times to the use of the first defendant's testimony. *Id.* at 421. The first defendant invoked the right against self-incrimination and did not answer the state's questions. *Id.* at 416. The state then admitted the first defendant's confession by reading the confession to the first defendant and asking him if the statements in the confession were accurate. *Id.* at 416–17. A jury convicted the second defendant and he appealed, asserting that the state violated his confrontation clause rights by admitting the first defendant's confession so that he could not challenge the first defendant's confession through cross-examination. *Id.* at 417. The Alabama appellate court found that the admission of the confession violated state confrontation principles, but did not grant relief because the petitioner did not continue to object. *Id.* at 418.

This Court rejected the waiver argument, finding that the record showed "counsel did object three times to the reading of the confession before the jury. After the second time, the Solicitor assured him that he already had an objection in—

plainly implying that further objection to the reading of the document was unnecessary." *Id.* at 421–22 (footnote omitted). After the state read the confession, "the defense moved to exclude it; it then moved for a mistrial and for a new trial; all three motions were denied." *Id.* at 422–23. Based on these facts, this Court had difficulty understanding the waiver holding from the Alabama appellate court. *Id.* at 422. This Court held that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair." *Id.* This Court held the defendant preserved the objection because it applied "the general principle" that a defendant preserves an objection when it is "ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review …." *Id.*

Douglas undermines Rushing's argument. Arizona's rule requires the defendant to make his objection with sufficient clarity to inform the court that there is a constitutional violation. Pet. Appx. at 8a, ¶13. This follows the general principle, as stated in *Douglas,* that an objection is preserved when it is "ample and timely" to alert the trial court to the constitutional violation and enable it to take appropriate corrective action. *Douglas*, 380 U.S at 422. This Court has enumerated the important state interests served by requiring defendants to object to alleged

constitutional error at trial to preserve the claim for appeal. *Wainwright,* 433 U.S. at 88–90.

Unlike the defendant in *Douglas*, who objected three times to the constitutional violation and filed three separate motions, Rushing stated that he was fine with the restraints, did not object to them, and informed the trial court that he did not want to turn it into an appellate issue. Rushing did not provide an "ample and timely" objection that would "bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action." *Douglas*, 380 U.S. at 422. Thus, under *Douglas*, Rushing did not object and the Arizona Supreme Court's application of fundamental error precludes federal review.

II. THE ARIZONA SUPREME COURT'S APPLICATION OF ARIZONA LAW CONCERNING WHETHER RUSHING PRESERVED THE SHACKLING ERROR DOES NOT VIOLATE THE CONSTITUTION.

Rushing asserts that the Arizona Supreme Court erred when it found he did not object to the visible shackling. He asserts that the court erred by misapplying federal law concerning when a defendant preserves an objection and by making erroneous factual findings. Pet. at 10–11. Arizona's application of state law governing whether a defendant preserves a claim for appellate review does not violate the constitution.

A. This Court has left it to the states to enforce criminal law and create criminal procedural rules.

"The States possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). This Court recognizes "that preventing and dealing with crime is much more the business of the States than it

is of the Federal Government" and because of this, "it is normally within the power of the State to regulate procedures under which its laws are carried out, … and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends" a fundamental principle of justice. *Patterson v. New York*, 432 U.S. 197, 201–02 (1977) (citations and quotation marks omitted). This Court has not deviated from these principles. *See e.g., McElrath v. Georgia*, 601 U.S. 87, 96 (2024). Thus, Arizona maintains the primary authority for defining its laws and has the power to regulate the procedures to carry them out, including how a defendant must preserve a claim for appellate review.

This Court has long recognized that state law may require defendants to comply with procedural requirements to preserve constitutional claims, whether state or federal. In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court addressed whether Florida's contemporaneous objection rule barred federal review of a claim in habeas proceedings. There, the defendant committed murder and confessed to the authorities. *Id.* at 74. The state admitted the confession at trial and the defendant did not challenge its admissibility at trial or on direct appeal. *Id.* at 74–75. But Florida required defendants to raise motions to suppress before trial, or else forfeit subsequent appellate review. *Id.* at 85–86. The defendant sought habeas relief on the ground that his confession was involuntary and therefore inadmissible, despite his failure to object at trial. *Id.* at 75–76. This Court held "that Florida['s] procedure did, consistently with the United States Constitution, require that respondents' confession be challenged at trial or not at all, and thus his

failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here." *Id.* 86–87.

B. Arizona requires a defendant to indicate their intent to object to the specific constitutional error at trial by either making an oral objection or filing a written objection.

Under Arizona law, "[t]he purpose of an objection is to permit the trial court to rectify possible error, and to enable the opposition to obviate the objection if possible." *State v. Rutledge*, 66 P.3d 50, 56, ¶30 (Ariz. 2003). "[A] general objection is insufficient to preserve an issue for appeal. And an objection on one ground does not preserve the issue on another ground." *State v. Lopez,* 175 P.3d 682, 683, ¶4 (Ariz. App. 2008) (internal citations omitted). A defendant does not need to use the word "object" to preserve the objection, but must explain with sufficient detail, through either a verbal objection or a written motion, the basis for the objection so the trial court can make a ruling. *State v. Teran*, 510 P.3d 502, 510, ¶25 (Ariz. App. 2022) (summarizing Arizona's caselaw on when a defendant preserves an objection for appellate review).

This requirement, calling for specific objections to preserve issues for appellate review, is consistent with most states and the federal appellate courts. *See e.g., Yakus v. United States*, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."); *Puckett v. United States*, 556

U.S. 129, 134 (2009 ("If a litigant believes that an error has occurred (to his detriment) during a … judicial proceeding, he must object in order to preserve the issue."); *Vaughn v. State*, 992 S.W.2d 785, 787 (Ark. 1999) ("To preserve an issue for appeal, a defendant must object at the first opportunity."); *State v. Levy*, 253 P.3d 341, 346 (Kan. 2011) ("a defendant must make a specific and timely objection to allow the trial court an opportunity to rule on the issue, even when the issue raised involves a fundamental right.").

C. Rushing's assertion that the Arizona Supreme Court made factual errors when it determined that he did not object is not a basis for granting review.

Rushing asserts that the Arizona Supreme Court mischaracterized the trial record when it held that he did not object to the visible shackles. Pet. at 12–14. But at bottom, his claim is that the court erred because it did not adopt his interpretation of the transcript. *Id.*

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings …." U.S. Sup. Ct. R. 10. Because Rushing's argument relies on his assertion that the Arizona Supreme Court made erroneous factual findings, this Court should deny review. Regardless, the record supports the Arizona Supreme Court's finding that Rushing did not object. Rushing had multiple opportunities to object when the parties discussed the restraints, but did not do so. Further, nothing prevented Rushing from raising the objection, at any time before the trial, either in a written motion or verbal objection. Thus, the Arizona Supreme Court reasonably concluded that Rushing did not object.

III. THE HOLDING IN *DECK V. MISSOURI*, 544 U.S. 622 (2005) DOES NOT DICTATE THAT THE STATE MUST PROVE THE SHACKLING ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT WHEN THE DEFENDANT FAILS TO PRESERVE THE SHACKLING CLAIM AT TRIAL.

Rushing assumes that this Court's decision in *Deck* applies with equal force when a defendant does not object to the visible shackles. Pet. at 7–19. This assumption is incorrect.

A. Unpreserved *Deck* claims are not subject to *Chapman* harmless error review.

In *Deck*, the defendant murdered two elderly victims. *Deck*, 544 U.S. at 624. At trial, the court required the defendant to wear leg braces that were not visible to the jury. *Id.* At the sentencing hearing, the court ordered the defendant to appear with "leg irons, handcuffs, and a belly chain." *Id.* at 625. The defendant objected before, during, and after voir dire. *Id.* The trial court overruled each objection. *Id.* This Court held that the constitution forbids the state from routinely placing visible shackles on the defendant during the guilt phase and, in a capital trial, the penalty phase. *Id* at 626, 632. However, this prohibition is not absolute. *Id.* at 633. The constitution "permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific …." *Id.* If a trial court provides insufficient reasons to support the shackling decision, then "[t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained

of did not contribute to the verdict obtained.'" *Id.* at 635 (quoting *Chapman v. California,* 386 U.S. 18, 24 (1967)).

Deck did not address an unpreserved shackling error. But the basic rule is that *Chapman*'s harmless error standard applies only to preserved claims of error. *See, e.g.*, *Brown v. Davenport*, 596 U.S. 118, 124 (2022) ("In *Chapman*, this Court held that a preserved claim of constitutional error identified on direct appeal does not require reversal of a conviction if the prosecution can establish that the error was harmless beyond a reasonable doubt."). And this Court has rightly indicated that shackling claims follow this basic rule. *See id.* (in a shackling case, stating that harmless error review applies to "a *preserved* claim of constitutional error") (emphasis added). Rushing acknowledges this point. Pet. at 7 (quoting *Davenport*, 596 U.S. at 124). Thus, a state appellate court is not constitutionally required to review an unpreserved shackling error under the *Chapman* standard.

This Court's holding on a similar issue also indicates that *Deck* does not dictate that the State must prove the error was harmless beyond a reasonable doubt when the defendant does not object to visible shackling. In *Estelle v. Williams*, 425 U.S. 501 (1976), this Court decided whether the state violated the defendant's constitutional right to a fair trial when it forced the defendant to appear at trial in prison attire. *Estelle,* 425 U.S. at 502. There, the Court acknowledged that requiring a defendant to appear in prison attire impairs the presumption of innocence at trial. *Id.* at 504. However, this Court held that "instances frequently arise where a defendant prefers to stand trial before his peers in prison garments,"

and that "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." *Id.* at 508. After considering the interaction between the constitutional right to a fair trial and the defense's right to formulate a strategy, this Court held that a trial court cannot compel a defendant to appear at trial in prison attire, but that if the defendant does not object, he cannot later show compulsion. *Id.* at 512–13.

The reasoning of *Estelle* applies even more strongly in the shackling context. The state interest in shackling a dangerous prisoner is much greater than any interest in requiring a defendant to wear prison attire, and unlike compelled prison attire, compelled shackling can be constitutional when necessary to preserve the safety of the courtroom. *See e.g., Deck*, 544 U.S. at 632 ("We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations."); *id.* at 633 ("The constitutional requirement … is not absolute" and "[i]t permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling" so that they may "accommodate[] the important need to protect the courtroom and its occupants."). Thus, just as a defendant must properly object to prison attire to preserve such a claim of constitutional error, *see Estelle*, 425 U.S. at 512–13, a defendant must properly object to shackling to preserve that claim of constitutional error.

Consistent with this straightforward logic and *Deck*, several states have held that *Deck* does not dictate that the state has to prove a shackling error was

harmless beyond a reasonable doubt when the defendant fails to object. Idaho and Illinois have held that a defendant might have a strategic reason for remaining in visible shackles during the trial. *See State v. Medina*, 447 P.3d 949, 953 (Idaho 2019); *People v. Strickland*, 843 N.E.2d 897, 902-03 (Ill. App. Ct. 2006). Thus, before visible shackling claims can be considered in those states, the defendant must show that the trial court forced visible shackles upon him against his will. *Medina,* 447 P.3d at 953; *Strickland*, 843 N.E.2d at 903. The *Medina* court included this requirement because "otherwise [it] would provide an incentive to defendants to remain silent about visible shackles in the hope that the trial court neglects to make sua sponte findings, and, in the event of an unfavorable outcome, allege error on appeal." *Id.* at 954. Other courts preclude any appellate review of visible shackles when the defendant does not object at trial. *See State v. Sellers*, 782 S.E.2d 86, 88 (N.C. 2016) (precluding appellate review because defendant did not object to the visible shackles); *Munn v. State*, 873 S.E.2d 166, 174–75 (Ga. 2022) (same); *Cedillos v. State*, 250 S.W.3d 145, 149–50 (Tex. App. 2008) (same).

The same concerns this Court addressed in *Estelle* are present in Rushing's case. Rushing represented himself during the resentencing, and thus controlled the strategic decisions at trial. He decided to wear jail attire during the trial because he felt it was "disingenuous to wear street clothes after twenty-five years in custody." Pet. Appx. at 6a, ¶6. It was therefore consistent with his strategy to retain the visible restraints, a point bolstered by Rushing's lack of objection. Because *Rushing* did not object, the State did not have to prove the error harmless

beyond a reasonable doubt. Instead, the Arizona Supreme Court properly reviewed for fundamental error.

B. The Arizona Supreme Court correctly applied Arizona's fundamental error standard to Rushing's visible shackling claim because Rushing did not object to the error and it did not prejudice him.

Rushing asserts that this Court's decisions in *Chapman* and *Deck* prevent the Arizona Supreme Court from creating and applying an Arizona standard of review for unpreserved trial error. Pet. at 15–16. He alleges that the Arizona Supreme Court erred by applying Arizona's fundamental error standard of review instead of the federal plain error standard of review. *Id.* at 16–17. Finally, he alleges that the purported shackling error is so prejudicial that he should not have to prove prejudice. *Id.* at 17–19. These arguments are meritless.

1. *The Arizona Supreme Court did not disregard the inherent prejudice of visible shackles when it required Rushing to prove he was prejudiced by the unpreserved shackling error.*

Rushing argues that the Arizona Supreme Court disregarded the inherent prejudice visible shackles cause a defendant at a capital sentencing trial. Pet. at 17–18. But the Arizona Supreme Court acknowledged the "inherent prejudice" caused by visible shackles, deciding that it did not compel automatic reversal under Arizona's fundamental error review standard. The court reasoned that because this Court concluded in *Deck* that a visibly shackled defendant can still receive a fair trial and because any visible shackling claim is still subject to harmless error

review, then Rushing was not entitled to automatic reversal under *Escalante*'s third category and had to demonstrate prejudice. Pet. Appx. at 11a, ¶24.

Rushing next asserts that the Arizona Supreme Court "co-opted this Court's words" and were "effectively thumb[ing] its nose at the unique prejudice visible shackling causes at a capital sentencing trial …" when it quoted *Deck*'s statement that visible shackles placed a "thumb on death's side of the scale." Pet. at 18 (citing *Deck*, 544 U.S. at 633). That quotation was not disrespect, but rather part of the court's prejudice analysis. The Arizona Supreme Court noted that Rushing did not present mitigation, decided to appear in jail clothing, did not address the jury, and did not challenge the State's case in any way. Pet. Appx., at 12a, ¶27. In other words, any prejudice Rushing suffered in the eyes of the jury was primarily due to his own decisions at trial and "his convictions for two horrific murders," not from "the partial restraint of one hand or the sound of shackles, assuming they existed." *Id.*

C. The federal plain error standard does not apply to Rushing's unpreserved shackling error.

Rushing asserts that Arizona lacks authority to create its own standard of review for unpreserved errors. *Id.* at 15–16. As previously noted, this Court has affirmed that the states have "primary authority for defining and enforcing the criminal law." *Engle*, 456 U.S. at 128. Rushing also specifically asserts that this Court's decisions in *Chapman* and *Deck* foreclose Arizona from creating a standard of review for unpreserved error. Pet. at 15–16. But as shown above, *Deck* does not dictate that the State must prove a shackling error was harmless beyond a

reasonable doubt when the defendant fails to preserve the visible shackling claim at trial.

Rushing goes on to argue that the Arizona Supreme Court should have applied federal plain error review and should have followed federal circuit opinions applying this standard. Pet. at 16–17. In so arguing, he relies on one civil and several criminal cases from various federal circuit courts. *Id.* In these cases, the circuit courts exercised their original appellate jurisdiction to resolve appeals arising from the application of federal law in the federal district courts. But Rushing cannot point to a single case from this Court, or any other federal court, applying plain error review to state court convictions on direct appeal. That is telling and fatal to Rushing's position.

Rushing's argument relies on the false premise that the states are bound by the Federal Rules of Criminal Procedure. In federal cases, Rule 52 governs the plain error doctrine. Fed. R. Crim. P. 52. The federal rules of criminal procedure "govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States." Fed. R. Crim. P. 1(a)(1). The rules specify that they do not apply to the states unless the rule expressly requires the states to follow it. *See* Fed. R. Crim. P. 1(a)(2); *see also Cameron v. Hauck*, 383 F.2d 966, 971 n.7 (5th Cir. 1967) ("The Federal Rules [of Criminal Procedure] do not apply to state cases."). Rule 52 does not state that the plain error standard of review applies to the states. Fed. R. Crim.

P. 52. Therefore, the federal plain error standard of review does not apply to Arizona.

In the alternative, even applying the plain error standard, Rushing is not entitled to relief. There are three threshold requirements for plain error. *Greer v. United States*, 593 U.S. 503, 507 (2021). "*First*, there must be an error. *Second*, the error must be plain. *Third*, the error must affect substantial rights, which generally means that there must be a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Id.* at 507–08 (emphasis in original) (quotation marks and citations omitted). If the defendant meets these three threshold requirements, the appellate court may grant relief only if it "concludes that the error had a serious effect on the fairness, integrity or public reputation of judicial proceedings." *Id.* at 508. It is the defendant's burden to prove all four requirements, which is meant to be a difficult standard to meet. *Id.*

Rushing does not address all four requirements under his plain error argument. Assuming for the sake of argument that Rushing's petition meets the first two requirements, his argument falls apart on the third and fourth requirements for much the same reason that Rushing was unable to prove fundamental error under Arizona's standard. Under the third prong of plain error review, the defendant must prove that there is a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Id.* at 507–08. Rushing cannot meet his burden here because the visible restraints did not have an impact on the verdict. As noted above, Rushing failed to challenge the

State's case, which included three unrebutted aggravating circumstances for a grisly murder, in any meaningful way. Instead he waived mitigation, declined to cross-examine witnesses, and largely sat mute in front of the jury in jail garb. Pet. Appx. at 12a, ¶27. Rushing cannot show that but for the visible shackling, he would have received a life sentence. This same reasoning applies to the fourth requirement because the visible shackling in Rushing's case did not have "a serious effect on the fairness, integrity or public reputation of [Rushing's] judicial proceedings." *Greer,* 593 U.S. at 508. Thus, Rushing has not shown he would receive relief under the federal plain error standard.

Rushing's case is also distinguishable from *Claiborne v. Blauser*, 934 F.3d 885 (9th Cir. 2019), the only federal case Rushing cites that addresses an unpreserved shackling error under the plain error standard of review. Pet. at 16. In *Claiborne*, the prisoner asserted a section 1983 claim, which arose from the prisoner asserting that corrections officers used excessive force and ignored his medical needs—the prisoner had mobility issues and needed a cane to walk—when the corrections officers restrained him. 934 F.3d at 892. At trial, the district court noted that the prisoner was in shackles but the prisoner did not object. *Id.* The Ninth Circuit found that the defendant met all four requirements for relief under plain error review. *Id.* at 897–901. For the third prong, the court held that the prisoner's "dangerousness was the key issue at trial" and "the trial pitted his credibility against the defendant officers' credibility." *Id.* at 899. The court made

this holding because of "the inherent nature of visible shackles and its interplay with the heart of Claiborne's excessive force claim." *Id.*

Rushing asserts that this holding conflicts with the Arizona Supreme Court's consideration of an unpreserved shackling error. Pet. at 16. But in both cases, the appellate court reviewed the circumstances of the unpreserved shackling error and considered whether, absent the shackles, the result would have been different. *Compare Claiborne*, 934 F.3d at 899 *with* Pet. Appx. at 11a–12a, ¶¶23–28. The Ninth Circuit and the Arizona Supreme Court reached different conclusions based on the key issues in the respective cases, and thus the prejudice determinations for each case were different. As shown above, Rushing cannot meet the third requirement for plain error based on the facts and circumstances of his case. Accordingly, Rushing would not receive relief under federal plain error review, even if he were entitled to it.

CONCLUSION

Because Rushing has failed to demonstrate a compelling reason for a grant of certiorari, this Court should deny his petition.

Respectfully submitted this 6th day of February 2026.

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