

No. 25-6315

In the Supreme Court of the United States

—»«—
JASPER PHILLIP RUSHING

PETITIONER,

v.

STATE OF ARIZONA,

RESPONDENT.

On Petition for a Writ of Certiorari
to the Arizona Supreme Court

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

1. This Court may exercise jurisdiction because the judgment below does not rest on adequate and independent state grounds.

The State claims this Court lacks jurisdiction because the Arizona Supreme Court judgment rests on an adequate and independent state ground. BIO at 17. But the State’s characterization of fundamental error as an adequate and independent state ground is incorrect. On direct review, a state procedural rule does not deprive this Court of jurisdiction if the state court’s judgment depended upon resolution of the federal constitutional question. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (holding the Oklahoma waiver rule does not preclude U.S. Supreme Court jurisdiction when the resolution of the procedural question depends upon a federal constitutional ruling). When the Arizona Supreme Court utilized its fundamental error framework here, the analysis involved evaluating whether the trial court violated Mr. Rushing’s federal due process rights. *State v. Rushing*, 573 P.3d 72, 80–82 (Ariz. 2025); (Pet. Appx. 9a–11a ¶¶ 16–22). Because operation of Arizona’s fundamental error rule required that the court adjudicate the federal constitutional issue to assess whether any error occurred, its judgment never rested on independent and adequate state grounds.

A. On direct review this Court presumes jurisdiction unless the state court judgment expressly relied upon non-federal grounds.

This Court enjoys jurisdiction on direct appeal of a federal constitutional issue unless the state court’s decision rests on independent and adequate state grounds. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). But “[a] state ground of decision is

independent only when it does not depend on a federal holding, and also is not intertwined with questions of federal law.” *Glossip v. Oklahoma*, 604 U.S. 226, 242 (2025) (internal citations omitted). In contrast, when a state court judgment appears either to rest “primarily on federal law, or to be interwoven with the federal law,” and if “the adequacy and independence of any possible state law ground is not clear from the face of the opinion,” then a *conclusive presumption* exists that the state court decision is based upon an interpretation of the federal law in question. *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983); *Coleman*, 501 U.S. at 732 (describing the rule set forth in *Michigan*, 463 U.S. 1032, as a “conclusive presumption”). In such cases, the presumption is only overcome when the state court “indicates clearly and expressly that [its decision was] based on bona fide separate, adequate, and independent grounds.” *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (quoting *Michigan*, 463 U.S. at 1040).

The conclusive presumption applies here because the Arizona Supreme Court addressed the federal constitutional question, and its resolution of that question shaped the analysis that followed. The State does not – because it cannot – identify any statement from the decision below that either disclaims reliance on federal law or declares the federal constitutional question irrelevant to its judgment.

This unique posture distinguishes Mr. Rushing’s case from situations where the state court disposed of the case on state grounds without resolving the federal question. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210–211 (1935) (This court lacks jurisdiction when state court judgment rests upon both federal and nonfederal grounds and the state court disposes of the case before the federal question is

addressed). Here, the Arizona Supreme Court did not bypass the federal question; it decided it first.

B. As applied here, the use of Arizona’s fundamental error framework is not independent of the federal issue it decided.

The State contends that use of Arizona’s fundamental-error framework constitutes an independent state ground because it differs from the fundamental error rule at issue in *Ake*, 470 U.S. 68. BIO at 21. That argument rests on a mischaracterization of Arizona law and a misunderstanding of the independence inquiry. Understood correctly, *Ake* applies squarely to Mr. Rushing’s case.

i. Arizona treats constitutional error as fundamental.

The State distinguishes *Ake* with an unsupported assertion that, unlike Oklahoma, Arizona does not treat all constitutional error as fundamental. BIO at 22. That premise is incorrect. Like Oklahoma, Arizona has long recognized that “[c]onstitutional error is one form of fundamental error.” *State v. Burton*, 144 Ariz. 248, 251 (1985). And like Oklahoma, unpreserved constitutional error at trial may be categorized as fundamental error but it is not categorically waived. *Simpson v. State*, 1994 OK CR 40, ¶ 30 (Oklahoma courts sought to move away from the old, draconian rule that barred relief because an appellant failed to preserve the error at trial); *State v. Valverde*, 220 Ariz. 582, 585 (2009) (where no objection made at trial, the Arizona Supreme Court will still review for fundamental error).

The Arizona Supreme Court has established “the first step in fundamental error review is determining whether trial error exists.” *State v. Escalante*, 245 Ariz. 135 (2018). In its first step here, the Arizona Supreme Court determined whether

permitting visible restraints violated Mr. Rushing's federal due process rights under *Deck*. It held that Mr. Rushing proved constitutional error. *Rushing*, 573 P.3d at 81; (Pet. Appx. 10a–11a ¶ 22).

Arizona's fundamental error doctrine required the Arizona Supreme Court adjudicate Mr. Rushing's federal due process claim before denying relief. Because application of Arizona's fundamental error framework depended upon an antecedent determination of federal constitutional law, it does not represent an independent state ground. *Ake*, 470 U.S. at 75 (holding a state ground is not independent when its application depends upon an antecedent determination of federal constitutional law.) 470 U.S. at 75.

ii. Arizona's fundamental error doctrine is not a categorical procedural bar.

This Court's decision in *Stewart v. Smith*, 536 U.S. 856 (2002), illustrates the distinction between when a state procedural law is independent of the federal question and when it is not. Relying on *Arizona Rule of Criminal Procedure, 32.2(a)(3)*, the Arizona courts held that petitioner waived review of a previously unraised federal constitutional issue. *Stewart*, 536 U.S. at 857. Rule 32.2 allowed the state court to deny review based *solely* on the timing and sequencing of petitioner's claim, without addressing the merits of the underlying federal constitutional question he presented. *Id.* at 859–60. This Court found that no jurisdiction existed due to application of this procedural rule because by invoking it, the state court did not need to examine the merits of petitioner's constitutional claim. *Id.* at 860.

Arizona's fundamental error doctrine functions differently. Under fundamental review, the Arizona Supreme Court cannot deny relief without first addressing whether error exists. Here the Arizona Supreme Court first needed to determine whether the trial court erred when it allowed Mr. Rushing to be visible shackled throughout trial. After it determined, under *Deck*, that this was constitutional error, the court applied the rest of its fundamental error framework and found the unconstitutional shackling insufficiently prejudicial to warrant reversal.

Like *Ake* – where Oklahoma's application of its rule for unpreserved error depended upon an antecedent determination of a federal constitutional question – application of Arizona's fundamental error analysis here was dependent upon whether the trial court committed federal constitutional error. [470 U.S. at 75](#).

C. The court's decision here does not rest solely on a state law determination.

The State argues that the Arizona Supreme Court's judgment rests solely on Mr. Rushing's failure to object and the consequent fundamental error analysis. The State is wrong, as the court only found the constitutional error did not entitle him to a reversal. [Rushing, 573 P.3d at 82–83](#); (Pet. Appx. 11a–12a ¶¶ 23–28). It never decided whether the constitutional violation amounted to fundamental error. After it first found error, which is the first step in fundamental error analysis, it began the second step by rejecting Mr. Rushing's argument that the shackling error constituted category three fundamental error.¹ But rather than find that the constitutional error

¹The State conflates fundamental error analysis and fundamental error. They are two different things; the latter is a constituent part of the former. Fundamental error

did not equate to fundamental error, the court surmised that regardless Mr. Rushing was not entitled to relief because he needed to prove additional prejudice. *Id.*

The Arizona court's prong three analysis heavily relied upon *Deck* to determine whether the inherent prejudice visible shackles caused fundamental error so egregious that Mr. Rushing could not possibly have received a fair trial. *Rushing*, 573 P.3d at 82; (Pet. Appx. 11a ¶¶ 23–24). And when it required Mr. Rushing to show additional prejudice, the court also invoked federal law to assess and dismiss the additional prejudice Mr. Rushing presented. *Id.* (Pet. Appx. 12a ¶¶ 26–27). Both conclusions are inseparable from the federal question at issue.

“[W]hether a state law determination is characterized as entirely dependent on, resting primarily on, or influenced by a question of federal law, the result is the same: the state law determination is not independent of federal law and thus poses no bar to our jurisdiction.” *Foster v. Chatman*, 578 U.S. 488, 499, n. 4 (2016) (internal quotations omitted) (citing *Stewart*, 536 U.S. at 860 (per curiam); *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984)). As this Court observed: “where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain.” *Michigan*

analysis first requires that the defendant prove that trial error occurred. If he does, then he must also prove that this error was fundamental meaning it either constituted (1) error that went to the foundation of the case; (2) took from the defendant a right essential to his defense; or (3) it was error so egregious that he could not possibly have received a fair trial. Only for fundamental error prongs (1) and (2), is a defendant required to make a showing of prejudice. *Escalante*, 245 Ariz. at 142 ¶ 21.

v. Long, 463 U.S. at 1038 (quoting *Enter. Irr. Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 164 (1917)). The state court's analysis of Mr. Rushing's argument that this was prong-three fundamental error, as well as its analysis of whether he proved additional prejudice depended largely on its interpretation of federal due process law and this Court's interpretations of unconstitutional shackling error. This demonstrates that the rule the State points to did not operate independently of federal law. It required adjudication of the federal claim to function at all.

D. Because the federal constitutional question controlled the judgment, this Court has jurisdiction.

This Court is not being asked to correct a state court's application of its own procedural rules. It is being asked to decide whether a state may:

- acknowledge a federal constitutional violation;
- redefine the prejudicial effect of that violation through state doctrine; and
- insulate the resulting judgment from federal review.

That is not an adequate and independent state ground. It is a federal question squarely within this Court's jurisdiction on direct review.

2. The Arizona Supreme Court's preservation ruling presents a federal question.

The State contends that the Arizona Supreme Court's determination that Mr. Rushing failed to object to his visible shackling is a matter of state procedural law beyond this Court's review. BIO at 26–27. That is incorrect. Whether a federal constitutional claim has been sufficiently presented and preserved is itself governed by federal law. A state may regulate the manner in which objections are made, but it

may not determine whether federal rights are properly preserved in a manner inconsistent with this Court's standards.

A. Whether Mr. Rushing preserved his federal constitutional claim at trial is a federal question.

This Court has long held that questions on waiver of one's federally guaranteed constitutional rights are a federal question that federal law, not state law, controls. *Hemphill v. New York*, 595 U.S. 140 (2022). 148-49 (2022), *Brookhart v. Janis*, 384 U.S. 1, 4 n.4 (1966); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Likewise, where plainly and reasonably asserted, federal rights may not be defeated "under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); see also *Douglas v. State of Ala.*, 380 U.S. 415, 421-22 (1965) and *Osborne v. Ohio*, 495 U.S. 103, 124-125 (1990).

The State argues that Mr. Rushing failed to preserve his claim under state objection rules. But federal law governs what establishes sufficient preservation of a federal constitutional claim. *Davis*, 263 U.S. 22; *Douglas*, 380 U.S. 415.

These cases establish the principle that a claim is preserved for federal review provided the substance of the federal constitutional issue is fairly and timely brought to the trial court's attention, and the court addresses it by ruling on it in a way that also addresses the State's concerns. *Douglas*, 380 U.S. at 422. This is because "[i]f the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds." Cf. *Davis*, 263 U.S. at 24.

Preservation does not require “incantation of particular words.” *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000). It requires the trial court to be fairly alerted to the substance of the federal claim and afforded an opportunity to rule. Once a constitutional issue has been raised with the court and adjudicated, the federal claim is preserved for review. *Cf. Henry v. State of Miss.*, 379 U.S. 443, 450 (1965) (when the purpose of a contemporaneous objection rule is met by other means, reliance upon it “for its own sake would be to force resort to an arid ritual of meaningless form.”) (internal quotation omitted).

Here, the trial court addressed whether allowing visible shackling would run afoul of Mr. Rushing’s federal rights, it listened to both parties before offering its rationale and ruling. Although preservation questions involve factual analysis, this Court is not required to defer to the Arizona Supreme Court’s factual interpretation of the record. This is because when a state court uses its own factual determinations to determine whether a defendant satisfies federal constitutional preservation requirements, that determination is intermingled with federal law and should be subject to independent review by this Court.

Because the Arizona Supreme Court’s preservation determination turned on its characterization of the trial record in a case involving a federal constitutional right, this Court has an independent responsibility to ensure that federal standards were properly applied. *Cf. Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (requiring independent review where enforcement of federal constitutional rights turns on evaluation of the trial record below).

B. *Wainwright* does not govern this case.

Relying on *Wainwright v. Sykes*, 433 U.S. 72 (1977), the State argues that this Court “has long recognized that state law may require defendants to comply with procedural requirements to preserve constitutional claims, whether state or federal.” BIO at 27. *Wainwright* addressed federal habeas review of a constitutional issue the petitioner presented to neither the trial court nor to the state appeals court on direct appeal. 433 U.S. at 75. He was therefore barred from any state-court adjudication of his constitutional claim. *Id.* at 85–87. It is within this context alone that the Court upheld that decision by the state court. *Id.*

This case presents the opposite posture. First, the constitutional issue was brought before the trial court, the judge heard from both sides and then ruled on the constitutional issue and provided his reasoning. (Pet. for Cert. at 3–4, 10–12). Unlike the petitioner in *Wainwright*, Mr. Rushing brought the constitutional issue to the state appeals court, and it adjudicated his federal due process claim. *Rushing*, 573 P.3d at 81; (Pet. Appx. 10a–11a ¶¶ 22). *Wainwright* is inapplicable here.

C. Arizona’s preservation determination is subject to federal review.

The Arizona Supreme Court concluded that Mr. Rushing’s statements to the trial court were not a sufficient objection to trigger harmless-error review. *Rushing*, 573 P.3d at 79–80; (Pet. Appx. 6a – 8a ¶¶ 6 – 13). But because the question is whether a federal constitutional issue was fairly presented to and ruled upon by the trial court, the governing standards must be federal, not state.

The issue here is not whether a state court may refuse to adjudicate a federal constitutional claim that was never previously presented. The issue is whether a state

appeals court may characterize a presented, litigated, and adjudicated federal constitutional issue as unpreserved through reliance on its local rules in a manner inconsistent with federal preservation standards. Under this lens, Mr. Rushing’s constitutional claim was properly preserved. A state court’s reliance on State procedural rules cannot insulate the antecedent federal question from review.

3. After finding that visible shackling violated federal due process, the Arizona Supreme Court could not require that Mr. Rushing prove prejudice beyond that recognized in *Deck*.

The State asserts that Mr. Rushing “assumes” that “*Deck* applies with equal force” to unpreserved claims. BIO at 30. That misstates the issue. Mr. Rushing does not contend that every unpreserved claim must receive *Chapman* review. This issue arises only after the Arizona Supreme Court adjudicated the federal issue and found a *Deck* violation. But although *Deck* recognizes the inherent prejudice this causes in a capital sentencing proceeding, the Arizona Supreme Court’s ruling accords it virtually no weight.

A. *Deck*’s inherent prejudice doctrine has particular force in a capital sentencing proceeding where the jury observed visible shackling.

The State disagrees that *Deck* applies with “with equal force” when a defendant fails to object at trial. BIO at 30. That framing obscures the posture of this case. The Arizona Supreme Court did not merely assume error; it adjudicated the federal question and held that Mr. Rushing’s visible shackling violated the Due Process Clause under *Deck*. *Rushing*, 573 P.3d at 80–81; (Pet. Appx. 9a–11a ¶¶ 16–22). It further acknowledged that the jury observed at least some of the restraints throughout Mr. Rushing’s capital sentencing trial. *Id.* at 79; (Pet. Appx. 7a ¶ 9). Once

it made those determinations, the constitutional significance of the violation was governed by *Deck v. Missouri*, 544 U.S. 622, 632–633 (2005).

Deck does not treat visible shackling as a routine trial error. It recognizes that visible restraints are inherently prejudicial because they suggest to the jury that a capital defendant is too dangerous to be trusted to control himself in the courtroom. This inference severely undermines the fairness of the proceeding. *Id.* at 630. That concern is heightened in the capital sentencing context, where jurors must make a moral judgment about whether a defendant should live or die and inevitably consider issues of dangerousness and character. *Id.* at 633.

The prejudice here under *Deck* is not speculative. The Arizona Supreme Court found that Mr. Rushing was visibly restrained before the jury throughout the capital sentencing trial without adequate justification. *Rushing*, 573 P.3d at 81; (Pet for Cert. 7a–8a ¶ 22). In that posture, the inherent prejudice that *Deck* recognized was fully realized. Requiring Mr. Rushing to identify additional, case-specific prejudice beyond this inherent harm, transformed *Deck*'s protection into a formality. Proving prejudice under *Deck* does not require proof that a particular juror relied on the restraints because it arises from the objective risk to the fairness and reliability of the capital sentencing determination that visible shackles create. *Id.* at 632–33.

The State's citation to *Estelle v. Williams*, 425 U.S. 501 (1976), is also misplaced. There, the Court declined to presume compulsion where the defendant failed to object to appearing in jail clothing and therefore concluded he failed to establish a constitutional violation. By contrast, here the Arizona Supreme Court expressly held that the trial court's decision and reasons for keeping Mr. Rushing in

shackles triggered a constitutional violation. The question here is whether state courts may diminish the constitutional consequences of a *Deck* violation in a capital sentencing proceeding by requiring that a defendant prove additional prejudice beyond the inherent harm recognized in *Deck*.

Federal courts applying plain error have recognized that determining whether the fairness or integrity of a jury proceeding has been undermined depends on the visibility of shackles to the jury. *Claiborne v. Blausen*, 934 F.3d 885, 898–901 (9th Cir. 2019) (unobjected to but unjustified visible shackling in civil case caused error so grave that it required a new trial); *United States v. Haynes*, 729 F.3d 178, 189 (2d Cir. 2013) (finding clear constitutional error even where defense counsel was responsible for drawing jurors attention to defendant’s shackles); *United States v. Reed*, 163 F.4th 338, 362 (6th Cir. 2025) (“pivotal question” was whether restraints were visible to jury in the courtroom which led to the court’s conclusion of no plain error); *United States v. Ahmed*, 73 F.4th 1363, 1377–78 (11th Cir. 2023) (“even if the district court should not have restrained Ahmed during the trial, the shackling did not affect Ahmed's substantial rights—such as the presumption of innocence—or prejudice the jury because the shackles were never visible.”); *United States v. Green*, 158 F.4th 1347, 1373 (11th Cir. 2025) (“Our precedent confirms that there is no error, plain or otherwise, when the jury is unable to view the defendant’s shackles.”); *United States v. Cooper*, 591 F.3d 582, 588–89 (7th Cir. 2010) (“critically, these were not visible shackles” and thus finding no plain error because “the jury could not see the shackles.”). These cases do not support the Arizona court’s finding that inherent prejudice may be ignored in a capital sentencing proceeding. Neither do the other

authorities cited by the State, none of which involve capital proceedings. BIO at 33. Even under deferential standards of review, visible restraints are treated as a grave constitutional error.

B. Requiring additional prejudice beyond *Deck* improperly diminished the consequence of this constitutional violation.

After finding Mr. Rushing's visible shackles violated *Deck*, the Arizona Supreme Court should have addressed the inherent prejudice this caused. The court instead ignored it and required Mr. Rushing to demonstrate prejudice beyond that inherent harm.

Imposing this requirement is incompatible with *Deck*. *Deck* identifies visible restraints as inherently prejudicial because they communicate dangerousness and undermine the fairness of a capital sentencing proceeding. 544 U.S. at 635. Once a court determines a *Deck* violation occurred the constitutional baseline of prejudice is established. Requiring that a defendant prove more collapses *Deck's* inherent prejudice into no prejudice at all.

Both the Arizona court and the State suggest that any error was harmless because of the strength of the aggravating evidence and Mr. Rushing's own litigation choices. *Rushing*, 573 P.3d at 82–83; (Pet. Appx. 12a ¶ 27); BIO at 35. But that reasoning addresses the weight of the evidence, not the constitutional harm identified in *Deck*. The prejudice inherent in visible shackling lies in its tendency to unduly influence the sentencing jury's perception of dangerousness and moral culpability, both of which become central to the decision of whether to impose life or death. Even in the presence of substantial aggravating factors, visible restraints risk undermining

the fairness of such a sentencing proceeding. *Deck*'s recognition of inherent prejudice rests on the understanding that this type of influence cannot be reliably disentangled from the jury's ultimate sentencing determination. 544 U.S. at 633; Cf. *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) ("It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.").

C. Federal courts do not treat visible shackling as a trivial error even under plain error review.

The State accuses Mr. Rushing of "argu[ing] that the Arizona Supreme Court should have applied federal plain error review[.]" BIO at 36. That is not Mr. Rushing's argument. Mr. Rushing points to federal plain error decisions to demonstrate that federal courts have treated visible shackling as a serious constitutional violation even under highly deferential review. Arizona treated the violation of Mr. Rushing's due process rights differently. After the court found a *Deck* violation, it required Mr. Rushing to prove additional prejudice beyond the inherent harm that *Deck* recognizes. Effectively this made the constitutional violation indistinguishable from ordinary, non-constitutional trial error. (Pet. for Rev. at 17). In contrast, federal courts who have applied plain error review still recognize that if the jury saw those shackles, it would seriously affect the fairness, integrity, and public reputation of judicial proceedings (*supra*). Even under that deferential standard, visible restraints are not treated as routine or nominal errors. They are understood to carry substantial

constitutional weight because of the message they convey to jurors and the risk they pose to the fairness of the proceeding.

The point is that federal courts do not diminish the import of the inherent prejudice caused by visible shackling in violation of the constitution, even when reviewing an unpreserved claim. Arizona's additional requirement that a defendant demonstrate additional prejudice beyond the inherent harm in a capital sentencing proceeding – after expressly finding a bona fide *Deck* violation – reduces the practical force of the constitutional protection. That inconsistency underscores the need for this Court's review to clarify the constitutional consequences of a conceded *Deck* violation in a capital sentencing case.

CONCLUSION

The judgment below presents substantial federal questions warranting this Court's review. It does not rest on an adequate and independent state ground where its fundamental error analysis required adjudication of petitioner's federal due process claim under *Deck*. Whether Mr. Rushing sufficiently preserved that federal constitutional claim is governed by federal law, not state procedural formalism. And once the Arizona Supreme Court found a constitutional violation in this capital sentencing proceeding and acknowledged that the jury observed the visible restraints, it could not require petitioner to prove additional prejudice beyond the inherent harm that *Deck* recognizes.

The Court should grant Mr. Rushing's petition for certiorari.

RESPECTFULLY SUBMITTED this 18th day of February 2026.

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