No. 15-____

IN THE
SUPREME COURT OF THE UNITED STATES

Clark Elmore,
Petitioner,
v.

Donald R. Holbrook,
Respondent.

On Petition for a Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May capital defense counsel decide to present evidence of a single mitigating factor without having first conducted a thorough investigation of other potential mitigating factors? Does counsel's *post-hoc* concern about possible rebuttal evidence justify the failure to investigate?

Where a state court provides a reasoned decision denying relief, does 18 U.S.C. Section 2254(d) permit a federal court to ignore the reasoning of the state court and substitute its own reasons for denying relief? Does the violent nature of the crime lessen the prejudice from unconstitutional shackling?

LIST OF PARTIES

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at 799 F.3d 1238 (9th Cir. 2015).

JURISDICTION

The date on which the United States Court of Appeals decided this case was April 1, 2015 and is reported at 781 F.3d 1160 (9th Cir. 2015). A timely petition for rehearing was filed. The opinion was amended and superseded on denial of rehearing September 3, 2015. The order denying rehearing *en banc* appears in the amended decision. This Court extended the time to file this petition until January 19, 2016. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides in pertinent part:

> No person….shall be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to….have the assistance of counsel for his defense.

The Eighth Amendment states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law;

Section 2254 of Title 28 of the United States Code, provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

I. State Court Proceedings

On April 27, 1995, Clark Elmore was charged with one count of aggravated murder for the rape and murder of his step-daughter. Two months later, appointed counsel convinced Elmore to plead guilty by telling him it would increase the likelihood of a life sentence. At the penalty phase-only jury trial, the defense case lasted less than an hour and consisted of five witnesses, none of whom had a

relationship with Elmore. After his jury deliberated for almost 10 hours, Elmore was sentenced to death on May 3, 1996.

Elmore appealed. The Washington Supreme Court affirmed Elmore's conviction and death sentence on October 7, 1999. *State v. Elmore,* 139 Wash.2d 250, 985 P.2d 289 (1999). Appendix B.

After Elmore's certiorari petition to the United States Supreme Court was denied, Elmore filed a timely state post-conviction petition. The Washington Supreme Court dismissed the petition on November 21, 2007. *In re Elmore,* 162 Wash.2d 236, 172 P.3d 335 (2007). Appendix C.

II. Federal Court Proceedings

Elmore filed his habeas petition on January 14, 2008. On November 2, 2011, District Court Judge Ronald Leighton denied Elmore's request for an evidentiary hearing. On June 21, 2012, he denied Elmore's petition in its entirety.

Elmore filed a timely notice of appeal. On May 15, 2013, the Ninth Circuit granted a certificate of appealability. On April 1, 2015, the panel issued a decision. The panel amended its opinion, but rehearing *en banc* was denied on September 3, 2015.

III. Statement of Facts

A. Elmore Raped and Murdered His Step-Daughter

Clark Elmore raped and murdered his teenage step-daughter, Kristy Ohnstad, on April 17, 1995 in Whatcom County, Washington. III ER 160.[1] At the time of the murder Elmore was 40 years old. He had no previous history of violence. II ER 125-141. Elmore concealed his step-daughter's body and attempted to mislead the authorities, posing as the worried father of a missing child. Once the police found the body, Elmore fled to Oregon. However, he quickly returned, turned himself into the police, and voluntarily confessed his guilt. IV ER 120.

B. Inexperienced Counsel Was Appointed for Elmore

Jon Komorowski ("trial counsel"), a local public defender with no prior death penalty experience, was appointed to defend Elmore. Trial counsel assembled a defense team which failed to include a single person with death penalty experience. II ER 102-121. Although trial counsel sometimes asked local experienced capital defense attorneys for their advice, he consistently ignored it.

Only two months after he was appointed, trial counsel convinced Elmore to plead guilty and make himself eligible for a death sentence. II ER 125-141. After

[1] "ER" refers to the excerpts of record provided to the Ninth Circuit. "SR" refers to the state court record filed in this habeas proceeding.

the guilty plea, trial counsel retained a psychologist with no capital experience and instead of seeking an evaluation focused on issues that might be relevant to sentencing, asked him to determine whether Elmore was insane or incompetent. After conducting only a cursory investigation, counsel decided to use remorse as his exclusive defense after mock jurors responded favorably and despite the fact that the consulting firm recommended further investigation of both remorse and other categories of mitigation.

C. Elmore Was Introduced to His Jurors Heavily Shackled

Jury selection for the penalty phase trial began on February 20, 1996.

Just prior to the start of the proceedings, the parties met in the trial judge's chambers. III ER 143-159. The prosecutor, concerned that Elmore was dressed in jail clothes, wanted to put on the record that Elmore did not object to the jail garb. III ER 145. However, Elmore was also fully shackled. He was handcuffed, and wearing both a belly chain and leg irons, all of which restraints were fully visible. III ER 145-46. The transportation officer explained that the shackles had been put on by mistake because the officer had not realized that Elmore would be appearing in front of the jury. III ER 145-46. The trial judge ordered that the shackles remain on for at least that day because it was "easier" and because he believed that shackling should be left up to the jailers. III ER 146-48. Defense counsel did not object.

Elmore then made his first appearance in front of all of the prospective jurors visibly and heavily shackled. II ER 102-108; III ER 148; III ER 1-3. He was escorted to his seat with his chains "clanking" and remained fully and visibly shackled for the first day of jury selection. II ER 109-113; III ER 1-3. The trial judge then read a statement to the jurors describing the crime. Later, when deciding whether to impose death, jurors were specifically instructed to consider Elmore's dangerousness, as one of two identified mitigating factors.

After the first day, jury selection took place in the judge's chambers with only one juror at a time being questioned. Elmore was required to wear a stun belt under his clothes, rather than the shackles during the *in camera* questioning. Otherwise, the jurors did not see Elmore until the trial began.

Elmore's trial lasted 3 ½ days.

D. Defense Counsel Presented a One Hour Defense of Mr. Elmore's Life

The State's Case

During penalty phase, the State presented evidence that Elmore raped and murdered his daughter by strangling and bludgeoning her and Elmore's efforts to deceive the police. SR 2348-2580.

The Defense Case

The defense case consisted of just five witnesses whose testimony collectively lasted less than an hour. III ER 28-65. Four of the witnesses were

judges who offered terse descriptions of how Elmore had appeared ("overwhelmed" and "dejected") during his brief, preliminary court appearances. III ER 28-41. None of them stated that Elmore was remorseful, or even that Elmore's appearance was in any way out of the ordinary for a defendant charged with murder.

Michael Sparks, the defense investigator, then read a "bare bones" (517 word) chronological narrative of Elmore's life. III ER 46-48; SR 2306. At no point in the trial, neither in voir dire, opening statement, the defense case, or closing argument, did Mr. Elmore's counsel ever mention Elmore's appearance in shackles and jail clothes or make any argument that his appearance in shackles demonstrated Elmore's remorse.

In closing arguments, the State urged a death verdict based on the brutality of the crime and the lack of mitigation. III ER 71-105; 131-140. The defense told the jury that Elmore had no "excuses" for his crime, but that he should not be sentenced to death because he was remorseful, relying almost exclusively on Elmore's guilty plea as inferential evidence of remorse. III ER 106-130.

The Lengthy Jury Deliberations

Despite having heard almost nothing about Mr. Elmore's character and background, the jury deliberated for about 10 hours before they returned a death sentence. SR 2733-34.

E. A Robust Mitigation Case Was Presented to the State Post-Conviction Court Which Included Multiple Categories of Uninvestigated Mitigation

After his death sentence was affirmed on direct appeal, Elmore filed a post-conviction petition alleging ineffective assistance of trial counsel at sentencing and identifying numerous categories of readily available mitigation that trial counsel failed to investigate. That mitigating evidence is described briefly below.

Elmore Had Been Non-Violent His Entire Life

Elmore had never been violent prior to this crime. Instead, he was a hard and trusted worker who avoided conflict. His employer at the time of the crime could have testified:

> He acted like a real professional, and he took his work very seriously.
> I was shocked when I heard about the crime and Clark's confession.
> I could not reconcile the crime with the man I had known.

III ER 17-21.

Several people who knew Elmore would have testified similarly. None was contacted by the trial team.

The state court termed this evidence "cumulative" of the investigator's "bare bones" chronology. The Ninth Circuit failed to mention or discuss it.

Mr. Elmore Suffers from the Effects of Traumatic Brain Injury

Mr. Elmore was exposed to neurotoxins throughout his life. He grew up about one block from an airport in the Willamette Valley of Oregon and as a child

was repeatedly sprayed with DDT and other pesticides that have long since been banned. "When it would rain the pesticide would collect in the rain water and then migrate down through Clark Elmore's house and he would be playing in the water and would have further exposure to neurotoxic pesticide." SR 7379.

When he was only 17, Elmore voluntarily enlisted in the Army, serving in Viet Nam where worked as a mechanic repairing pumps used for Agent Orange, a highly toxic herbicide that has led to numerous medical problems. II ER 42-59. His brain was further poisoned by solvents from his work as a car mechanic and on oil pipelines.

Elmore has sustained several concussions. In Vietnam, a nearby mortar blast caused him to strike his head and lose consciousness. II ER 67. Later, a serious car accident left Elmore unconscious. After his initial discharge from the hospital, Elmore experienced seizures. II ER 67; III ER 26-27.

Neuropsychological tests confirm his brain damage and its destructive impact on his impulse control and judgment. Dr. Dale Watson noted that Elmore's brain impairment appears to have left him "vulnerable to stress in particular." SR 7094. According to neuropsychiatrist Dr. George Woods, Elmore's brain damage and the other trauma he experienced help explain why the rape and murder of his step-daughter was so brutal. II ER 25-31, 74-75. For the first time in his life, Mr. Elmore "completely lost control." II ER 30.

Trial counsel later admitted he did not investigate Elmore's brain damage solely due to his inexperience.

Elmore was Traumatized by Repeated Prison Rapes

Elmore suffers from PTSD. While serving a prison term for a property crime, Elmore was repeatedly raped. II ER 128. Elmore was told if he did not become another inmate's "whore" that he would be killed. Elmore was then sent to an honor camp, but was raped there, too. Prison records reflect a corresponding abrupt change in Elmore's personality from "congenial," "upbeat," and "happy-go-lucky" (if "fairly easily intimidated"), to "extremely paranoid" and having difficulty "establishing friendly relationships." SR 5349.

No reviewing court has ever mentioned this evidence.

Elmore Did Not Pose a Risk of Committing Future Acts of Violence

Whether Elmore posed a future danger was one of two mitigating factors identified in the instructions. Without presenting any evidence, defense counsel nevertheless argued that Elmore was not a future danger. The prosecutor responded by arguing that Elmore's crime proved his dangerousness.

For the first time in the state post-conviction proceeding, Elmore proffered the opinion of Chase Riveland, former director of the Washington state prison system, who reviewed Elmore's history and concluded that Elmore presented a very low risk of committing future acts of violence in prison. III ER 11. Milton

Tybo, a prison official who had supervised Elmore in an Idaho prison, also could have testified:

> Nothing in these records suggest to me that IDOC [Idaho Department of Corrections] had any difficulty controlling Mr. Elmore or that any other prison would have had difficulty handling an individual with this kind of record. On the contrary, it appears that Mr. Elmore was a pretty good inmate, and able to live peacefully in an institutional setting. (III ER 13-14).

No reviewing court has discussed this mitigating evidence.

Trial Counsel Had an Unfounded Concern that Elmore was "Backing Off" Remorse

Trial counsel gave two reasons for his failure to investigate. First, he decided to rely exclusively on a remorse defense. Second, trial counsel misunderstood Elmore's statement that he had nobody left to apologize *to* (after Elmore's wife left him), as meaning he had nothing to apologize *for*. Counsel claimed after Elmore made that statement he feared presentation of a robust mitigation case would motivate the prosecutor to investigate whether Elmore was remorseful by interviewing the chaplain or a jail guard.

If that investigation had been conducted, the evidence discovered would have helped, not hurt Elmore. Post-conviction counsel interviewed both the jail chaplain and a jail officer. If called, those witnesses would have transformed a weak case of remorse into a powerful one. Dana Sellars, the jail chaplain, noted that the day he met Elmore, just after he had arrived at the jail, Elmore was "huddled into a ball" and "shaking uncontrollably," an image Sellars said he'd

never forget. He met with Elmore once or twice a week thereafter, and his impression did not change; Elmore was "unlike any prisoner [he'd] counseled before," absolutely "wracked with anguish and dripping with remorse." Jail Officer Donald Pierce had repeated contacts with Mr. Elmore, but none with defense counsel, and could have told jurors:

> During the time that I observed Mr. Elmore he was an emotional wreck. Mr. Elmore was totally withdrawn and did not seem to care about his appearance or well-being. It seemed to me that Mr. Elmore was extremely overwhelmed by what he had done. It also seemed to me that Mr. Elmore was extremely remorseful for what he had done. In fact, Mr. Elmore was as emotionally upset as any prisoner that I have ever observed.

III ER 15-16.

The state court called this evidence cumulative. The Ninth Circuit opinion fails to mention it.

Trial Counsel's Truncated Investigation Fell Below the Prevailing Standard of Practice

Affidavits from experienced death penalty attorneys describe how trial counsel's truncated penalty phase investigation fell below the applicable standard of practice. II ER 76-125; III ER 1-27.

No reviewing court has ever mentioned these uncontested declarations regarding the relevant standard of practice at the time of trial.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision that the Selection of an Exclusive Penalty Phase Defense Eliminates the Duty to Conduct a Thorough Mitigation Investigation Radically Departs from Numerous Decisions of This Court.

A. Introduction

When Clark Elmore was only 17 years old he enlisted in the Army to serve his country in the Vietnam war. There, he was repeatedly exposed to Agent Orange, a highly toxic defoliant scientists have since linked to neurological damage and brain impairment. This was one of several instances when Elmore's brain was poisoned.

Elmore's trial counsel admitted his failure to investigate Elmore's brain injury was due to his own inexperience in capital cases. Yet, this was only a fraction of the mitigating evidence counsel failed to discover prior to making his decision to defend Elmore by presenting only weak evidence of Elmore's remorse. Nevertheless, the state court and Ninth Circuit both rejected Elmore's ineffectiveness claim without discussing most of the mitigating evidence presented in the state post-conviction proceeding. The Ninth Circuit decision disregards the well-founded constitutional duty to conduct a thorough mitigation investigation before making a decision about what evidence to present. After applying this rule, the Ninth Circuit fails to analyze or even acknowledge the mitigating evidence that counsel could and should have discovered.

The Ninth Circuit concluded that Elmore's counsel did not perform deficiently because he considered "what [he] perceived to be the relative strength of a remorse defense," and then "made the strategic decision to pursue this defense exclusively." 799 F.3d at 1250. "Once counsel reasonably selects a defense, it is not deficient performance to fail to pursue alternative defenses," citing *Rios v. Rocha,* 299 F.3d 796, 807 (9th Cir.2002). *Id.*[2]

B. The Ninth Circuit Decision Eliminates the Duty to Thoroughly Investigate

Elmore, supra, conflicts with nearly four decades of this Court's Eighth Amendment jurisprudence requiring a thorough mitigation investigation before making decisions about what evidence to present. And, as far back as *Strickland v. Washington,* 466 U.S. 668 (1984), this Court has held that only when counsel's judgments are informed by the results of a reasonable investigation may those judgments be fairly labeled "strategic."

In *Lockett v. Ohio,* 438 U.S. 586 (1978), this Court adopted an expansive definition of mitigation as including "any aspect of a defendant's character or

[2] While a decision to present a single guilt phase defense often makes sense, a decision to limit a penalty phase to one aspect of a defendant's background or character rarely does. Moreover, *Rios* does not hold that the decision to pursue an exclusive defense eliminates the need to investigate further. Instead, *Rios* held the decision to pursue an exclusive trial defense was "patently unreasonable" because "counsel failed to obtain the essential facts on which to decide whether to present a misidentification defense, an unconsciousness defense, or both." 299 F.3d at 807.

record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Subsequent cases reinforced that rule. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986). Consequently, competent capital trial counsel must make "a broad inquiry into all relevant mitigating evidence to allow an individualized determination" of the appropriateness of the death penalty. *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998).

A claim of strategy must be evaluated "in terms of the adequacy of the investigations supporting" it. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). This Court has emphasized that in preparing a death penalty mitigation case, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins*, 539 U.S. at 521 (quoting *Strickland v. Washington*, 466 U.S. at 691). The duty to conduct a thorough investigation of the defendant's background exists wholly apart from the strategic decision about what evidence to present in the mitigation case. *Wiggins*, 539 U.S. at 521-23.

This Court has previously held that counsel acts deficiently when counsel makes a trial strategy decision uninformed by an adequate investigation. In *Williams v. Taylor*,529 U.S. 362 (2000), this Court concluded that counsel's failure to uncover and present voluminous mitigating evidence could not be

justified as a tactical decision to focus exclusively on Williams' voluntary confessions, because counsel had not first "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." 529 U.S. at 396.

In *Wiggins*, this Court emphasized that the duty to investigate mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. 539 U.S. at 524. See also *Porter v, McCullum,* 558 U.S. 30 (2009) (counsel's failure to uncover and present evidence of Porter's mental health or mental impairment, his family background, or his military service was unreasonable); *Sears v. Upton,* 561 U.S. 945 (2010) (a theory might be reasonable in the abstract, but that does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced the defendant).

Here, Elmore's lawyer conducted no brain injury investigation, no rape-trauma investigation, no future dangerousness investigation, did not speak with people who were shocked that Elmore committed this crime, and even failed to conduct a thorough investigation of Elmore's remorse—the so-called exclusive defense. According to the holding of the Ninth Circuit, none of these failures to investigate was unreasonable. Once trial counsel made a decision to limit the penalty phase case, the duty to investigate was fulfilled. As a result, there was no

corresponding duty for a reviewing court to determine whether the failure to discover available mitigation was unreasonable, much less prejudicial.

C. The Ninth Circuit Decision Eliminates the Duty to Investigate Possible Rebuttal Evidence

This Court has also previously held that capital counsel acts unreasonably when he fails to investigate possible rebuttal. In *Rompilla v. Beard,* 545 U.S. 374 (2005), this Court held that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, counsel is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation.

In spite of that ruling, the Ninth Circuit further excused trial counsel's failure to investigate based on counsel's idle speculation about rebuttal. 799 F.3d at 1251. Because counsel's speculation relieved him of the duty to investigate, the Ninth Circuit did not feel compelled to note that an investigation revealed just the opposite of what trial counsel purportedly feared. If an investigation had been conducted into Elmore supposed waning remorse, counsel would have discovered that Elmore was not just "dejected," but that he was profoundly remorseful. As it was, counsel proceeded with unimpressive evidence of his exclusive defense when compelling, but uninvestigated evidence existed. But, the rule adopted by the Ninth Circuit eliminated any reason to discuss these facts.

D. Mr. Elmore's Death Sentence Was Allowed to Stand Without Consideration of the Facts

This Court should not allow Mr. Elmore's death sentence to stand on reasoning that conflicts so dramatically with this Court's precedential authority. When this Court granted certiorari and summarily reversed in *Porter*, it noted "there exists too much mitigating evidence that was not presented to now be ignored." 558 U.S. at 40. The same is true in this case. Like in *Porter*, Elmore's jury did not hear voluminous available, but uninvestigated mitigating evidence. That evidence should not be ignored any longer.

II. This Court Should Accept Review to Resolve Whether the Review Specified in *Richter* Applies to Reasoned State Court Decisions.

A. The Habeas Court Failed to Determine Whether the State Court's Harm Analysis Was Unreasonable

At both the direct appeal and post-conviction stages, the Washington Supreme Court found that Mr. Elmore's appearance in shackles before all his prospective jurors was unwarranted. On direct appeal, the state court found that Elmore's shackling constituted a due process violation (*Elmore,* 985 P.2d at 305), while in post-conviction, the Washington Supreme Court held that Elmore's counsel acted deficiently for not objecting to Elmore's unjustified shackling. *In re Elmore,* 172 P.3d at 348. However, the state court held that these violations did not prejudice Elmore and offered an explanation for its conclusions. 985 P.2d at 306-06; *id.*

Elmore challenged the state court's lack of prejudice holdings, contending they were unreasonable under the 2254(d) standard. The Ninth Circuit decision upholding the state court relies on a reason for lack of prejudice—the violent nature of the crime—that forms no part of the state court explanations for lack of prejudice.

This Court should grant certiorari to resolve the deepening split in authority between and in and the United States Circuit Courts of Appeals over whether AEDPA requires federal courts to give deference only to the "statement of reasons" in a reasoned state court decision or must instead give deference to the state court decision, based on reasons not included in the statement of reasons. It should also grant certiorari because the Ninth Circuit's made up reason about the "violent nature of the crime" conflicts with this Court's shackling precedents

B. There is a Deep Split of Authority on This Important Issue

The Sixth, Eighth and Ninth Circuit have concluded that AEDPA allows for review of the statement of reasons explaining the ultimate legal outcome. The First, Fifth, Seventh, and Eleventh Circuits have concluded that the word "decision" in AEDPA means the state court's ultimate legal outcome. In addition, intra-circuit splits now exist in both the Eighth and Ninth Circuits, deepening the split of authority.

Additionally, the question presented by this case is of great importance. Habeas review of state court convictions implicates Federalism. The question has national implications: nearly 20,000 petitions are filed in district courts across the country each year.

Furthermore, the Ninth Circuit's harm analysis is has turned this Court's precedent in *Deck v. Missouri*, 544 U.S. 622 (2005), on its head. The danger from shackles is increased—not decreased—when the crime involves a violent act, and especially when the jury must decide whether the defendant poses a future danger.

C. The State Court Decisions Provide Reasoning for Denying Elmore's Shackling Claims.

Direct Appeal

On direct appeal, the Washington Supreme Court found that Mr. Elmore's due process rights were violated because he was displayed in heavy and visible shackling before all of the prospective jurors for the entire first day of jury selection violated due process. The state court found no prejudice on the basis that the shackling was part of Elmore's trial strategy to show remorse and that the shackling was "self-imposed." 985 P.2d at 306. Although the direct appeal court found a constitutional error, it analyzed prejudice under the *Brecht* "more probable than not" standard rather than employing the *Chapman* standard that requires the State to show that the error was harmless beyond a reasonable doubt. *Id.* at 305.

State Post-Conviction

The Washington State Court reversed its position on the "self-imposed" nature of the shackling at the post-conviction stage. It ruled that trial counsel's failure to object to the shackles "fell below an objective reasonableness standard for counsel in a capital case." 172 P.3d at 348. However, the Court ruled that because Elmore had not thereafter been shackled and because his trial strategy was to show remorse, he could not establish prejudice. According to the state court, Elmore's shackling had a different impact than in other cases from Washington in which shackling had led to reversals. "[U]nlike the defendant in *Finch* [a Washington death penalty case reversing a conviction because the defendant had been shackled], Elmore's trial strategy was to demonstrate remorse and accept responsibility. This evidence was sufficient to offset any implication of dangerousness created by Elmore's appearance in shackles." *Id.* at 348.

At no point in either of its decisions, does the Washington State Court ever either explicitly or implicitly rely on the "violent nature of the crime" as a reason for not finding prejudice for Elmore's unjustified shackling.

D. The Ninth Circuit Decision Ignores the State Court Reasoning

The Ninth Circuit began its analysis by referring to the requirements of AEDPA, which it explains requires it to determine whether the state court decision was unreasonable. 799 F.3d at 1247. But the analysis and rationale actually

provided by the Ninth Circuit do not make this determination but instead involve the Ninth Circuit's own conclusion that the "violent nature of the crime" alleviates rather than exacerbates the harm flowing from shackling.

The "violent nature of the crime" underpins the Ninth Circuit's finding that Elmore did not suffer prejudice from his heavy, visible, and unjustified shackling. "We hold that Elmore cannot show prejudice from his shackling on the first day of voir dire because of the limited nature of the shackling and the violent nature of the crime." 799 at 1248. *See also id.* at 1249 ("As above, we conclude that the Washington State Supreme Court was not unreasonable in concluding that Elmore failed to show prejudice from his shackling because of the limited duration of the shackling and the violent nature of the crime."). [3]

At no point does the Ninth Circuit discuss or decide whether the Washington Supreme Court findings that Elmore was not prejudiced because his shackling was "self-imposed" or because it was part of a strategy to convey remorse were unreasonable. At no point does the Ninth Circuit discuss the use of the wrong prejudice standard by the Washington Supreme Court in its direct appeal decision. At no point does the Ninth Circuit discuss whether the Washington State Supreme

[3] Both the state court and the Ninth Circuit incorrectly conclude that Elmore's jurors saw him in court without shackles for lengthy periods of time. 985 P.3d at 305 (two weeks); 799 F.3d at 1248 (three weeks). In fact, jurors only saw Elmore without shackles for minutes when each was individually questioned and then for the 3 ½ days of trial.

Court's determination that trial counsel's deficient failure to object to the shackles did not prejudice Elmore because shackling conveys remorse was unreasonable. At no point does the Ninth Circuit discuss whether it is reasonable to conclude that shackles convey remorse when trial counsel fails to make that argument and no cautionary instruction is given by the court. Instead, the Ninth Circuit premises its finding of no prejudice with a reason—the violent nature of the crime—not included in the state court statement of reasons for denying relief.

E. The Ninth Circuit's Approach is Incorrect and Contrary to Precedent

The Antiterrorism and Effective Death Penalty Act of 1996 directs a federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims. Only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented," may a federal court grant habeas relief premised on a federal claim previously adjudicated on the merits in state court. 28 U. S. C. §2254(d).

Historically, this task has been straightforward. When the last state court to decide a claim has issued an opinion explaining its decision, a federal habeas court simply evaluates deferentially the specific reasons set out by the state court. *See*

e.g., *Porter v. McCollum*, 558 U. S. 30, 39–44 (2009); *Rompilla v. Beard*, 545 U.S. 374, 388–392 (2005); *Wiggins v. Smith*, 539 U. S. 510, 523–538 (2003).

The circuit courts are divided over whether *Harrington v. Richter,* 562 U.S. 86 (2011), changed the approach. *Richter* held that when confronted with a state court's summary denial, a habeas court must determine what arguments or theories "could have supported the state court's decision," and then ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." 131 S.Ct. at 786.

There was no state court reasoning to review in *Richter.* After *Richter,* the question is whether habeas review of a reasoned state court decision has changed. In *Richte*r, 562 U.S. at 98, this Court addressed the limited question "whether § 2254(d) applies when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." This Court ultimately held that "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* Critically, this Court went on to describe the federal habeas court's duty to "determine what arguments or theories supported or, as here, could have supported, the state court's decision." *Id*. at 102 (emphasis added). The "as here" referred to cases where, as in *Richter*, the state court had not provided a reasoned decision.

This Court's decisions issued after *Richter* demonstrate that this Court has not applied *Richter* in the manner adopted by the Ninth Circuit. In *Wetzel v. Lambert*, __ U.S.__, 132 S. Ct. 1195, 1198 (2012), which involved a reasoned state court decision, this Court intentionally used ellipses to remove the language "or could have supported" from its citation to *Richter*. *Id*. ("Under § 2254(d), a habeas court must determine what arguments or theories supported . . . the state court's decision.") (ellipses in original.) Moreover, this Court remanded the case with explicit instructions for the court to consider whether "each ground supporting the state court decision was reasonable." *Id.* at 1199; see also *Williams*, 529 U.S. at 386 ("In this respect, it seems clear that Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting their decisions."). As with cases prior to *Richter*, this Court did not instruct the court on remand to consider whether other theories could have supported the state court's decision.

Limiting federal court review to a state court's actual reasoning, when it is provided, is itself a form of deference, and other Supreme Court cases demonstrate that this is what federal courts are required to do under AEDPA. *See Burt v. Titlow*, __ U.S. __, 134 S. Ct. 10, 16-18 (2013) (examining state court reasoning and record in assessing reasonableness under 2254(d)); *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376 (2012) (holding state failed to examine relevant facts and evidence

under *Strickland* and rejecting dissent argument that the state court's reasoning could have been read to implicate the prejudice prong of *Strickland*, or could have been read to suggest that the petitioner had not met his burden on deficient performance, and thus should have been read that way).

This Court has repeatedly stressed that in habeas review, the courts must pay close attention to what the state courts decide and not, to instead, substitute their own (and in this case unfounded) views. "In this respect, it seems clear that Congress intended federal judges to attend with the utmost care to state-court decisions, including all of the reasons supporting the decisions." *Williams v. Taylor*, 529 at 386. By failing to heed this mandate, the Ninth Circuit has both failed to show deference to the state court reasoning and deprived Mr. Elmore of his right to a meaningful review of the state court decision.

The Ninth Circuit's approach renders §2254(d) analysis superfluous. There would be no need to analyze the reasonableness of a state court opinion if the reviewing court were free to determine the reasonableness of other arguments not considered or adopted by the state court. Congress surely meant to make the 2254(d) analysis meaningful, it nullifies Congressional intent to render it superfluous. Applying *Richter* as the Ninth Circuit did in this case would transform the goals of deference and comity into a federal court mandate to rewrite state court decisions. There is no support for such a mandate, and implementing this

approach would turn the habeas process into a rubber stamp for state court decisions.

F. There is a Need to Resolve a Deep and Increasing Circuit Split

Prior to *Elmore,* the Ninth Circuit held in *Frantz v. Hazey,* 533 F.3d 724, 739 (9th Cir. 2008):

> To identify a § 2254(d)(1) "contrary to" error, we analyze the court's actual reasoning, to the extent that the Supreme Court has dictated how a state court's reasoning should proceed. Identification of such an error is not the end of a federal habeas court's analysis, however, unless that identification necessarily means that the state court's determination of the ultimate constitutional or legal question is also wrong. Instead, pursuant to § 2254(a) and pre-AEDPA standards of review, we must also evaluate de novo the petitioner's constitutional claims, without limiting ourselves to the reasoning of the state court.

But, since *Franz* an intra-circuit split has developed. *See e.g., Mann v. Ryan,* 774 F.3d 1203, 1225 (9th Cir. 2014) (Kozinski, J., concurring in part, dissenting in part).

Review of the statement of reasons has also been the practice of the Sixth Circuit. *Rayner v. Mills,* 685 F.3d 631, 638-39 (6th Cir. 2012). In *Rayner,* the Sixth Circuit announced that, in their view, AEDPA affords deference to "claims" adjudicated on the merits in state court. *Id.* at 639. The Sixth Circuit then concluded that there is no conflict between their position and *Richter* because *Richter* applies only to summary decisions. *Id.* at 639. But, subsequent Sixth Circuit decisions conflict with *Rayner*. *Holland v. Rivard,* 800 F.3d 224 (6th Cir.

2015); *Davis v. Carpenter*, 798 F.3d 468 (6th Cir. 2015).

Most recently, the Eighth Circuit held that because the state court's conclusions relied on an unreasonable determination of the facts, § 2254(d) does not require adherence to that court's decision on this issue, and review is de novo. *Gabaree v. Steele,* 792 F.3d 991 (8th Cir. 2015). Until *Gabaree*, the Eighth Circuit followed a different rule. *See Williams v. Roper,* 695 F.3d 825, 831 (8th Cir. 2012) ("we examine the ultimate legal conclusion reached by the court not merely the statement of reasons explaining the state court's decision") (citation omitted).

Other circuits have concluded that the word "decision" in § 2254(d) means the ultimate legal outcome, not the statement of reasons. *See, e.g. Gill v. Mecusker,* 633 F.3d 1272, 1289-92 (11th Cir. 2011); *Hennon v. Cooper,* 109 F.3d 330, 334-35 (7th Cir. 1997) (holding that AEDPA mandates review of state court decisions because review of state court reasoning may lead to relief when the only error is "a failure of judicial articulateness."), *but see Sussman v. Jenkins,* 642 F.3d 532, 535-36 (7th Cir. 2001) (Ripple, J., in chambers); *Neal v. Puckett,* 239 F.3d 683, 696 (5th Cir. 2001) (en banc) ("It seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision"); *O'Laughlin v. O'Brien,* 568 F.3d 287, 300 (1st Cir. 2009) ("the question is not how well reasoned the state court decision

is, but whether the outcome is reasonable") (citation and quotation omitted); *Clements v. Clarke,* 592 F.3d 45, 55-56 (1st Cir. 2010) ("It is the result to which we owe deference, not the opinion expounding it").

This Court's certiorari review is appropriate to resolve these "discordant views" between and within the circuits. *United States v. Gaddis,* 424 U.S. 544, 547 (1976); *see also Scarborough v. United States,* 431 U.S. 563, 567 n. 4 (1977) (a split among the circuits and an intra-circuit split justified certiorari review).

G. This Question Presents an Issue of National Importance

This Court should also grant certiorari review on this question due to its national importance. The split in authority is not a split on a trivial aspect of AEDPA implementation. Instead, the split goes to the core of habeas corpus: *what* do federal courts review? Aside from the obvious impact on Elmore, the question presented affects federal district courts across the country. In 2014, there were 19,350 habeas corpus petitions filed in federal district court. Administrative Office of the United States Courts, *Statistical Tables for the Federal Judiciary, Judicial Business of the United States Courts*, 3 (December 31, 2014) *16 (Table C-2). The percentage of federal habeas petitions that receive merits review has likely increased after AEDPA's passage. *See* N. King, F. Cheeseman, & B. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts* 58 (2007). The disagreement on this issue needs to be resolved.

H. The Ninth Circuit's Reasoning Conflicts with *Deck*

In addition to resolving the circuit split, this Court should take review because the reasoning of the Ninth Circuit—that the violent nature of the crime lessens rather than exacerbates the prejudice from shackling—flouts this Court's precedent. *Deck v. Missouri, supra,* could hardly have been decided in Deck's favor if the violent nature of the crime was a reason to not find prejudice.

The Ninth Circuit does not even mention *Deck* in conjunction with its "violent nature of the crime" explanation. Nor does it cite any cases, whether from this Court or any of the federal circuit courts or the Washington Supreme Court, that support the notion that the more violent the crime the less shackles prejudice a capital defendant. There are numerous problems with this reasoning. First, all capital cases by definition involve violent crimes. Second, a determination of whether a capital defendant poses a future dangerousness often includes numerous other factors, including whether the defendant has been violent in the past, and especially whether he has been violent in custody.

Mr. Elmore asks the Court to grant certiorari, vacate the judgment, and remand with instructions to the court to perform the review of the actual state court decisions review that is mandated by 2254 (d) and this court's precedents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted:

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