No. _____

In the Supreme Court of the United States

MIKE BROWN, ACTING-WARDEN, PETITIONER

v.

ERVINE DAVENPORT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), the Court held that the test for determining whether a constitutional error was harmless on habeas review is whether the defendant suffered "actual prejudice." Congress later enacted 28 U.S.C. § 2254(d)(1), which prohibits habeas relief on a claim that was adjudicated on the merits by a state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Although the Court has held that the *Brecht* test "subsumes" § 2254(d)(1)'s requirements, the Court declared in *Davis* v. *Ayala*, 576 U.S. 257, 267 (2015), that those requirements are still a "precondition" for relief and that a state-court harmlessness determination under *Chapman* v. *California*, 386 U.S. 18 (1967), still retains "significance" under the *Brecht* test. The question presented is:

> May a federal habeas court grant relief based *solely* on its conclusion that the *Brecht* test is satisfied, as the Sixth Circuit held, or must the court also find that the state court's *Chapman* application was unreasonable under § 2254(d)(1), as the Second, Third, Seventh, Ninth, and Tenth Circuits have held?

PARTIES TO THE PROCEEDING

Petitioner, Mike Brown, is the Acting Warden where Respondent Ervine Davenport is currently held in custody. Duncan MacLaren, who previously was warden at the facility where Davenport was held, was appellee in the court below.

RELATED PROCEEDINGS

- *People* v. *Davenport*, Michigan Court of Appeals, Docket No. 287767, Opinion issued August 5, 2010 (affirming conviction).

- *People* v. *Davenport*, Michigan Supreme Court, Docket No. 141832, Order issued March 9, 2011 (reversing Michigan Court of Appeals judgment in part and remanding to trial court for evidentiary hearing).

- *People* v. *Davenport*, Kalamazoo County Circuit Court, Docket No. 07-0165, Opinion After Remand issued October 20, 2011 (finding no reversible error).

- *People* v. *Davenport*, Michigan Court of Appeals, Docket No. 306868, Opinion issued December 13, 2012 (affirming circuit court decision).

- *People* v. *Davenport*, Michigan Supreme Court, Docket No. 146652, Order issued July 3, 2013 (denying application for leave to appeal).

- *Davenport* v. *MacLaren*, United States District Court for the Western District of Michigan, Report and Recommendation issued November 7, 2016 (recommending that petition for writ of habeas corpus be denied).

- *Davenport* v. *MacLaren*, United States District Court for the Western District of Michigan, Opinion and Order issued September 26, 2017 (adopting report and recommendation and denying petition for writ of habeas corpus).

- *Davenport* v. *MacLaren*, United States Court of Appeals for the Sixth Circuit, Judgment issued June 30, 2020 (reversing district court and granting petition for writ of habeas corpus).

- *Davenport* v. *MacLaren*, United States Court of Appeals for the Sixth Circuit, Order issued September 15, 2020 (denying petition for rehearing en banc).

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JURISDICTION

The judgment of the court of appeals was entered on June 30, 2020. The order of the court of appeals denying the State's petition for rehearing en banc was entered on September 15, 2020. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States constitution provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

INTRODUCTION

Ervine Davenport was unconstitutionally shackled during his trial, at which a jury found him guilty of premeditated murder. All 12 jurors later testified that the shackling did not affect their verdict. Their decision, they said, was based on the evidence, which was highlighted by uncontroverted testimony that Davenport strangled a woman over a foot shorter and nearly 200 pounds lighter than he.

On direct appeal, the Michigan courts evaluated the juror's testimony and the evidence of guilt and found that the shackling error was harmless beyond a reasonable doubt. But the Sixth Circuit found those determinations irrelevant. So long as it makes an independent finding on habeas review that Davenport was prejudiced, the court held below, the State must retry him for his heinous crime nearly 14 years ago.

The independent test that the Sixth Circuit used —from *Brecht* v. *Abrahamson*—is certainly a demanding one. But it takes no account of the deference due state court decisions that Congress commanded when it enacted 28 U.S.C. § 2254(d) a few years after *Brecht*. And it conflicts with this Court's analysis in *Davis* v. *Ayala*, where this Court stated that AEDPA forms a "precondition" to relief and retains "significance" when reviewing a state court's harmless-error finding.

Not only does the Sixth Circuit's *Brecht*-only approach contradict AEDPA and *Ayala*, it also creates a circuit split. The Second, Third, Seventh, Ninth, and Tenth circuits have all required that a federal habeas court must determine whether AEDPA's deferential limitations have been overcome before granting relief.

Even the Sixth Circuit is fractured here—it denied rehearing en banc in an 8-to-7 vote.

The requirement that a federal habeas court must independently examine the state court's harmless-error finding before addressing *Brecht* is a meaningful restraint. It not only respects the state court by examining the court's analysis on the very issue, it requires the federal court to conclude that the state court's harmless-error analysis was an "extreme malfunction," as explained in *Harrington* v. *Richter*, 562 U.S. 86, 102 (2011), before granting relief. This step restrains the federal court from the all-too-tempting wish to review de novo and inadvertently reduce the threshold necessary for granting relief. Review under AEDPA is legally necessary and practically valuable.

Taking a *Brecht*-only approach to this case, the Sixth Circuit restricted the state court's application of *Chapman*'s general harmless-error standard, extended this Court's prohibitions on considering pretrial juror assumptions to posttrial juror observations, and relied on circuit precedent and extra-judicial resources to conclude that habeas relief was warranted. Those are all practices that AEDPA forbids. Had the court appropriately applied AEDPA's highly deferential standard, it would have reached an unmistakable conclusion: the Michigan courts did not unreasonably apply *Chapman* by denying Davenport relief.

The Sixth Circuit's decision below conflicts with AEDPA. It conflicts with *Ayala*. It creates a circuit split. And it offers an ideal vehicle for review because this circuit's failure to apply AEDPA to the facts and circumstances of this case affected its decision. The Court should grant this petition.

STATEMENT OF THE CASE

Ervine Davenport killed Annette White. He admitted it. His jury rejected his self-defense claim at trial and found him guilty of first-degree premeditated murder.

The trial

The prosecution presented a strong case. Davenport had bragged that, if he had a problem with someone, he would choke them. App. at 4a–5a. And days before the murder, he did just that—he strangled a woman until she lost consciousness and urinated on herself. App. at 121a. Davenport later admitted to killing White, saying he "offed her." App. 5a. Davenport also went to White's home after the murder and stole property. App. at 120a–121a. When the police questioned him, he gave three stories: first, that he knew nothing about White's death; second, that he helped dispose of her body but that another person had killed White; and third, that he had killed White in self-defense. See App. at 5a n.1.

A forensic pathologist examined White's body and opined that she died of manual strangulation. See App. at 4a. The pathologist explained that a strangled victim could lose consciousness after 30 seconds. *Id.* But death does not occur until the victim is without air for at least four to five minutes. *Id.*

At trial, Davenport explained that he and White had been using cocaine, after which he drove her home. App. at 3a. She became agitated and tried to grab the steering wheel, but Davenport pushed her

back. *Id*. He claimed that White then pulled out a box cutter and cut his arm. *Id*.

So Davenport extended one arm and pinned her back against the passenger side of the car, with his hand under her chin. *Id*. He said that White dropped the box cutter but tried to kick him, so he kept his arm extended across her neck. See App. at 88a. Davenport eventually noticed that White had stopped struggling. App. at 3a. Discovering that she was no longer breathing, he panicked and left her body in a field. *Id*.

Davenport's testimony was significantly undermined at trial. Although the police found a box cutter in the trunk of his car, no blood was found on the tool. App. at 89a. Also, the prosecution elicited from Davenport that he repeatedly lied to the police. See App. at 90a. He even testified: "[I]t's not gonna help me any to tell the truth." App. at 67a. And during rebuttal, the forensic pathologist testified that Davenport's version of events was not possible. App. at 4a. White's injuries were on both sides of her neck, consistent with strangulation and inconsistent with broad force being applied across the front of her neck. *Id*.

Direct appeal

Davenport appealed and argued that he was unconstitutionally shackled during his trial and that the trial court had not made any findings regarding the need for shackles. The Michigan Court of Appeals found error but determined that it was harmless; however, the Michigan Supreme Court remanded the case to the trial court for an evidentiary hearing to determine whether Davenport was prejudiced by the shackling. See App. at 95a–96a.

On remand, the trial court heard testimony from all 12 jurors. "Only five jurors testified that they observed defendant's shackles during trial. While some of the jurors remembered a comment being made about the shackling from one of the jurors, all 12 jurors testified that defendant's shackles were not discussed during deliberations and did not influence the verdict." App. at 96a. The trial court found that the prosecution had proved beyond a reasonable doubt that the shackling did not affect the jury's verdict. See *id*.

Davenport appealed again. The Michigan Court of Appeals discussed the jurors' testimony in detail. App. at 97a–98a. It found that "[a]ll of the evidence indicated that the shackling did not affect the verdict in any way." App. at 98a. Though three jurors testified that they believed Davenport might be dangerous, the appellate court found that all three explained that this belief was based on the first-degree murder charge itself, not the shackling. *Id*. The court also found that "it was proper for the jurors to testify regarding how viewing the shackles affected their deliberations." App. at 99a. Ultimately, the court held that "[t]he trial court did not err in finding that the prosecution proved beyond a reasonable doubt that the shackling error did not affect the verdict." App. at 100a. The Michigan Supreme Court subsequently denied Davenport's application for leave to appeal. It explained that although the Michigan Court of Appeals had erred by failing to apply *Holbrook* v. *Flynn*, 475 U.S. 560, 570 (1986), that "error was harmless under the facts of this case." App. at 93a–94a.

Federal habeas proceedings

Davenport sought federal habeas relief on his shackling claim. Magistrate Judge Ellen S. Carmody recommended that the district court deny habeas relief. App. at 91a–92a. In doing so, Judge Carmody discussed the evidence of Davenport's guilt along with the juror's testimony at the evidentiary hearing and found that the state courts' harmlessness determination did not meet AEDPA's stringent requirements. App. at 87a–91a. Judge Janet T. Neff adopted the report and recommendation and denied habeas relief. App. at 76a.

In a 2-to-1 decision, a panel of the Sixth Circuit reversed. The majority rejected the argument that, before granting relief, a habeas court must find actual prejudice under the *Brecht* test *and* conclude that the state court's decision was an unreasonable application of clearly established federal law under AEDPA. App. at 10a. Instead, noting that "the *Brecht* standard 'subsumes' AEDPA's unreasonableness inquiry," the majority held that " '*Brecht* is always the test' " and a habeas court need not also ask whether the state court's decision was unreasonable. App. at 10a (quoting *Ruelas* v. *Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009)). Finding only that Davenport was actually prejudiced, without reference to the state court's contrary opinions, the majority ruled that the error was not harmless and granted relief. See App. at 38a.

Judge Readler dissented. He found that a habeas court must engage in both inquiries when assessing the harmlessness of a constitutional error. App. at 39a–40a. Failing to do so, the opinion reasoned, contradicts *Ayala* and left the Sixth Circuit "stand[ing]

alone as the only Circuit to award habeas relief without expressly applying the requirements of both *Brecht* and AEDPA." App. at 41a (citing *Reiner* v. *Woods*, 955 F.3d 549, 556–57 (6th Cir. 2020) and noting that it "recogniz[ed] a 'colorable argument' that *Ruelas* and its progeny are incorrect in light of *Ayala*"). The dissent found that the state court harmless-error determinations did not run afoul of AEDPA and habeas relief was not warranted. See App. at 63a–64a.

The State filed a petition for rehearing en banc, arguing that the panel majority applied the wrong standard for reviewing a state court's harmless-error determination. The Sixth Circuit denied rehearing by an 8-to-7 vote. In a dissenting opinion, Judge Thapar (joined by five other judges) rejected the approach taken in the majority panel opinion.[1] According to Judge Thapar, that approach—that "federal judges can simply ignore AEDPA's guardrails whenever they find that a petitioner has suffered actual prejudice under *Brecht*"—"casts aside AEDPA and misinterprets Supreme Court precedent." App. at 119a. To demonstrate why application of AEDPA deference is required even if the *Brecht* test is met, Judge Thapar discussed the differences between the two standards: AEDPA prohibits extending Supreme Court precedent, it prohibits relying on circuit precedent, it gives state courts broad discretion when applying a general standard from the Supreme Court, and it prohibits considering evidence from outside the state court

[1] In a separate dissenting opinion, Judge Griffin also rejected the approach taken by the majority panel opinion. App. at 114a–118a.

record—the *Brecht* test does not require adhering to these clear rules. App. at 129a–133a. "Jettisoning these clear, rule-based requirements will make appellate review in habeas cases more difficult and unpredictable." App. at 133a (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989)). And doing so in this case, Judge Thapar said, shows why application of AEDPA deference would have required a different result. See App. at 132a. Judge Thapar also highlighted the "deepening split among the various federal Courts of Appeals" App. at 133–135a.

Additionally, Judge Sutton (joined by Judge Kethledge) wrote a separate concurring opinion expressing that he was skeptical that the panel majority applied the correct standard. App. at 109a–114a. He nevertheless voted to deny rehearing, in part because of his belief that it would be "inefficien[t]" to do so given that this Court has the "final" say on the matter. App. at 114a; see also *id.* (". . . Not only are we fallible, *we are not final either*." (emphasis added)).

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's *Brecht*-only approach conflicts with AEDPA and with the Court's analysis in *Ayala*.

By applying the *Brecht* standard without any regard to the analysis employed by the state courts, the Sixth Circuit's decision conflicts with both AEDPA and *Davis* v. *Ayala*.

In *Ayala*, the Court noted that the test for determining whether a constitutional error was harmless on habeas review is the *Brecht* standard—whether there is "grave doubt" that the error had "substantial and injurious effect or influence in determining the jury's verdict." 576 U.S. at 267–68. But *Ayala* reaffirmed that "AEDPA nevertheless 'sets forth a precondition to the grant of habeas relief,' " meaning that relief cannot be granted unless the state court unreasonably applied the harmless-error standard prescribed in *Chapman* v. *California*, 386 U.S. 18, 24 (1967). *Ayala*, 576 U.S. at 268. Though reiterating that both tests need not be formally applied, the *Ayala* Court focused on the standards outlined in both tests and determined that the prisoner could not meet *Brecht* nor could he show that the state court's determination was an unreasonable application of Supreme Court precedent. *Id.* at 270–86.

When seeking federal habeas corpus relief, it is undoubtedly true that the prisoner "must meet the *Brecht* standard." *Id.* at 268. Yet *Ayala* added an important caveat—"but that does not mean, as the Ninth Circuit thought, that a state court's harmlessness determination has no significance under *Brecht*." *Id.*

Despite this Court expressly disapproving the Ninth Circuit's disregard of a state-court harmlessness ruling, the Sixth Circuit made the same mistake here.

The Sixth Circuit ignored *Ayala*'s analysis and instead focused on a single clause within its 29-page opinion: "[I]f the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA." *Id.* at 270. According to the Sixth Circuit, this language gives a habeas court license to ignore AEDPA altogether. But *Ayala*'s lengthy outline of AEDPA's limitations and its application of the AEDPA/*Chapman* standard to the case at hand refute the Sixth Circuit's interpretation of that lone passage.

As support, the Sixth Circuit pointed to its own (pre-*Ayala*) precedents. App. at 10a–11a. Those precedents, in turn, focused on a statement in *Fry* v. *Pliler*, 551 U.S. 112, 120 (2007)—the *Brecht* standard "obviously subsumes" AEDPA/*Chapman*. App. at 10a–11a. But the Court in *Fry* assumed that there was no state court harmlessness determination in the case at hand, *Fry*, 551 U.S. at 116 n.1, meaning AEDPA deference was not relevant to its decision. The petitioner had argued that an earlier decision, *Mitchell* v. *Esparza*, 540 U.S. 12 (2003)—which applied AEDPA/*Chapman* and not *Brecht*—implied that AEDPA had eliminated the need to apply *Brecht* on habeas review. *Fry*, 551 U.S. at 119. *Fry* explained why it was not necessary for *Esparza* to apply the *Brecht* standard after finding that AEDPA/*Chapman* had not been met. *Id.* at 119–120. It reasoned that "it is implausible that, without saying so, AEDPA replaced the *Brecht* standard of actual prejudice with the more liberal AEDPA/*Chapman* standard." *Id.* (internal quotations, citations omitted).

But *Fry* made clear that it was deciding a very limited question: "whether *Brecht* or *Chapman* provides the appropriate standard of review when constitutional error in a state-court trial is first recognized by a federal court." *Id.* at 120. It had no reason to decide the standard—or standards—applicable when a *state* court recognizes an error but finds it harmless.

Ayala recognized *Fry*'s limits: "The *Fry* Court did not hold—and would have had no possible basis for holding—that *Brecht* somehow abrogates the limitation on federal habeas relief that § 2254(d) plainly sets out." *Ayala*, 576 U.S. at 268. Thus, while reiterating that "the *Brecht* test subsumes the limitations imposed by AEDPA,"—meaning *Brecht* cannot be met if AEDPA has not been met—it clarified that AEDPA's limitations still must be overcome before relief is granted.

True, AEDPA's limitations need not be *formally* applied, but the Sixth Circuit below expressly acknowledged that it did not consider the state court decisions *at all*, opining instead that the *Brecht* test does that work for them. App. at 11a (Stranch, J., majority opinion) ("a habeas court may [also] go straight to *Brecht*") (internal quotes and citation omitted). The panel dissent explained why this approach is wrong:

> . . . AEDPA requires a federal habeas court to assess whether Supreme Court precedent put a state court on notice of precise constitutional limitations. *See Yarborough*, 541 U.S. at 665. *Brecht*, on the other hand, writes largely on a clean slate.

> Unchecked by then-existing Supreme Court precedent, *Brecht* simply asks a federal habeas court to assess the prejudice arising from an alleged error. And that distinction can make all the difference. A habeas claim alleging a deeply prejudicial trial error may easily clear *Brecht*'s "actual prejudice" bar. But the claim may nonetheless fail AEDPA's comity-inspired requirements if the reviewing court must create new law or extend existing Supreme Court precedent to find underlying legal error, or that the error was not harmless. *Id*. at 666.

App. at 49a–50a (Readler, J., dissenting) (paragraph break added).

As Judge Readler has aptly explained, AEDPA's standard requires a federal court to defer to a state court's determination; it may displace a sovereign jurisdiction's "good-faith attempt[ ] to honor constitutional rights" only if it contravenes or unreasonably applies holdings of this Court. See *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). The *Brecht* test, though certainly a high one, does not contain those requirements; a federal habeas court may extend holdings of this Court, look at circuit precedent, and consider extra-judicial resources. See App. at 129a–133a (Thapar, J., dissenting) (discussing practices that are appropriate under *Brecht* but prohibited under AEDPA). So long as a court independently concludes that it is in "grave doubt" as to an error's impact on the verdict, it must grant habeas relief. *O'Neal* v. *McAninch*, 513 U.S. 432, 435 (1995).

But applying *Brecht*, without more, fails to give effect to AEDPA's purpose of ensuring "that state-court decisions be given the benefit of the doubt." See *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002). This is the chief failing of relying on *Brecht* alone. The Sixth Circuit's *Brecht*-only approach is incompatible with *Ayala* and with AEDPA. The Court should grant this petition.

II. The Sixth Circuit's *Brecht*-only approach creates a split with the Second, Third, Seventh, Ninth, and Tenth circuits.

Five circuits have rejected the Sixth Circuit's *Brecht*-only approach. These circuits require a review of a state-court's harmless-error determination under AEDPA before habeas relief may be granted.

Start with the Second Circuit. In *Orlando* v. *Nassau County District Attorney's Office*, the court noted that, "[w]hen a state court makes a harmless error determination on direct appeal, we owe the harmlessness determination itself deference under [AEDPA]." 915 F.3d 113, 127 (2d Cir. 2019) (internal quotations omitted). *Id*. Only because the state court did not make a harmlessness determination in the case at hand did the Second Circuit apply the *Brecht* test. A 2019 unpublished decision fully captures the point:

> Although the district court correctly inquired as to whether the error at [the petitioner]'s trial yielded a "substantial and injurious effect or influence" on the jury verdict, *recent Supreme Court precedent required more*.

> Specifically, *the inquiry requires considering whether the state courts' harmlessness determinations were unreasonable*. . . . [T]he district court "appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review" and thus "overlook[ed] arguments that would otherwise justify the state court's result."

Spencer v. *Capra*, 788 F. App'x 21, 23 (2d Cir. 2019) (emphasis added, and paragraph break added) (citing *Ayala*, and quoting *Harrington* v. *Richter*, 562 U.S. at 102).

The Third Circuit has also rejected a *Brecht*-only approach. In a post-*Ayala* case, the court discussed the impact that this Court's decision had on this question and required that the court "defer" to the state court's determination:

> In *Davis* v. *Ayala*, the Court confirmed that the *Brecht* standard still governs our harmless error analysis on collateral review. However, where a state court has concluded that the error was harmless on direct review, *the Supreme Court clarified that we must defer to that determination under AEDPA* unless the state court unreasonably applied *Chapman* v. *California*.

Johnson v. *Lamas*, 850 F.3d 119, 133 (3d Cir. 2017) (footnotes and citations omitted; and emphasis added).

In a more recent decision, the Third Circuit underscored the importance of applying AEDPA deference to a state-court's harmless-error analysis. In *Johnson* v. *Superintendent Fayette SCI*, the court noted that the state court had not conducted a harmless-error analysis, and it found actual prejudice under the *Brecht* test. 949 F.3d 791, 798–99, 804 (3d Cir. 2020). The court then referenced *Johnson* v. *Lamas* and explained why that precedential opinion did not compel a different result. *Id*. at 804. Despite the similarity of the errors, the state court in *Lamas* had undergone a harmless-error analysis, meaning that AEDPA deference applied. *Id*. A finding of harmlessness in *Lamas* was compelled by the different standard of review. *Id*. In the case at bar, the court contrasted, the harmless-error question was reviewed *de novo* under *Brecht*. *Id*. By implication, the court reiterated its conclusion in *Lamas* that AEDPA is a separate standard that could necessitate a different outcome than that reached under a *Brecht*-only approach.

The Seventh Circuit first grappled with this issue before *Ayala* was decided. In *Johnson* v. *Acevedo*, the court noted that the "harmless-error question has some difficulties" before discussing the two competing approaches. 572 F.3d 398, 403 (7th Cir. 2009). At the time, two decisions seemingly governed the answer—*Esparza* and *Fry*. The Seventh Circuit first focused on the pronouncement in *Esparza* that " 'habeas relief is appropriate only if the [State] Court of Appeals applied harmless-error review in an "objectively unreasonable" manner.' " *Acevedo*, 572 F.3d at 404 (quoting *Esparza*, 540 U.S. at 18). The court then looked to *Fry*, asking whether the decision held that the *Brecht* test is the only applicable test for all collateral attacks. *Id*.

The Seventh Circuit rejected that interpretation because the issue in *Fry* was merely the standard to apply when a state court did *not* conduct a harmless-error analysis. *Id.*; see also *supra* at 11–12. The court ultimately outlined its approach, which reviewed the reasonableness of the state court's analysis on harmlessness:

> If the state court has conducted a harmless-error analysis, *the federal court must decide whether that analysis was a reasonable application of the* Chapman *standard*. If the answer is yes, then the federal case is over and no collateral relief issues. That's the holding of *Esparza*. If the answer is no—either because the state court never conducted a harmless-error analysis, or because it applied *Chapman* unreasonably—then § 2254(d) drops out of the picture and the federal court must make an independent decision, just as if the state court had never addressed the subject at all. And we know from *Fry* that, when this is so, a federal court must apply the *Brecht* standard to determine whether the error was harmless. . . .

Acevedo, 572 F.3d at 404 (emphasis added).

Post-*Ayala*, the Seventh Circuit still uses this approach. In *Welch* v. *Hepp*, the court pointed out *Ayala*'s requirement that actual prejudice under *Brecht* be shown, but it stated that, because the state court in the case at bar conducted a harmless-error analysis, "[t]hat determination is subject to deference." 793 F.3d 734, 738 (7th Cir. 2015). The *Welch* court went on to discuss the reasonableness of the

state court's analysis, ultimately denying relief. *Id.* at 739. And in *Richardson* v. *Griffin*, the Seventh Circuit again addressed a habeas claim by asking whether a state court's harmless-error analysis overcame AEDPA's deferential standard of review. 866 F.3d 836, 841 (7th Cir. 2017). The *Richardson* court found that the state court's analysis was contrary to *and* an unreasonable application of clearly established federal law because the state court had not applied the *Chapman* standard in its harmless-error analysis. *Id.* at 844. Only then did the Seventh Circuit go on to discuss whether the petitioner was actually prejudiced under *Brecht*.[2] *Id.* at 844–45.

A recent decision from the Ninth Circuit similarly reflects this approach. After finding a due-process violation under *Darden* v. *Wainwright*, 477 U.S. 168 (1986), the Ninth Circuit in *Ford* v. *Peery* determined that the *Darden* violation necessitated a finding of actual prejudice. 976 F.3d 1032, 1044 (9th Cir. 2020). Nevertheless, the court found it necessary to also ask whether the state court's harmless-error determination was unreasonable under *Chapman*. *Id.* at 1044–45. After finding *both* standards met, the court granted habeas relief. *Id.* at 1045.

The Tenth Circuit takes a similar approach. In *Malone* v. *Carpenter*, the court said that "satisfaction of the AEDPA/*Chapman* standard is a *necessary* condition for relief." 911 F.3d 1022, 1030 (10th Cir. 2018).

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[2] But see *Czech* v. *Melvin*, 904 F.3d 570, 577 (7th Cir. 2018). Although the court in *Czech* focused only on the *Brecht* test, it determined that there was no actual prejudice, so it had no reason to address whether AEDPA was necessarily met after succeeding under *Brecht*.

The Tenth Circuit then found that the state court's harmless-error determination was not an unreasonable application of Supreme Court precedent. *Id.* at 1031–37. It only reached *Brecht* in a one-sentence analysis that it said it would have employed if it alternatively were to accept the argument that the state court applied the wrong harmless-error standard. *Id.* at 1037. Thus, the Tenth Circuit applies *Brecht* only if the state court's harmless-error analysis was unreasonable.

The Sixth Circuit acknowledged many of these decisions from its sister circuits but nevertheless found no conflict. According to the court, that some courts choose to perform a harmless-error analysis under both standards does not mean that they have rejected a *Brecht*-only approach. See App. at 25a–27a (finding that, even though a federal habeas court may choose to apply both tests, "it is not necessary" because a *Brecht*-only approach encompasses both). But no identified decision—except the one below—has indicated that the application of AEDPA before granting habeas relief was merely an option.[3]

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[3] The panel majority argued that the Ninth Circuit has found that analysis under AEDPA is optional, citing *Hall* v. *Haws*, 861 F.3d 977, 992 (9th Cir. 2017). App. at 22a–23a. But despite saying that it "need not apply both" tests, the *Hall* court nevertheless *did* go on to "separately analyze the state court's harmless error determination under AEDPA/*Chapman*." *Hall*, 861 F.3d at 992. And, regardless, as discussed above, the same circuit three years later expressly applied the AEDPA/*Chapman* standard *after* already finding actual prejudice under *Brecht*. *Ford*, 976 F.3d at 1044–45. And even if the Sixth Circuit were correct, it would just mean that it is a four-to-two circuit split, rather than a five-to-one split.

Indeed, performing an optional analysis that requires detailing the reasoning behind a state court opinion and contrasting it with this Court's holdings would be an unnecessary waste of time and resources if it was understood that the case was won or lost under *Brecht*. In other words, a court's decision to stop its discussion after finding the *Brecht* test unsatisfied says nothing about whether it employs the Sixth Circuit's express *Brecht*-only approach.

The Sixth Circuit also pointed out that none of its sister-circuit decisions had undergone an analysis under AEDPA after finding actual-prejudice existed under *Brecht*. But that is because none of those cases found actual prejudice under *Brecht*. Because the failure to meet either standard precludes relief—as *Ayala* says—it would make little sense to perform a second test after the first fails.[4] Conversely, the Sixth Circuit fails to appreciate that none of these circuits have *granted* habeas relief before making an explicit determination regarding the reasonableness of the underlying state-court decision. Put differently, each of these circuits acknowledges that habeas relief may be *denied* solely under the *Brecht* test, but habeas relief may not be *granted* unless AEDPA's deferential standard is also met.

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[4] See App. at 23a (Stranch, J., majority opinion) (pointing to an unpublished decision, *Wharton* v. *Vaughn*, 722 F. App'x 268, 277 (3d Cir. 2018), for its proposition that the Third Circuit applies a similar *Brecht*-only approach, but failing to recognize that the decision merely limited its harmless-error inquiry to the *Brecht* test because *no actual prejudice was found*, see *id*. at 278; it thus had no reason to subsequently apply AEDPA and is entirely consistent with the State's argument).

Simply put, *Ayala* instructed federal courts that AEDPA forms a "precondition" to habeas relief and fully applies to state-court harmlessness determinations. 576 U.S. at 268 (internal quotation omitted). The Second, Third, Seventh, Ninth, and Tenth circuits have all recognized that this instruction demands a deferential review of a state court's harmless-error determination. The Sixth Circuit below, in contrast, reasoned that no deferential inquiry is necessary. Because there is a circuit split, the Court should grant the petition.

III. As stated by Judge Thapar in his en banc dissent, this case presents an "ideal vehicle" to resolve the conflict over federal review of state-court harmlessness rulings in habeas.

The question presented was squarely raised to the Sixth Circuit. It was fully analyzed in a panel majority opinion, a dissenting opinion, and competing opinions of an almost equally divided circuit when deciding whether to rehear the case en banc. And this case exemplifies why the differences between the Brecht test and AEDPA's highly deferential standard are important.

A. The Sixth Circuit relied on circuit precedent and social-science studies to find harmful error.

In finding actual prejudice under *Brecht*, the Sixth Circuit relied on authority that cannot be considered under AEDPA's standard.

When discussing whether the evidence against Davenport could prove the shackling error harmless, the court relied in part on *Ruimveld* v. *Birkett*, 404 F.3d 1006, 1016 (6th Cir. 2005), one of its own precedents that found actual prejudice stemming from a shackling error and that affirmed a habeas grant. App. at 23a–24a, 32a. But such a comparison of lower federal court cases is not allowed when performing an analysis under AEDPA. The Court has warned lower courts time and again that "circuit precedent does not constitute clearly established Federal law, as determined by the Supreme Court." *Kernan* v. *Cuero*, 138 S. Ct. 4, 9 (2017) (internal quotations omitted).

The Sixth Circuit repeated its mistake when rejecting the argument that the juror testimony supported a harmless-error finding. Pointing out that the Ninth Circuit had found that a shackling error was not harmless in a similar case (though the juror testimony in that case occurred during habeas proceedings, not in the state courts), the court relied on it to show that the *Brecht* test was met here. App. at 37a–38a (quoting *Rhoden* v. *Rowland*, 172 F.3d 633, 637 (9th Cir. 1999)). Never did the Sixth Circuit determine whether *this* Court's precedents prohibit a state court from finding harmless error when all 12 jurors explicitly disclaim any effect caused by the shackling.

And to further discredit the jurors' explicit testimony, the Sixth Circuit relied on "a voluminous body of social-science research." App. at 34a. The court attempted to cloak its reliance on this extra-judicial research by stating that it "merely provides further support for the Supreme Court's determination" in *Flynn* that shackling is "inherently prejudicial." App. at 35a.

But that statement is hard to reconcile with the Sixth Circuit panel majority's footnote inserted just three lines earlier where it explicitly relied on a 2019 study to buttress its conclusion that shackling Davenport created a presumption of dangerousness and guilt because he is "a 6′5″ tall black man weighing approximately 300 pounds." App. at 34a n.13. This race and size component to the shackling harmless-error determination has no support in the record and is found nowhere in Supreme Court precedent.

The Sixth Circuit's actual-prejudice analysis in this case wholly circumvented the reins that AEDPA places on habeas review. Judge Thapar explained why this case demands further review:

> . . . [T]he differences between *Brecht* and AEDPA matter. If AEDPA applies, the panel decision is plainly erroneous since it extends Supreme Court precedent, relies on circuit precedent, creates a new standard for harmless-error review in the shackling context, and introduces evidence not presented in the state court proceedings. Thus, this case presents an *ideal vehicle* for clarifying the relationship between *Brecht* and AEDPA.

App. 133a (Thapar, J., dissenting) (emphasis added; internal citation omitted). Put simply, because applying both standards in this case would have changed the panel majority's decision here, this case is an ideal vehicle to clarify a recurring problem in habeas cases.

B. The Sixth Circuit extended this Court's decision in *Holbrook* v. *Flynn*.

The Sixth Circuit also found that the state court improperly relied on the juror testimony because "the Supreme Court has made clear that jurors' subjective testimony about the effect shackling had on them bears little weight." App. at 34a. But this Court has adopted no such holding.

In *Holbrook* v. *Flynn*, this Court reviewed whether the presence of uniformed state troopers in the courtroom for security was so "inherently prejudicial" so as to deny a fair trial. 475 U.S. at 562, 569. It noted that many of the prospective jurors were asked about the troopers' presence during *voir dire* and the trial court found that the answers indicated that the troopers' presence did not create an inference of guilt. *Id*. at 565. Finding the "assessment of jurors' states of mind cannot be dispositive here," the Court said "[e]ven though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." *Id*. at 570. But this did not foreclose the approach taken here by the state courts for two reasons.

First, the juror testimony in *Flynn* occurred *before* trial, see *id*. at 565, where they were asked to explain the effect the troopers' presence *might* have. As Judge Thapar put it: "That is a far cry from post-trial testimony from jurors about how shackling actually affected their verdict." App. at 129a. Indeed, part of *Flynn*'s reasoning rested on the fact that the jurors could "only speculate on how they will feel after being exposed to a practice daily over the course of a long trial." 475 U.S. at 570.

Here, the jurors did not need to speculate—they had already been exposed to the shackling error and could assess the impact it had on their verdict. The Sixth Circuit therefore had to extend *Flynn*, an action that is prohibited by AEDPA. See *White* v. *Woodall*, 572 U.S. 415, 426 (2014) ("Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error.").

Second, *Flynn*'s discussion of the jurors' testimony was limited to whether there was an underlying constitutional violation. 475 U.S. at 570. This Court ultimately found that there was no violation because the troopers' presence was not "inherently prejudicial." *Id*. at 570–71. It thus had no reason to employ a harmless-error analysis. Although juror testimony cannot be considered when determining whether a courtroom security practice is "inherently prejudicial," it does not necessarily follow that juror testimony cannot be considered when determining whether that practice amounted to harmless error.

Here, it is uncontroverted that Davenport's shackling was "inherently prejudicial" and was error: the question was whether that error was harmless. Because neither *Flynn*, nor any other Supreme Court precedent, prohibits consideration of juror testimony in answering that question, the Michigan courts' consideration of the jurors' post-trial testimony was well within the range of reasonable jurisprudence.

By extending *Flynn* beyond its holding, the Sixth Circuit's *Brecht*-only approach failed to appreciate the limits imposed by AEDPA.

C. The Sixth Circuit failed to give substantial leeway to the state court's application of the *Chapman* standard.

Under AEDPA, lower federal courts cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced." *Marshall* v. *Rodgers*, 569 U.S. 58, 63 (2013) (per curiam) (citation omitted). So, when "evaluating whether a rule application was unreasonable," a habeas court must "consider[ ] the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004).

The rule at issue here is a general one—*Chapman*'s harmless-beyond-a-reasonable-doubt standard. Although *Deck* v. *Missouri* provided a framework for identifying a shackling error, it did *not* discuss how to analyze such an error under the *Chapman* standard. 544 U.S. 622, 635 (2005). Thus, the general principles announced in *Chapman* are all that guide a federal court's review of a state court's determination that a shackling error was harmless.

Taking its *Brecht*-only approach, the Sixth Circuit failed to explain why the Michigan court determinations fell outside the substantial leeway it was allowed in applying *Chapman* to the facts. The Michigan Court of Appeals found that all of the jurors who observed Davenport in shackles "believed that there was nothing unusual" about it and that "every juror testified that defendant's shackles were not discussed during jury deliberations and that the verdict was based solely on the evidence presented at trial." App. at 98a.

The state court concluded that the error was harmless beyond a reasonable doubt. *Id*. In its analysis, the court also noted that, although several jurors testified that they believed that Davenport was dangerous, each testified that their belief was based on the first-degree murder charge itself, not the shackling. *Id*.

Finally, the state court noted that its harmlessness finding was buttressed by the fact that there was overwhelming evidence of Davenport's guilt. App. at 99a n.2. Then, in denying leave to appeal, the Michigan Supreme Court said that the juror testimony should have been evaluated differently, but it too held that "the substantial evidence of guilt presented at trial" rendered any error harmless. App. at 93a–94a.

Instead of considering the reasonableness of this approach and analyzing whether it contravened *Chapman*, the Sixth Circuit reviewed the harmlessness inquiry de novo. It set forth a lengthy dissertation on the difference between first- and second-degree murder, applying its interpretation of Michigan law to its own independent balancing of the facts. App. 28a–33a. While a state court *could have* found, as the Sixth Circuit did, that it was a close call whether Davenport committed first-degree premeditated murder, it was not *unreasonable* to conclude that the evidence overwhelmingly supported first-degree murder.

Indeed, the record allows for a reasonable ruling that there was overwhelming evidence that this murder was premeditated. Davenport described to a witness his penchant for choking people. App. at 4a–5a. Shortly before the murder, he strangled another woman until she lost consciousness and urinated. App. at 121a.

After murdering White, Davenport left her body in a field and stole property from her home. App. at 120a–121a. He even confessed that he had "off[ed]" White, and he repeatedly lied to the police. App. at 5a and n.1. He later claimed self-defense, but his physical explanation was not consistent with her injuries. App. at 3a, 4a. The Sixth Circuit found that this evidence did not overwhelmingly prove Davenport guilty of first-degree premeditated murder. App. at 32a. This finding was in turn supported by two other findings: (1) that the murder occurred during a fight, and (2) that Michigan law provides that strangulation alone cannot prove premeditation. App. at 30a–32a. Both findings ignored critical features in Davenport's case.

First, whether a fight occurred is largely irrelevant—Davenport strangled White to death, an act that required completely depriving her of air for *at least four to five minutes* and could only have been completed *after* White had already lost consciousness. App. at 4a. By finding that the jury "easily could have found that this was second-degree [non-premeditated] murder," App. at 31a, the Sixth Circuit ignored evidence showing that Davenport continued to strangle her for a significant duration after she no longer posed any threat. Nothing in the Sixth Circuit's *Brecht*-only approach explains why a rational jurist could not have weighed this evidence differently than it did.

Second, although strangulation alone cannot prove premeditation in Michigan, *People* v. *Johnson*, 597 N.W.2d 73, 79 (Mich. 1999), there was much more here. Along with the actual act of strangling White—which enable him to take a "second look," *id.* (quotation, citation omitted)—here the jury also heard more:

- Davenport had a plan to use deadly force when in a confrontation,
- Davenport had done so before, and
- Davenport took actions after the murder that revealed his state of mind.

The Sixth Circuit's independent review fails to see the true picture of the crime and, in any event, fails to appreciate that a rational jurist could have viewed this case differently.

In ruling that the error was not harmless, the Sixth Circuit discussed its own view of the facts as it applied to state law and failed to provide the appropriate leeway that AEDPA demands. The state court decision here was reasonable in denying relief.

CONCLUSION

The petition for writ of certiorari should be granted.

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