No. 20-826

In the Supreme Court of the United States

MIKE BROWN, ACTING-WARDEN, PETITIONER

v.

ERVINE DAVENPORT

APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PENDING DECISION ON THE STATE OF MICHIGAN'S PETITION FOR A WRIT OF CERTIORARI

To the Honorable Brett M. Kavanaugh,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Sixth Circuit

RESPONSE REQUESTED BY FEBRUARY 3

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INTRODUCTION

Respondent Ervine Davenport killed Annette White. He admitted doing so (even though he claimed self-defense). A Michigan jury found him guilty of first-degree premeditated murder. While Davenport was unconstitutionally shackled at trial (a fact that is undisputed) the state courts determined that the error was harmless. On habeas review, in a 2-to-1 panel decision (and in an 8-to-7 decision denying rehearing en banc) the Sixth Circuit disagreed with the state court's harmless-error determination and granted habeas relief. Despite the panel majority writing that "[t]he jury easily could have found" that Davenport committed some form of murder, the Sixth Circuit nevertheless ruled that he must be retried or released by May and then denied the State's motion to stay the mandate—regardless whether this Court has yet ruled on the State's now pending petition for a writ of certiorari.

The underlying legal issue is important: Must a federal court defer to a state-court harmless-error determination before it can grant habeas relief? That question has divided Sixth Circuit judges almost equally, and it is the source of a split among the courts of appeals. As discussed in the State's petition filed on December 14, the panel majority's holding that a federal court *need not* defer to state court determinations violates 28 U.S.C. § 2254(d), violates this Court's precedents, and renders habeas review unpredictable. All told, there is a reasonable probability that the petition will be granted by this Court and a fair prospect that the Sixth Circuit's decision will be reversed.

Thus, this Court should stay the mandate so that the State is not required to retry or release Davenport soon after this Court makes its decision on whether to grant the petition for certiorari. The State asks this Court to provide a response by **February 3, 2021**, which is 90 days before May 4, 2021, (the date by which the State must release or retry Davenport). The State asks for a stay of the mandate so that it may avoid having to take steps necessary to prepare this matter for retrial while its petition for certiorari is pending. Indeed, without a stay, and if this Court denied the petition (which would occur sometime in March by the State's calculations), the State will have to take extraordinary steps to retry Davenport for a 2007 murder in a western Michigan county (Kalamazoo), which currently is not conducting jury trials as a result of the COVID-19 pandemic. And that county will not begin trials again until February of 2021 *at the earliest*. Once jury trials resume in Kalamazoo, there will be a significant number of in-custody criminal defendants in the queue for trial.

Rather, given the substantial nature of the question presented and reasonable probability of a petition grant, the better course is to stay the mandate while the petition is pending. Such a stay would not significantly prejudice Davenport, as he would receive credit for the time he is currently serving, even if the jury returned a verdict of only second-degree murder as the panel majority below surmised was possible. Moreover, even Davenport's own trial attorney, who would be appointed to represent him next year, might not be interested in retrying the case in such short order. Consistent with Rule 23, the State asks this Court to stay the mandate until the petition for certiorari reaches final disposition in this Court.

OPINIONS BELOW

On June 30, 2020, the Sixth Circuit reversed the district court and granted habeas relief, ordering that the State release or retry Davenport "within 180 days from the date of [the] opinion." (Appendix A.) The Sixth Circuit denied rehearing en banc on September 15, 2020. (Appendix B.) On November 5, 2020, the Sixth Circuit, in a single-judge order issued by Judge Stranch, denied the State's motion to stay the mandate. (Appendix C.) That same day, the Sixth Circuit issued the mandate for the case. (Appendix D.) Accordingly, on November 18, 2020, the district court issued an order directing the State to file a notice that a retrial has been scheduled no later than December 29, 2020, and that if a new trial has not commenced by December 30, 2020, a writ of habeas corpus would issue. (Appendix E.)

On November 24, 2020, in another single-judge order issued by Judge Stranch, the Sixth Circuit denied the State's motion to reconsider its denial of the motion to stay the mandate or to recall the mandate, but the order clarified that the 180-day period within which to release or retry Davenport began running from November 5, 2020, the date the mandate issued. (Appendix F.) Pursuant to that order, on December 4, 2020, the district court amended its order and directed the State to file a notice that a retrial has been scheduled no later than May 3, 2021, and that if a new trial has not commenced by May 4, 2021, a writ of habeas corpus would issue. (Appendix G.)

JURISDICTION

This Court has jurisdiction to review the Sixth Circuit's order denying a stay under Supreme Court Rule 23 and 28 U.S.C. § 2101(f).

STATEMENT OF THE CASE

Respondent Ervine Davenport killed Annette White by strangulation. (Appx. A, 2–3.) He testified at trial that his actions were done in self-defense, claiming that White attacked him with a box cutter as he was driving, that he merely extended an arm and pinned her against the passenger side of the car, and that he panicked when he noticed that she was no longer breathing. *Id.* But a forensic pathologist explained that Davenport's version of events was not possible—White's injuries were to both sides of her neck, consistent with strangulation and inconsistent with broad force being applied across the front of her neck. (Appx. A, 3.) The forensic pathologist also testified that a strangled victim could lose consciousness after 30 seconds but that death does not occur until the victim is without air for at least four-to-five minutes. (*Id.*) The prosecution also presented evidence showing that Davenport had threatened to strangle people when problems arise, that he had strangled another woman to unconsciousness just days before he killed White, that he admitted that he "offed her," and that he left White's body in a field and then stole property from her home. (*Id.*; Appx. B, 16.) Finally, on the stand, Davenport admitted that he repeatedly lied to the police during the investigation into White's death. (See Appx. A, 4, n.1.)

On direct appeal, Davenport argued that he was unconstitutionally shackled. The case was eventually remanded to the trial court to hear testimony from the jurors

regarding the effect the shackling had on their verdict. Five jurors testified that they observed the shackles during trial and some jurors remembered one juror making a comment about the shackling, but all 12 jurors testified that the shackling was not discussed during deliberations and did not affect their verdict. (Appx. A, 5.) The Kalamazoo County Circuit Court found that the prosecution had proved beyond a reasonable doubt that the shackling error was harmless. *Id*. The Michigan Court of Appeals affirmed that determination, focusing on the jurors' testimony and also highlighting the "overwhelming[ ]" evidence of Davenport's guilt. See *id*. The Michigan Supreme Court denied leave to appeal, stating in its order that the Michigan Court of Appeals should have evaluated the case differently but that the error was harmless considering "the substantial evidence of guilt." (Appx. A, 6.)

Davenport then filed a federal habeas petition, raising the same shackling claim, but the district court denied it. On appeal, the Sixth Circuit reversed in a 2-to-1 decision. The panel majority rejected the argument that, before granting relief, a habeas court must find actual prejudice under the harmless-error test announced in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), *and* conclude under § 2254(d) (AEDPA) that the state court's decision was an unreasonable application of the harmless-error test announced in *Chapman* v. *California*, 386 U.S. 18, 24 (1967). (Appx. A, 7.) 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. *Id*. (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 Appx. A, 25–26.)

The panel majority ordered the State to release Davenport from prison unless it affords him a new trial "within 180 days from the date of this opinion." *Id*.

Judge Readler dissented. He found that a habeas court must make two inquiries when assessing the harmlessness of a constitutional error. (Appx. A, 27 (Readler, J., dissenting)). He reasoned that failure to do so contradicts this Court's decision in *Davis* v. *Ayala*, 576 U.S. 257 (2015), does not give effect to AEDPA's deferential standard of review, and splits from the reasoning employed by several other courts of appeals. (Appx. A, 27–28.) Judge Readler found that the state court harmless-error determination did not run afoul of AEDPA and that habeas relief was not warranted. (See Appx. A, 40, 46.)

The State moved for rehearing en banc, but the Sixth Circuit denied the motion 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. (Appx. B, 15 (Thapar, J., dissenting).) Noting the differences between the *Brecht* test and AEDPA, Judge Thapar reasoned that taking a *Brecht*-only approach before granting habeas relief "casts aside AEDPA and misinterprets Supreme Court precedent." (Appx. B, 15; see also Appx. B, 21–25.) In a separate dissenting opinion, Judge Griffin also rejected the approach taken by the majority panel opinion. (Appx. B, 12–14 (Griffin, J., dissenting).)

Additionally, in a concurring opinion, Judge Sutton (joined by Judge Kethledge) expressed that he was skeptical that the panel majority applied the correct standard but 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. (Appx. B, 11 (Sutton, J., concurring).)

Planning to file a petition for certiorari in this Court, the State moved the Sixth Circuit to stay the mandate. On November 5, 2020, the Sixth Circuit, in a single-judge order issued by Judge Stranch, denied the State's motion. (Appx. C, 3.) It issued the mandate on that same day. (Appx. D.) The State filed a motion in which it asked the court to reconsider its order, recall the mandate, and, at the least, to clarify that the 180-day period did not begin to run until the date the mandate was issued. In the meantime, the district court ordered the State to file a notice of a scheduled retrial no later than December 29, 2020, and ordered that a writ of habeas corpus would issue if a new trial had not begun by December 30, 2020. (Appx. E.)

Subsequently, the Sixth Circuit, again in a single-judge order issued by Judge Stranch, denied the State's motion for reconsideration and to recall the mandate, but it did clarify that the 180-day period did not begin to run until the mandate issued on November 5, 2020. (Appx. F, 2.) The district court then amended its earlier order and directed the State to file a notice of a scheduled retrial no later than May 3, 2021, and ordered that a writ of habeas corpus would issue if a new trial had not begun by May 4, 2021. (Appx. G, 2.)

STANDARDS FOR GRANTING RELIEF

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). Further, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id*.

REASONS FOR GRANTING THE STAY APPLICATION

I. There is a reasonable probability that the State's petition for certiorari will be granted and a fair prospect that the Court will reverse the Sixth Circuit's habeas grant.

The question of whether a federal habeas court must apply AEDPA deference before granting habeas relief is a recurring problem in the lower federal courts. Because the Sixth Circuit's decision that it only needed to determine that the *Brecht* test was met before granting habeas relief conflicts with this Court's decision in *Ayala*, conflicts with AEDPA, and creates a circuit split, see the State's petition for certiorari, pp. 10–29, the State's petition is reasonably likely to be granted, and there is a fair prospect that the habeas grant will be reversed.

A. The Sixth Circuit's decision conflicts with *Ayala* and AEDPA.

In *Ayala*, the Court noted that the test for determining whether a constitutional error was harmless on habeas review is the *Brecht* standard, but it 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 267–68.

The Sixth Circuit ignored this analysis and instead focused on *Ayala*'s language (taken from an earlier decision in which AEDPA deference was not relevant) that "the *Brecht* test 'subsumes' the limitations imposed by AEDPA." *Id*. at 268. The court reasoned from this statement that AEDPA need not be applied at all before granting habeas relief. (Appx. A, 7.) But this ruling conflicts with *Ayala*'s analysis.

The Sixth Circuit's ruling also conflicts with AEDPA, which requires deference to a state court's determination and allows habeas relief only if that determination contravened or unreasonably applied holdings of this Court. The *Brecht* test does not contain those requirements—so long as a court 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). Because *Brecht* does not contain AEDPA's strict limitations, and because *Ayala* requires a habeas court give AEDPA deference to state-court harmlessness determinations, the Sixth Circuit's analysis conflicts with statute and precedent.

B. The Sixth Circuit's decision creates a circuit split.

The Second, Third, Seventh, Ninth, and Tenth circuits have all rejected the Sixth Circuit's *Brecht*-only approach. See *Orlando* v. *Nassau County District Attorney's Office*, 915 F.3d 113, 127 (2d Cir. 2019) ("When a state court makes a harmless error determination on direct appeal, we owe the harmlessness determination itself deference under [AEDPA]." (internal quotations omitted)); *Johnson* v. *Lamas*, 850 F.3d 119, 133 (3d Cir. 2017) ("[W]here 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*."); *Welch* v. *Hepp*, 793 F.3d 734, 738 (7th Cir. 2015) (stating that a state court's harmlessness determination "is subject to deference under [AEDPA]"); *Ford* v. *Peery*, 976 F.3d 1032, 1044 (9th Cir. 2020) (applying AEDPA deference to the state court's harmlessness determination after already finding actual prejudice under *Brecht*); *Malone* v. *Carpenter*, 911 F.3d 1022, 1030 (10th Cir. 2018) ("[S]atisfaction of the AEDPA/*Chapman* standard is a *necessary* condition for relief.").

These circuits require a review of a state-court's harmless-error determination under AEDPA before habeas relief may be granted. Thus, there is a circuit split.

C. This case presents an ideal vehicle for review.

The question presented was squarely raised to the Sixth Circuit and fully analyzed in a panel majority opinion, a dissenting opinion, and competing opinions of an almost equally divided court when deciding whether to rehear the case en banc.

The differences between the *Brecht* test and AEDPA's highly deferential standard are important, and they emanate in this case. In granting habeas relief under a *Brecht*-only approach, the Sixth Circuit relied on circuit precedent and extra-judicial studies to find harmful error, extended this Court's precedents to support its finding, and failed to give the substantial leeway required to the state court's application of the *Chapman* standard. Had the court applied AEDPA, the panel majority's decision would have changed, and Davenport would have been denied habeas relief. Thus, this case presents an ideal vehicle to clarify this recurring problem. (See Appx. B, p. 25 (Thapar, J., dissenting) ("[T]his case presents an ideal vehicle for clarifying the relationship between Brecht and AEDPA.").)

For these reasons, there is a reasonable probability that the State's petition will be granted, and there is a fair prospect that the Court will rule in the State's favor and reverse the habeas grant.

II. The balance of harms weighs in the State's favor.

Given the significant harm to the State absent a stay, and considering the lack of prejudice that Davenport would suffer should a stay be granted, the balance of the harms supports the conclusion that this Court should stay the mandate.

A. The State will be irreparably harmed absent a stay.

Without a stay, the State will be put in an untenable procedural position. The Sixth Circuit has indicated that Davenport must be released or provided a new trial within 180 days from the date the mandate issued. That period ends on May 4, 2021.

Consistent with this order, the district court has already ordered the State to file a notice, no later than May 3, that it has scheduled a new trial and that, if a new trial has not begun by May 4, the writ would issue. (Appx. E.) But the timing of the Sixth Circuit's order based on this mandate overlooks the State's opportunity to obtain review in this Court and disregards the procedural hurdles that must be overcome before a new trial may be scheduled and held.

Notably, this Court likely will not make a decision on this petition until only some weeks before the lower court deadlines. The State's petition was signed and mailed on December 14, 2020. The petition was docketed on December 18, 2020, and Davenport's response is due on January 19, 2021. If Davenport files a brief on that date, the case will be distributed and "placed on the next relevant conference list that is at least 14 days after the filing." (Supreme Court February 2020 Memorandum Concerning the Deadlines for Cert Stage Pleadings and the Scheduling of Cases for Conference at 4(c).) The first distribution date after that 14-day time period is February 3, 2021, and the corresponding conference would occur on February 19, 2021. (Case Distribution Schedule – October Term 2020, p. 4.) Thus, the earliest possible date that this petition could be decided by this Court would be about ten weeks before the State has to begin to retry Davenport (and avoid releasing him).

And that is only the earliest *possible* date that the petition would be decided, not the earliest *likely* date. Should Davenport seek a 30-day extension to file a brief in opposition, a request that is "generally grant[ed]," (February 2020 Memorandum at 1), his brief would not be due until February 18, 2021. If he files on that date, the

case will not be distributed to the Court until March 10, 2021, and not scheduled for conference until March 26, 2021. (Case Distribution Schedule, p. 5.) Unless a decision is made on the first conference day, the Court could review the petition again at conference scheduled for April 1, 2021. *Id*. That date is *less than five weeks* before the new trial must begin according to the Sixth Circuit and the district court below if the State does not release Davenport.

Although the State believes there is a substantial probability that this petition will be granted, if the Court *denies* the petition, the State will likely have—at most—only 33 days within which to schedule and hold a retrial for a 2007 murder case. But that is an extremely short time to prepare a murder case, particularly for events that occurred well over a decade ago. Witnesses (who may have moved out of the area) will have to be found. Pretrial hearings and motions will have to be held. Open days on which to hold a lengthy jury trial must be found on the trial court's busy schedule (which will likely be even busier as it reschedules the jury trials not held during the COVID-19 pandemic). Simply put, the short period within which to retry Davenport will make it necessary for the State to prepare for trial while this petition is pending. And this truncated time framework may affect the State's ability to take all of the necessary actions to again present the evidence of Davenport's guilt.

This analysis is even further complicated by the current COVID-19 pandemic. In Kalamazoo County, Michigan, the number of positive cases of the virus exceeds the local health department's recommendation within which to conduct in-person jury

trials. Therefore, the circuit court has ordered that all in-person jury trials be suspended until February 1, 2021. (See Appendix H, Kalamazoo County Courts Administrative Directive.) The jury trials that would have been held during the pandemic will be in line to be rescheduled near the same time that Davenport must be retried. This unprecedented event further complicates the State's ability to retry Davenport within the already-truncated time framework.

Given the reasonable likelihood that the petition will be granted and the fair prospect of reversal, this Court should stay the mandate to avoid placing this burden on the State.

B. Davenport will not be prejudiced by a stay.

With a stay, Davenport will be in the same position he has been for nearly 14 years and the same position he will be even if the habeas grant stands. Specifically, Davenport is incarcerated. If this Court does not reverse the Sixth Circuit's decision, the State will retry Davenport. And he is all but sure to be convicted again.

Notably, there is no disagreement that Davenport killed White. Although he claimed self-defense, that claim was significantly undermined. His statements before the murder (he said he chokes people if problems arise), his actions before the murder (he strangled another woman until she lost consciousness and urinated on herself), his actions during the murder (he placed force around White's neck for several minutes *after* she lost consciousness), his statements after the murder (he said he "offed her"), and his actions after the murder (he left her in a field, went to her home, and stole her property) conclusively disproves his self-defense theory.

In other words, this was a murder. Even the majority panel opinion that granted habeas relief below indicated that "the jury easily could have found that this was second-degree murder." (Appx. A, 21.)

The only issue that will really be in dispute at a retrial will be the degree of murder Davenport is guilty of. And although first-degree murder requires a life-without-parole sentence, Mich. Comp. Laws § 750.316(1)(a), a sentence for second-degree murder can be nearly as long. Even if convicted of the lesser offense, Davenport could be sentenced to life in prison (although with eligibility for parole) or any term of years. Mich. Comp. Laws § 750.317.

Davenport has yet to serve even 15 years, and he is likely to be given a minimum sentence that exceeds 15 years for a brutal murder, especially given Davenport's heartless conduct both before and after the crime. All told, whether or not this Court grants the petition and reverses the Sixth Circuit's habeas grant, Davenport will remain incarcerated. And he will receive credit under Michigan law for any time he has been incarcerated before his retrial. See Mich. Comp. Laws § 769.11b (jail credit statute). Therefore, he will not suffer any prejudice if this Court grants the stay.

The State asks that this Court provide a response by **February 3, 2021** (90 days before May 4, 2021) to enable the State to know what actions it will need to take for retrial while the petition is pending in the event this Court denies the motion for stay.

CONCLUSION

For these reasons, this Court should grant a stay of the Sixth Circuit's mandate that Davenport be released or retried by May 4, 2021. The State requests that a decision be made on this motion by February 3, 2021.

Respectfully submitted,

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