No. 20A116

IN THE

Supreme Court of the United States

MIKE BROWN, ACTING-WARDEN,

Applicant,

v.

ERVINE DAVENPORT,

Respondent.

OPPOSITION TO APPLICATION TO STAY THE MANDATE OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT PENDING PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 4

ARGUMENT 9

I. THE STATE FAILED TO ASK THE COURT OF APPEALS FOR THE RELIEF IT NOW SEEKS 9

II. THE STATE HAS NOT MET THE HEAVY BURDEN REQUIRED FOR ISSUANCE OF A STAY 11

A. This Court Is Unlikely To Grant Certiorari Or Reverse 12

1. The question on which the State seeks certiorari is not presented in this case 12

2. The court of appeals' decision is consistent with *Ayala* and AEDPA 14

3. The decision below does not conflict with any other court of appeals' decision 18

B. The State Would Not Suffer Irreparable Harm Without A Stay 20

C. The Equities Weigh Against A Stay 22

CONCLUSION 23

CERTIFICATE OF SERVICE

APPENDIX A: Decision of Michigan Court of Appeals, dated December 13, 2012 ..... 1a

APPENDIX B: Decision of Michigan Supreme Court, dated July 3, 2013 ..... 4a

APPENDIX C: Respondent-Appellee's Motion to Stay the Mandate of the United States Court of Appeals for the Sixth Circuit, dated December 13, 2012, dated September 22, 2020 ..... 5a

APPENDIX D: Respondent-Appellee's Emergency Motion to Reconsider [Sixth Circuit] Court's Order Denying Motion to Stay the Mandate, Request to Recall the Mandate, and Request for Expedited Consideration of the United States Court of Appeals for the Sixth Circuit, dated November 13, 2020 ..... 18a

TABLE OF AUTHORITIES

CASES

Page(s)

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 1, 15, 18

Chapman v. *California*, 386 U.S. 18 (1967) 2, 3

Conkright v. *Frommert*, 556 U.S. 1401 (2009) 21

Davis v. *Ayala*, 576 U.S. 257 (2015) 3, 14, 15, 16, 17

Deck v. *Missouri*, 544 U.S. 622 (2005) 1, 6, 22

Ford v. *Peery*, 976 F.3d 1032 (9th Cir 2020) 19, 20

Fry v. *Pliler*, 551 U.S. 112 (2007) 15, 18

Graddick v. *Newman*, 453 U.S. 928 (1981) 11

Hall v. *Haws*, 861 F.3d 977 (9th Cir. 2017) 19, 20

Hammonds v. *Commissioner, Alabama Department of Corrections*, 712 F. App'x 841 (11th Cir. 2017) 20

Holbrook v. *Flynn*, 475 U.S. 560 (1986) 6, 13

Jensen v. *Clements*, 800 F.3d 892 (7th Cir. 2015) 19

Johnson v. *Lamas*, 850 F.3d 119 (3d Cir. 2017) 19

Johnson v. *Superintendent Fayette SCI*, 949 F.3d 791 (3d Cir. 2020) 19

Malone v. *Carpenter*, 911 F.3d 1022 (10th Cir. 2018) 19

O'Neal v. *McAninch*, 513 U.S. 432 (1995) 15

Orlando v. *Nassau County District Attorney's Office*, 915 F.3d 113 (2d Cir. 2019) 18

Reyes v. *Madden*, 780 F. App'x 436 (9th Cir. 2019) 20

Rostker v. *Goldberg*, 448 U.S. 1306 (1980) 11, 12, 21

Sampson v. *Murray*, 415 U.S. 61 (1974) 21

Sifuentes v. *Brazelton*, 825 F.3d 506 (9th Cir. 2016) 20

Spencer v. *Capra*, 788 F. App'x 21 (2d Cir. 2019) 19

Welch v. *Hepp*, 793 F.3d 734 (7th Cir. 2015).....19

Williams v. *Taylor*, 529 U.S. 362 (2000) 3, 13

Wise v. *Lipscomb*, 434 U.S. 1329 (1977).....11

STATUTES AND RULES

28 U.S.C.
§ 2101.....20
§ 2254.....12, 13, 15

Supreme Court Rules
Rule 10 .....12, 22
Rule 23.3 .....1, 9, 11

Fed. R. App. P.
Rule 35 22
Rule 41 .....7, 9

INTRODUCTION

Ervine Davenport was unconstitutionally shackled at the waist, wrist, and ankles during his 2008 trial. As the State concedes in its petition for certiorari, it is "uncontroverted that [Mr.] Davenport's shackling was 'inherently prejudicial' and was error." Pet. 25 (No. 20-826). Because of the inherently prejudicial nature of shackling—as established by this Court in *Deck* v. *Missouri*, 544 U.S. 622 (2005)—and because the evidence of premeditation and deliberation necessary to a first-degree murder conviction was not overwhelming, the court of appeals found that the unconstitutional shackling of Mr. Davenport was not harmless error under the *Brecht* standard. *See Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993) (habeas relief should be granted if the underlying constitutional error resulted in "actual prejudice"). Accordingly, the court of appeals granted Mr. Davenport a conditional writ of habeas corpus and ordered the State to retry or release Mr. Davenport within 180 days.

The State now requests that this Court stay—or, more accurately, recall—the court of appeals' mandate while considering the State's petition for certiorari. But the State's stay application is procedurally and substantively meritless, and it should be denied.

First, the stay application is procedurally improper under Supreme Court Rule 23.3 and should not be entertained by this Court because the State never sought from the court of appeals the specific relief it now requests. After the court of appeals denied rehearing and denied the State's initial motion to stay the mandate, the State asked the court to recall its mandate and reconsider its decision on the stay. But in the alternative, the State asked the court simply to clarify that the 180-day period within

which the State must retry or release Mr. Davenport began to run on the date the mandate issued (November 5, 2020), and not the date of the court of appeals opinion granting relief (June 30, 2020). The court of appeals granted that requested alternative relief, confirming that the 180 days began to run from the mandate's issuance, and therefore did not recall or stay the mandate. The State sought no further relief in that court. Until filing this application, the State never contended that the 180-day period—as clarified by the court of appeals—would be insufficient to allow it to prepare for retrial and, after the 180-day period was clarified, the State never asked the court of appeals to recall or stay the mandate. Instead, the State's stay application to this Court seeks additional relief, beyond the relief that the State requested and successfully obtained from the court of appeals, which it has never sought in any other court.

Second, the State's stay application should be denied because the petition for certiorari lacks merit and is unlikely to be granted. As an initial matter, the question on which the State seeks certiorari is not presented in this case, and resolving it would make no difference to the outcome. The petition poses the question "[whether] a federal habeas court [may] grant relief based *solely* on its conclusion that the *Brecht* test is satisfied … or must the court also find that the state court's *Chapman* application [which requires that the prosecution prove that the error was harmless beyond a reasonable doubt (*Chapman* v. *California*, 386 U.S. 18 (1967))] was unreasonable under [the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")]." Pet. i. But the Michigan Supreme Court here did not apply *Chapman*. It instead applied a different standard in purporting to evaluate harmlessness. Thus, there is no "state court[] *Chapman* application" to review here. *Id.* And even if this Court were to agree

with the State that the federal habeas court was obliged to consider the reasonableness of the state court's harmlessness determination under AEDPA in addition to finding "actual prejudice" under *Brecht*, AEDPA would pose no bar to relief because the state court's application of a rule that contradicts the governing law as established by this Court was necessarily unreasonable and merits no deference. *See Williams* v. *Taylor*, 529 U.S. 362, 405 (2000) (O'Connor, J., opinion).

In any event, even if the question were presented, there is no reasonable likelihood of a grant or fair prospect of reversal. The State's petition effectively seeks reversal not of the court of appeals' decision, but of this Court's own precedent. The State claims that a federal habeas court must separately address both whether a constitutional error resulted in "actual prejudice" under *Brecht* and whether the state court's application of the *Chapman* harmless error standard was unreasonable under AEDPA. Pet. 10-14. But this Court has held exactly the opposite: that "the *Brecht* test subsumes the limitations imposed by AEDPA" and that—as the State concedes (Pet. 12)—"a federal habeas court need not 'formal[ly] apply both *Brecht* and AEDPA/*Chapman*.'" *Davis* v. *Ayala*, 576 U.S. 257, 268, 270 (2015). This means that a federal habeas court may ensure compliance with AEDPA/*Chapman* by applying the more stringent *Brecht* test. *See*, *e.g.*, *id.* at 270 ("[A habeas petitioner] must show that he was actually prejudiced by [the error], a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the [state court's] decision that this procedure met the *Chapman* standard of harmlessness"). Contrary to the State's assertion, there is no relevant circuit split, as the State cites no decision holding—in conflict with the

decision below—that a habeas petitioner who satisfied *Brecht* was not entitled to relief because the state court's *Chapman* analysis was not unreasonable.

Finally, the State fails to articulate any harm it may suffer absent a stay, and the balance of equities favors Mr. Davenport. By the State's own admission, there is more than enough time for this Court to consider and rule on the petition for certiorari before the 180-day period expires in May 2021. Application to Stay the Mandate 11-14 (hereinafter "Appl."). Moreover, the State's concerns about having enough time to prepare for a retrial are not only an improper proper basis for a stay, but also unfounded. There is nothing stopping the State from preparing for retrial now. Indeed, the State could have been preparing since June 30, 2020, when the court of appeals issued its opinion granting habeas relief.

A stay (let alone a recall) of a court of appeals' mandate is the rare exception, not the rule. Because there are no compelling reasons to issue a stay in this case—and any stay would serve only to extend Mr. Davenport's unlawful custody—the State's application should be denied.

BACKGROUND

In July 2008, the State of Michigan tried Mr. Davenport before a jury in the Kalamazoo County Circuit Court (Lightvoet, J.) on a charge of "open murder" for the 2007 death of Annette White. During trial, Mr. Davenport was visibly shackled with a waist chain, a wrist shackle on his left hand, and ankle shackles. State App. A at 2, 5.[1] The trial court made no on-the-record finding to justify the shackling. *Id.* at 4.

[1] "State App." refers to an appendix to the State's Application to Stay the Mandate. "Davenport App." refers to an appendix attached to this opposition.

At trial, the prosecution alleged that Mr. Davenport strangled Ms. White while they argued in a car. The defense did not contest that Mr. Davenport caused the death of Ms. White but maintained that he acted in self-defense after Ms. White attacked him with a box cutter while he was driving. State App. A at 2. The general circumstances surrounding the night of Ms. White's death were largely undisputed and corroborated by witness testimony: Mr. Davenport and Ms. White were together; Ms. White was intoxicated, having smoked crack cocaine and consumed alcohol; and Ms. White was agitated. *Id.* at 2-4. There was a struggle between Ms. White and Mr. Davenport while they were driving alone in a car, and Mr. Davenport caused Ms. White's death during this struggle. *Id.* The jury had to decide whether Mr. Davenport intentionally killed Ms. White with premeditation and deliberation (first-degree murder), intended to kill Ms. White but without premeditation and deliberation (second-degree murder), or acted in self-defense. The jury deliberated over the course of two days and returned a verdict of guilty on first-degree murder. *Id.* at 4. On August 25, 2008, Mr. Davenport was sentenced to mandatory life imprisonment without the possibility of parole.

On direct appeal, the Michigan Supreme Court remanded the case to the trial court for an evidentiary hearing to determine whether the jurors saw the shackles and, if they did, whether this error was harmless. State App. A at 4-5. On remand, the trial court held evidentiary hearings in which all 12 jurors testified. *Id.* at 5. Five jurors testified that they saw Mr. Davenport's shackles during trial and two additional jurors testified that they heard comments from other jurors about the restraints. When asked, the jurors also testified that the shackling did not affect their deliberations. *Id.* Based on this testimony, the trial court found that while the jurors were able to observe

the shackles at trial, the prosecution proved beyond a reasonable doubt that it did not affect the verdict.[2] *Id.*

The Michigan Court of Appeals affirmed, holding that the "trial court properly found that the prosecution met its burden of proving beyond a reasonable doubt that the error did not affect the jury's verdict." Davenport App. 2a. The Michigan Court of Appeals based its conclusion on—and devoted nearly the entirety of its three-page opinion to considering—the juror testimony. *Id.*[3]

The Michigan Supreme Court denied leave to appeal, but in doing so rejected the Michigan Court of Appeals' analysis. Davenport App. 4a. In particular, the Michigan Supreme Court held that the appellate court's reliance on juror testimony was error under *Holbrook* v. *Flynn*, 475 U.S. 560 (1986). *Id.* The court supplied its own reasoned explanation for the denial of relief, concluding that the unconstitutional shackling of Mr. Davenport was harmless because, "[g]iven the substantial evidence of guilt presented at trial, we cannot conclude that there was an unacceptable risk of impermissible factors coming into play." *Id.*

Mr. Davenport filed a federal habeas petition, claiming that his due process rights were violated by the unconstitutional shackling. The district court denied his

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[2] In *Deck* v. *Missouri*, 544 U.S. 622, 635 (2005), this Court confirmed that unconstitutional shackling should not be deemed harmless on direct review unless the prosecution proves harmlessness beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18 (1967). The parties in this case do not dispute that the proper standard for considering the harmlessness of a shackling error on direct review is the *Chapman* standard.

[3] In a two-sentence footnote, the Michigan Court of Appeals mentioned the evidence presented at trial, asserting that it was "overwhelming … and belied [Mr. Davenport's] contention that he killed [Ms. White] in self-defense." Davenport App. 3a n.2. But the court did not address the strength of the evidence of premeditation and deliberation necessary for a conviction of first-degree murder. Moreover, the Michigan Court of Appeals did not find that the strength of the trial evidence supported a finding of harmlessness beyond a reasonable doubt. *Id.* at 2a-3a.

petition. State App. A at 6. On June 30, 2020, however, the U.S. Court of Appeals for the Sixth Circuit reversed and granted Mr. Davenport a conditional writ of habeas corpus, finding that he was unconstitutionally shackled during trial and that the shackling was not harmless error. *Id.* at 25-26. The court of appeals ordered that Mr. Davenport be "release[d] from prison unless the State of Michigan commences a new trial against him within 180 days from the date of this opinion." *Id.*

In granting habeas relief, the court of appeals applied *Brecht*. The court discussed at length the appropriate standard of review and the intersection of *Brecht* with AEDPA. State App. A at 6-13. Drawing on *Ayala*, the court of appeals held that "both *Brecht* and AEDPA must be satisfied," and that a federal habeas court may find both standards satisfied by applying the more stringent *Brecht* test. *Id.* at 12; *see also id.* ("The tests of *Brecht* and AEDPA/*Chapman* then both seek traces of the same poison but *Brecht*'s test covers both because it requires the petitioner to show enough poison to be fatal under either test.").

The State filed a petition for rehearing en banc, which was denied on September 15, 2020. *See* State App. B.

On September 22, 2020, the State filed a motion to stay the mandate so that it could file a petition for certiorari in this Court. *See* Davenport App. 5a-17a. On November 5, 2020, the court of appeals denied the stay. *See* State App. C. In that denial, the court of appeals concluded that the State had not carried its burden of showing that the circumstances justified a stay. Specifically, the court of appeals found that "the State did not present 'good cause' for a stay,' which [Federal Rule of Appellate Procedure] 41(d)(1) requires," and "the State did not discuss at all how it would suffer

irreparable harm if the stay were denied, which parties seeking a stay in this context must show." *Id.* at 2. The mandate issued the same day. *See* State App. D.

Eight days later, on November 13, 2020, the State filed an "Emergency Motion To Reconsider [The Sixth Circuit's] Order Denying Motion To Stay The Mandate, Request To Recall The Mandate, And Request For Expedited Consideration." *See* Davenport App. 18a-33a. Calculating the 180-day period from the date of the court's June 30 opinion, the State argued that the requirement to release or retry Mr. Davenport by December 27, 2020 presented an "undeniable choice of undesirable outcomes" because the deadline would not allow sufficient time for a petition for certiorari to be resolved or for a new trial to commence. Davenport App. 22a (¶ 7). The State therefore requested that the court of appeals "recall the mandate and stay its issuance as well as staying the 180-day requirement during which Davenport must be released or retried, ordering that the 180-day time period will instead begin to run from the final disposition of the State's petition for certiorari in that court." Davenport App. 28a (¶ 13). "Alternatively," the State asked the court of appeals to "clarify that the 180-day period runs from the date of the mandate, which issued on November 5, 2020, not the date of the opinion." *Id.* (¶ 14).[4] Mr. Davenport responded, indicating he "ha[d] no objection to the Court clarifying that the 180 days runs from [the date of the mandate]." State App. F at 1.

[4] As a further "alternative[]," the State asked the Court to "toll the 180-day period during the time that the State's motion for rehearing en banc and motion to stay the mandate were pending," which would have "extend[ed] the December 27 date" by which the State must release or retry Mr. Davenport to "March 29, 2021." Davenport App. 28a-29a (¶ 15).

On November 24, 2020, the court of appeals clarified, as the State had requested, that the 180-day period only began to run when the mandate issued on November 5, 2020. *See* State App. F at 2. Having granted that relief, the court of appeals denied the State's alternative requests for a recall and stay. *Id.* The State took no further action in the court of appeals, and instead filed the instant stay application.

ARGUMENT

I. THE STATE FAILED TO ASK THE COURT OF APPEALS FOR THE RELIEF IT NOW SEEKS

Supreme Court Rule 23.3 provides that "[a]n application for a stay shall set out with particularity why the relief sought is not available from any other court or judge" and that "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below." Sup. Ct. R. 23.3. Here, in violation of that Rule, the State's stay application seeks relief that it never previously sought from the court of appeals.

The State filed two stay motions with the court of appeals after its rehearing petition was denied. Neither sought the specific relief requested here. Prior to the issuance of the mandate, the State sought a stay of the mandate "so that [the State] may file a petition for a writ of certiorari with the United States Supreme Court." Davenport App. 5a. The court of appeals denied this request because the State completely failed to address "good cause"—one of the two stay requirements laid out by Federal Rule of Appellate Procedure 41(d)(1). State App. C at 2. The court of appeals explained that "the State did not discuss at all how it would suffer irreparable harm if

the stay were denied, which parties seeking a stay in this context must show." *Id.* The mandate then issued.

The State then filed an emergency motion, asking the court of appeals to reconsider its prior decision denying the stay or to grant various alternative forms of relief. *See* Davenport App. 18a-33a. Attempting to remedy its prior failure, the State purported to demonstrate good cause by arguing that it would have insufficient time to seek this Court's review of a petition for certiorari or to retry Mr. Davenport if the 180-day period for Mr. Davenport's release or retrial expired in December 2020. Davenport App. 22a-28a (¶¶ 7-13). The State sought various forms of relief in the alternative to remedy the harm it asserted would arise if it were required to release or retry Mr. Davenport by December 27, 2020. Among them, the State asked: "Alternatively, if this Court does not [recall the mandate and stay its issuance] …, th[e] Court should clarify that the 180-day period runs from the date of the mandate, which issued on November 5, 2020, not the date of the opinion." Davenport App. 28a (¶ 14). The State did not argue, as it now does, that this relief would be insufficient in any respect, and it did not ask that any other relief be granted in addition to the clarification of the 180-day period. Indeed, such a contention would have made little sense because the State's theory of good cause rested on the prejudice that would allegedly arise if it were obligated to release or retry Mr. Davenport by December 27, 2020, and clarification of the 180-day period would address that alleged prejudice. The court of appeals granted the "alternative" relief requested by the State, and that clarification obviated the need for a stay as the State had described it. State App. F.

The State now contends for the first time that the relief it requested and received is inadequate and that it requires the additional relief of staying the mandate because the 180-day period—even as clarified by the court of appeals—is insufficient. At no time did the State present that argument below or ask the court of appeals to recall and stay its mandate on this ground. Therefore, the requested relief was not properly sought from the court of appeals and the stay application should not be entertained by this Court. Sup. Ct. R. 23.3.

II. THE STATE HAS NOT MET THE HEAVY BURDEN REQUIRED FOR ISSUANCE OF A STAY

Even if the State had properly sought the requested relief from the court of appeals, the State's application should be denied. The State bears a heavy burden in persuading this Court to stay (or recall) the mandate. "The judgment of the court below is presumed to be valid, and absent unusual circumstances we defer to the decision of that court not to stay its judgment." *Wise* v. *Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers); *Graddick* v. *Newman*, 453 U.S. 928, 933 (1981) (Powell, J., in chambers) (accord). A stay "is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

To warrant this "extraordinary" relief, the State must make a "four-part showing." *Rostker*, 448 U.S. at 1308. "First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction." *Id.* "Second, the applicant must

persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Id.* "Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay." *Id.* "And fourth, in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.*

Here, the State's application fails at every step.

A. This Court Is Unlikely To Grant Certiorari Or Reverse

Review of a writ of certiorari is a matter of judicial discretion, and a petition will be granted only for "compelling reasons." Sup. Ct. R. 10. No such compelling reason exists here. The question on which the State seeks certiorari is not presented in this case, and resolving it would not alter the outcome. And, even if it were presented, the question does not warrant review. Contrary to the State's assertions, the court of appeals' decision is consistent with *Ayala* and AEDPA, and the decision below does not conflict with any decision of another court of appeals regarding the proper application of the harmless-error standard on habeas review.

1. The question on which the State seeks certiorari is not presented in this case

The State's petition for certiorari seeks review of a single question: "May a federal habeas court grant relief based *solely* on its conclusion that the *Brecht* test is satisfied … or must the court also find that the state court's *Chapman* application was unreasonable under § 2254(d)(1) … ?" Pet. i. In this case, however, the last reasoned state court decision did not apply the *Chapman* standard in evaluating whether Mr.

Davenport's unconstitutional shackling was harmless. Instead of holding the State to its burden of proving harmlessness beyond a reasonable doubt under *Chapman*, the Michigan Supreme Court concluded, citing *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), that the undisputed due process violation was harmless because the court "c[ould not] conclude that there was an unacceptable risk of impermissible factors coming into play." Davenport App. 4a.

The Michigan Supreme Court's failure to apply *Chapman* eliminates the very premise of the State's petition. The petition asks the Court to consider whether a federal habeas court must defer under AEDPA to "the state court's *Chapman* application." Pet. i. But here, there is no "state court[] *Chapman* application" to consider or defer to.

Moreover, by imposing a burden on Mr. Davenport to establish "an unacceptable risk of impermissible factors coming into play" instead of holding the State to its burden to prove that the unconstitutional shackling was harmless beyond a reasonable doubt under *Chapman*, the Michigan Supreme Court "applie[d] a rule that contradicts the governing law" established by this Court in *Chapman* and *Deck*. *Williams* v. *Taylor*, 529 U.S. 362, 405 (2000) (O'Connor, J., opinion). Such a decision warrants no deference and poses no bar to relief under AEDPA. *See, e.g.*, *id.* at 406 (federal habeas court is "unconstrained by [28 U.S.C.] § 2254(d)(1)" where the state court did not apply the standard clearly established by this Court). Accordingly, resolving the question posed by the petition would have no bearing on the outcome of this case. Even if this Court were to agree with the State that a federal habeas court cannot grant relief without

applying both *Brecht* and AEDPA/*Chapman*, Mr. Davenport would still prevail because the state court's harmlessness analysis was necessarily unreasonable under AEDPA.

2. The court of appeals' decision is consistent with *Ayala* and AEDPA

This Court is unlikely to grant certiorari or reverse for the additional reason that the court of appeals decision granting habeas relief to Mr. Davenport is fully consistent with *Davis* v. *Ayala*, 576 U.S. 257 (2015), and AEDPA.

In *Ayala*, this Court reaffirmed the relationship between *Brecht* and AEDPA/*Chapman*, confirming that while both standards apply to habeas review of a state court's harmless-error decision, "a federal habeas court need not 'formal[ly]' apply both." 576 U.S. at 268. Applying *Brecht* alone, however, does not mean that AEDPA's limitations are irrelevant. To the contrary, *Ayala* explained that *Brecht* does not "abrogate" AEDPA's requirements, which continue to "set[] forth a precondition to the grant of habeas relief," but "subsumes" them. *Id.* In other words, because *Brecht* is a more stringent standard than AEDPA, if a habeas petitioner satisfies the stringent *Brecht* standard (*i.e.*, demonstrates actual prejudice), AEDPA/*Chapman*'s limitations are necessarily met as well (*i.e.*, no fairminded jurist could agree that the state court's finding of harmlessness beyond a reasonable doubt were reasonable). *See id.* at 270 ("[A habeas petitioner] must show that he was actually prejudiced by [the error], a standard

that he necessarily cannot satisfy if a fairminded jurist could agree with the [state court's] decision that this procedure met the *Chapman* standard of harmlessness.").[5]

The relationship between *Brecht* and AEDPA/*Chapman*, as laid out in *Ayala*, makes sense given what is demanded by each standard. The *Brecht* standard limits habeas relief to situations in which an error resulted in "actual prejudice." *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993); *see also Ayala*, 576 U.S. at 267. This means that "relief is proper only if the federal court has 'grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict.'" *Ayala*, 576 U.S. at 267-268 (quoting *O'Neal* v. *McAninch*, 513 U.S. 432, 436 (1995) (internal quotation marks omitted)). This standard requires "more than a 'reasonable possibility' that the error was harmful." *Id.* at 268 (quoting *Brecht*, 507 U.S. at 637).

Habeas relief under AEDPA, on the other hand, requires that a habeas court find that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1); *see also Ayala*, 576 U.S. at 268-269. Thus, in cases where the state court determined that a trial error was "harmless beyond a reasonable doubt," a habeas court may grant habeas relief only if it determines that the state court's decision

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[5] *See also Fry* v. *Pliler*, 551 U.S. 112, 119-120 (2007) ("Given our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief, it is implausible that, without saying so, AEDPA replaced the *Brecht* standard of 'actual prejudice' with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable." (citations and quotation marks omitted)). The State dismisses the relevance of *Fry*, claiming (Appl. 9) that "AEDPA deference was not relevant" in that case. But this Court has held to the contrary: "In *Fry v. Pliler*, we held that the *Brecht* standard 'subsumes' the requirements that 2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under *Chapman*." *Ayala*, 576 U.S. at 268.

was an unreasonable application of the *Chapman* standard—*i.e.*, that no fairminded jurist could agree with the state court decision that the error was harmless beyond a reasonable doubt. *Ayala*, 576 U.S. at 267.

Brecht's "actual prejudice" standard—which requires "more than a 'reasonable possibility' that the error was harmful"—is thus more stringent than AEDPA/*Chapman*—which only requires that no fairminded jurist could agree that the error was harmless beyond a reasonable doubt. By definition, a fairminded jurist could not agree that an error was harmless beyond a reasonable doubt if there is more than a reasonable possibility that the error was in fact harmful. Thus, a finding of "actual prejudice" under *Brecht*, as the court of appeals found in this case, means that the AEDPA/*Chapman* standard is necessarily met as well.

The State's arguments to the contrary mischaracterize both the court of appeals decision in this case and this Court's precedent in *Ayala*. ***First***, there is no inconsistency between granting habeas relief under *Brecht* without "formally" applying AEDPA/*Chapman* and acknowledging that AEDPA remains a precondition to that relief. As discussed above, this is in fact exactly what *Ayala* contemplates. Here, the court of appeals, consistent with *Ayala*, relied on *Brecht*'s stringency to find both standards satisfied. In fact, before undertaking the *Brecht* analysis, the court of appeals considered both AEDPA and *Brecht* at length, expressly recognizing that "AEDPA remains a precondition to habeas relief." State App. A at 8; *see also id.* at 12 ("There is no dispute that both *Brecht* and AEDPA must be satisfied for a habeas petitioner to show that a constitutional error was not harmless"); *id.* at 13 ("AEDPA deference may be exacted through *Brecht*'s demanding standard" and "*Brecht* … not only contains

AEDPA's stringent commands of deference to state court merit determinations but also its spirit of federalism, comity, and finality"). Thus, the court of appeals did not ignore AEDPA, as the State suggests, but ensured that AEDPA's requirements would be met through *Brecht*.

Second, the State's claim (Pet. 11) that the "Sixth Circuit ignored *Ayala*'s analysis and instead focused on a single clause within [*Ayala*]" is incorrect. Far more than "a single clause" of *Ayala* supports the court of appeals' approach. *Ayala* explains at length, as the court of appeals recognized, that "the *Brecht* test subsumes the limitations imposed by AEDPA" precisely because a habeas petitioner "necessarily cannot satisfy" *Brecht*'s requirement of "actual prejudice" if any "fairminded jurist could agree with the [state court's] decision that this procedure met the *Chapman* standard of harmlessness." 576 U.S. at 270. The habeas court therefore "need not 'formal[ly] apply'" both tests. *Id.* at 268.[6] Moreover, the court of appeals did not ignore *Ayala*. Rather, it explained at length why its approach was consistent with *Ayala*'s analysis. State App. A at 8-10, 12-13.

Third, it is not correct that *Brecht* "takes no account of the deference due state court decisions" under AEDPA. Pet. 2. Rather, as noted by the court of appeals, "AEDPA deference may be exacted through *Brecht*'s demanding standard" because it "not only contains AEDPA's stringent commands of deference to state court merit determinations but also its spirit of federalism, comity, and finality." State App. A at

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[6] *Ayala*'s "lengthy outline of AEDPA's limitations and its application of the AEDPA/*Chapman* standard to the case at hand" does not undermine this point. Pet. 11. The Court in *Ayala* did not prohibit courts from applying both *Brecht* and AEDPA/*Chapman*, it merely confirmed that doing so is not required.

13. In fact, this Court adopted *Brecht* for habeas review precisely because it protects States' "interest in finality and … sovereignty over criminal matters." 507 U.S. at 637; *see also Fry* v. *Pliler*, 551 U.S. 112, 117 (2007). Moreover, the State's assertion that AEDPA/*Chapman* provides more deference than *Brecht* reflects a fundamental misunderstanding of what the two standards require. As explained above, a finding of "actual prejudice" under *Brecht* necessarily means that a state court finding of harmlessness beyond a reasonable doubt was objectively unreasonable.[7]

3. The decision below does not conflict with any other court of appeals' decision

The State contends that the "Second, Third, Seventh, Ninth and Tenth circuits have all rejected the Sixth Circuit's *Brecht*-only approach." Appl. 10. This contention is incorrect.[8] None of the appellate decisions cited by the State took the approach the State advocates here—*i.e.*, none applied AEDPA/*Chapman* to deny relief even where actual prejudice existed under *Brecht*. Indeed, the State does not cite a single case (and Mr. Davenport is aware of none) in which a habeas petitioner who would have prevailed under *Brecht* was nonetheless denied relief under AEDPA/*Chapman*. *See Orlando* v.

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[7] Ironically, in arguing that the court of appeals should have deferred to the Michigan Supreme Court's harmlessness decision, the State itself disregards the state court's analysis. The State relies (Pet. 22-27) heavily on the jurors' testimony in contending that the court of appeals erred in granting relief; yet the Michigan Supreme Court explicitly held that it was not appropriate to rely on juror testimony in determining the impact of the shackling error on the verdict, *see* Davenport App. 4a.

[8] As explained above, the State's characterization of the Sixth Circuit's analysis as a "*Brecht*-only approach" is misleading. The court of appeals held that "both *Brecht* and AEDPA must be satisfied," but "*Brecht*'s test covers both because it requires the petitioner to show enough poison to be fatal under either test." State App. A at 12. Both the Sixth Circuit and its sister circuits recognize that a federal habeas court owes deference to a state-court harmlessness determination and that deference remains a precondition to habeas relief. But as the State concedes (Pet. 12), this does not mean that both tests must be "*formally* applied." That some courts do choose to apply both tests does not create a circuit split but simply reflects *Ayala*'s acknowledgment that a federal habeas court may but need not apply both. 576 U.S. at 268.

Nassau Cty. Dist. Attorney's Office, 915 F.3d 113, 127 (2d Cir. 2019) (relief granted where error was not harmless under *Brecht*), *cert denied*, 140 S. Ct. 2792 (2020); *Johnson* v. *Lamas*, 850 F.3d 119, 137 (3d Cir. 2017) (petitioner failed to satisfy AEDPA and therefore "'necessarily cannot satisfy' *Brecht*"); *Welch* v. *Hepp*, 793 F.3d 734, 738-739 (7th Cir. 2015) (holding "state court's finding of harmless error … was not only reasonable but correct" and error "neither prejudiced [the petitioner] nor influenced the jury's verdict"); *Ford* v. *Peery*, 976 F.3d 1032, 1044 (9th Cir 2020) (habeas relief warranted under both *Brecht* and AEDPA/*Chapman*); *Malone* v. *Carpenter*, 911 F.3d 1022, 1037 (10th Cir. 2018) (petitioner failed to satisfy AEDPA and alternatively failed to satisfy *Brecht*). As such, none of the cited cases conflicts with the court of appeals' decision to grant relief here on the ground that *Brecht* was satisfied and that AEDPA/*Chapman* was therefore necessarily also met.[9]

To the contrary, several circuit courts—including the Seventh and Ninth Circuits—have held since *Ayala*, in agreement with the court of appeals here, that satisfying *Brecht* also satisfies AEDPA/*Chapman*. *See, e.g.*, *Jensen* v. *Clements*, 800 F.3d 892, 908 (7th Cir. 2015) ("Because [petitioner] satisfies the *Brecht* standard, he necessarily satisfies the AEDPA standard of an unreasonable application of the *Chapman* harmless error standard."); *Hall* v. *Haws*, 861 F.3d 977, 992 (9th Cir. 2017) ("We need not apply both a *Brecht* review and an AEDPA/*Chapman* review because

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[9] The petition (at 15-16) also cites *Spencer* v. *Capra*, 788 F. App'x 21 (2d Cir. 2019), and *Johnson* v. *Superintendent Fayette SCI*, 949 F.3d 791 (3d Cir. 2020), but neither supports the State's assertion of a circuit split. The petitioner in *Spencer* —an unpublished opinion without precedential effect—failed to meet both AEDPA/*Chapman* and *Brecht*. 788 F. App'x at 23-24. And in *Johnson*, there was no state court harmless-error decision. 949 F.3d at 804.

'[a] determination that the error resulted in "actual prejudice" [under *Brecht*] necessarily means that the state court's harmless error determination was not merely incorrect, but objectively unreasonable.'"); *Hammonds* v. *Commissioner, Ala. Dep't of Corr.*, 712 F. App'x 841, 850 (11th Cir. 2017) (per curiam) ("[T]he *Brecht* standard 'obviously subsumes' the AEDPA test when it is applied to a *Chapman* finding of harmless error, meaning that if a petitioner satisfies the *Brecht* standard, he necessarily also satisfies the AEDPA standard[.]").[10] While there are few post-*Ayala* cases in which a circuit court granted relief after a state court concluded that a constitutional error was harmless, the infrequency of such decisions is not evidence of conflict, but merely evidence that the State's petition identifies no issue of recurring significance.

B. The State Would Not Suffer Irreparable Harm Without A Stay

The State contends that it will face "an untenable procedural position" without a stay. Appl. 11. This argument fails to carry the State's burden to show irreparable harm justifying a recall and stay of the mandate.

As an initial matter, a stay under Section 2101(f) is generally intended to "enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." 28 U.S.C. §

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[10] In *Ford*, 976 F.3d 1032, the Ninth Circuit considered harmlessness under AEDPA/*Chapman* analysis after having concluded that a trial error was not harmless under *Brecht*. But in doing so, the court did not explicitly consider the relationship between *Brecht* and AEDPA/*Chapman* and found *Brecht* satisfied only because the underlying constitutional error required a finding of prejudice. *Id.* at 1044. *Ford* thus did not purport to negate the Ninth Circuit's repeated holdings that if *Brecht* is satisfied, then AEDPA/*Chapman* is as well. *See Sifuentes* v. *Brazelton*, 825 F.3d 506, 535 (9th Cir. 2016) ("[I]f a petitioner does satisfy the *Brecht* requirement of showing that an error resulted in 'actual prejudice,' then the petitioner necessarily must have shown that the state court's determination that the error was harmless was objectively unreasonable."); *Hall*, 861 F.3d at 992; *Reyes* v. *Madden*, 780 F. App'x 436, 438, 440 (9th Cir. 2019) (noting that *Brecht* "'is so stringent that it 'subsumes' the AEDPA/*Chapman* standard for review of a state court determination of the harmlessness of a constitutional violation'" and granting habeas relief under *Brecht*).

2101(f). But no stay is required for that purpose here. The State has had ample opportunity to seek this Court's review, and by the State's own admission, this Court will likely dispose of the State's petition with more than a month to spare before the expiration of the 180-day period in which the State must retry or release Mr. Davenport. *See* Appl. 12-13.[11]

Without asserting any actual harm—much less irreparable harm—the State asserts that it will be "burden[ed]" without a stay for lack of sufficient time to prepare for trial if the Court denies its petition for certiorari. Appl. 13-14. But the State cites no authority suggesting that the mere "burdens" of preparing for possible retrial constitute irreparable harm warranting the "extraordinary" relief of a stay. *Rostker*, 448 U.S. at 1308. Nor could it: every litigant who seeks a stay of the mandate faces the expense of preparing for the possibility of further litigation if the stay is denied. *Cf. Conkright* v. *Frommert*, 556 U.S. 1401, 1403 (2009) (Ginsburg, J., in chambers) ("'Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough [for irreparable harm].'" (quoting *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974))). In any event, the State's concerns are unfounded. The State has conceded that it can release Mr. Davenport from his current incarceration within the 180-day period and then move to detain him like any other pretrial detainee. *See* Davenport App. 26a-27a (¶12 (noting that the State may "release Davenport from

[11] Mr. Davenport sought and received a 30-day extension to file his brief in opposition. The calculations in the State's stay application account for this extension.

prison" and then "seek to hold Davenport as a pretrial detainee under Michigan law on bail awaiting trial")).

Moreover, the State's claimed "untenable procedural position" is of its own making. The State waited 90 days after the court of appeals denied its petition for rehearing en banc—167 days after the panel issued its opinion granting Mr. Davenport habeas relief—before filing its petition for certiorari. Nothing stopped the State from filing sooner or from using that time to begin preparing for a retrial; and nothing is stopping the State from preparing now. To the extent the State delayed based on an assumption that its petitions for rehearing or certiorari would be granted, that assumption was not reasonable. *See* Fed. R. App. P. 35(a) (rehearing en banc "is not favored and ordinarily will not be ordered"); Sup. Ct. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.").

Thus, given that the 180-day period will not expire prior to this Court's disposition of the petition for certiorari, that the State may subsequently release and seek to hold Mr. Davenport as a pretrial detainee, and that any timing difficulties are both minimal and attributable to the State's own actions, the purported burden that the State would suffer absent a stay falls far short of the required irreparable harm. For this reason alone, the State's application should be denied.

C. The Equities Weigh Against A Stay

On the other side of the balance, Mr. Davenport is serving a life sentence after having been convicted at a trial that featured a blatant, undisputed violation of his constitutional rights—a violation this Court has deemed inherently prejudicial. *Deck* v.

Missouri, 544 U.S. 622, 635 (2005). The court of appeals' ruling that the constitutional violation was not harmless entitles him to either release or a new trial. That relief should not be delayed further. The State's sole argument to the contrary is that Mr. Davenport will remain incarcerated because he is "sure to be convicted again," Appl. 14, but that is mere conjecture. Any future conviction or sentence is for a jury to decide.

The equities thus favor Mr. Davenport, who has now spent more than a decade in prison based on an unconstitutional conviction. By its own admission, the State violated Mr. Davenport's rights, and the court of appeals has now held that the constitutional violation actually prejudiced the verdict. Under that decision, Mr. Davenport is entitled—finally—to a fair trial or his release.

CONCLUSION

The application should be denied.

Respectfully submitted.

/s/ Tasha J. Bahal
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JANUARY 2021

CERTIFICATE OF SERVICE

I, Tasha J. Bahal, a member of the bar of this Court, hereby certify that on this 12th day of January, 2021, I caused all parties requiring service in this matter to be served with the accompanying Opposition to the Application to Stay the Mandate of the Sixth Circuit Court of Appeals by email to the address below:

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I further certify that paper copies will be submitted to the Court and served on all parties requiring service by overnight courier on December 12, 2020.

/s/ Tasha J. Bahal

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Appendix A

Michigan Court of Appeals Decision (Dec. 13, 2012)

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2012
V	No. 306868 Kalamazoo Circuit Court
ERVINE LEE DAVENPORT, Defendant-Appellant.	LC No. 2007-000165-FC

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's opinion, after remand, holding that the prosecution proved beyond a reasonable doubt that the shackling error did not contribute to defendant's conviction of first-degree murder, MCL 750.316. We affirm.

I. FACTUAL BACKGROUND

The sole issue on appeal is the impact of defendant's partial shackling at trial. While this Court previously held there were no errors requiring reversal and no need to remand for an evidentiary hearing, in lieu of granting leave to appeal, our Supreme Court reversed this Court's order denying defendant's motion to remand for an evidentiary hearing. *People v Davenport*, 488 Mich 1054; 794 NW2d 616 (2011). The Court held that "defendant should have been permitted to develop the record on the issue of whether his shackling during trial prejudiced his defense" and remanded the case to the trial court for proceedings consistent with its order. *Id*.

On remand, the trial court conducted two evidentiary hearings. 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. The trial court issued an opinion finding that although many of the jurors were able to observe defendant's shackles during trial, in light of the jurors' testimony that it did not affect their verdict, the prosecution demonstrated beyond a reasonable doubt that the shackling error did not contribute to defendant's conviction. Defendant now appeals.

II. SHACKLING

A. Standard of Review

"We review a trial court's decision to shackle a defendant for an abuse of discretion under the totality of the circumstances." *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). However, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Deck v Missouri*, 544 US 622, 635; 125 S Ct 2007; 161 L Ed 2d 953 (2005). Instead, the prosecution "must prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Id.* (internal quotations and citation omitted).

B. Analysis

Defendant argues that he was denied due process when the trial court erroneously required him to be shackled during trial and the prosecution failed to prove beyond a reasonable doubt that the shackling error did not contribute to his conviction. We disagree.[1]

Although a defendant does not have an absolute right to be unshackled at trial, "a defendant 'may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order.'" *Payne*, 285 Mich App at 186, quoting *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). If the trial court improperly orders a defendant to be shackled, the burden falls on the prosecution to prove beyond a reasonable doubt that the error did not contribute to the guilty verdict. *Deck*, 544 US at 635.

In the instant case, it is uncontroverted that defendant was shackled and that the trial court erred in ordering his shackling. Five jurors also testified that they recalled seeing defendant shackled at some point during the proceedings. While some of the jurors testified that they remembered a minor comment by one of the jurors about the shackling, none could even remember who made the comment. Further, 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. The five jurors who observed defendant's shackles each testified that they believed there was nothing unusual about his shackling and that it did not influence their respective verdicts. All of the evidence indicated that the shackling did not affect the verdict in any way. Thus, the trial court properly found that the prosecution met its burden of proving beyond a reasonable doubt that the error did not affect the jury's verdict. See *Deck*, 544 US at 635.

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[1] Defendant also makes a passing reference to the prejudicial effect of wearing his orange jail uniform. However, the issue on remand was limited to the shackling, not defendant's apparel. See *Davenport*, 488 Mich at 1054.

Defendant contends that despite the jurors' specific testimony to the contrary, their testimony about defendant's shackles demonstrated that they were clearly affected by his shackling. Defendant emphasizes the testimony of three jurors who observed his shackles—Robert Jankord, James Vanderveen, and Michael Whately—and who testified that they thought defendant might be dangerous. However, Jankord, Vanderveen, and Whately each testified that his belief that defendant might be dangerous was based the charge of first-degree murder, not the shackling. They testified that they presumed defendant's shackles were routine procedure given the charge and that the shackles did not influence their verdict in any way. Therefore, contrary to defendant's assertion, the jurors' testimony did not indicate that the shackling error contributed to the verdict against defendant.

Also contrary to defendant's argument, it was proper for the jurors to testify regarding how viewing the shackles affected their deliberations. Jurors may only consider the evidence presented at trial when deliberating and may not consider "extraneous facts not introduced in evidence." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Subsequent to trial, jurors may not impeach their own verdict by testimony or affidavits that "challenge mistakes or misconduct inherent in the verdict." *Id.* at 91. However, one exception is that "oral testimony or affidavits" from jurors may "be received on extraneous or outside errors[.]" *Id.* Here, the fact that defendant was shackled was extrinsic error, completely unrelated to the evidence introduced at trial. See *id*. at 89. While defendant concedes that the viewing of the shackling is an extraneous error, he maintains that whether the jury discussed the shackling is not an extraneous error and should not have been subject to juror testimony at the evidentiary hearings. However, the Michigan Supreme Court has recognized that a trial court may properly elicit and consider testimony from the jurors "to determin[e] the extent to which the jurors saw *or discussed* the extrinsic evidence." *Budzyn*, 456 Mich at 91 (emphasis added). Thus, the trial court was not in error.[2]

III. CONCLUSION

The trial court did not err in finding that the prosecution proved beyond a reasonable doubt that the shackling error did not affect the verdict. We affirm.

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan

[2] Defendant also contends that the evidence at trial was "hotly disputed" and that the jury's decision was essentially one of credibility, rendering the shackling all the more prejudicial. Contrary to this assertion, the evidence at trial overwhelmingly established defendant's guilt and belied his contention that he killed the 103 pound victim in self-defense, a theory that was explicitly disputed by expert medical testimony.

Appendix B

Michigan Supreme Court Decision (July 3, 2013)

July 3, 2013

146652

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 146652
COA: 306868
Kalamazoo CC: 2007-000165-FC

ERVINE LEE DAVENPORT,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the December 13, 2012 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. While the Court of Appeals erroneously failed to consider defendant's claim in light of the United States Supreme Court decision in *Holbrook v Flynn*, 475 US 560, 570; 106 S Ct 1340; 89 L Ed 2d 525 (1986) ("the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play'"), citing *Estelle v Williams*, 425 US 501, 505; 96 S Ct 1691; 48 L Ed 2d 126 (1976), the error was harmless under the facts of this case. Given the substantial evidence of guilt presented at trial, we cannot conclude that there was an unacceptable risk of impermissible factors coming into play.

Appendix C

State's Motion to Stay (Sept. 22, 2020)

No. 17-2267

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERVINE LEE DAVENPORT,

Petitioner-Appellant,

v.

DUNCAN MACLAREN, Warden,

Respondent-Appellee.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Magistrate Judge Ellen S. Carmody

RESPONDENT-APPELLEE'S
MOTION TO STAY THE MANDATE

Respondent-Appellee Duncan MacLaren, by his attorneys, Dana Nessel, Attorney General for the State of Michigan, and Jared Schultz, Assistant Attorney General, and pursuant to Federal Rule of Appellate Procedure 41, asks this Court to enter an order staying the issuance of the mandate of its published June 30, 2020 opinion so that Respondent may file a petition for a writ of certiorari with the United States Supreme Court. Respondent argues the following in support of its motion to stay the mandate:

1. Petitioner-Appellant Ervine Davenport filed a habeas corpus petition alleging that he was unconstitutionally shackled during his jury trial for first-degree premeditated murder.

2. The district court denied the petition, rejecting Davenport's shackling claim.

3. Davenport appealed, and, on June 30, 2020, a three-judge panel of this Court reversed the district court's decision denying habeas relief and granted Davenport "a conditional writ of habeas corpus that will result in his release from prison unless the State of Michigan commences a new trial against him within 180 days." (6/30/20 Op., Doc. 35-2, Pages 25–26.) Judge Readler dissented.

4. Respondent 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. On September 15, 2020, this Court issued a published order denying the petition. (9/15/20 Order Den. Pet. for Reh'g En Banc at 2.) Four separate opinions were attached. Six judges found rehearing unwarranted because the panel majority applied the correct standard (*id.* at 3–7 (Stranch, J., concurring)); seven judges found rehearing *was* warranted because the

panel majority applied the wrong standard (*id.* at 12–14 (Griffin, J., dissenting), 15–28 (Thapar, J., dissenting)), and two judges were skeptical that the panel majority applied the correct standard but nevertheless voted to deny rehearing for other reasons (*id.* at 8–11, (Sutton, J., concurring)).

5. Respondent plans to file a petition for a writ of certiorari in the Supreme Court. Consistent with Supreme Court Rule 10, which sets out considerations governing review for certiorari, there are compelling reasons to grant the petition.

6. Respondent respectfully requests that this Court stay the mandate. This Court has granted motions to stay mandates in other habeas matters in which the State has sought to raise important questions before the Supreme Court. *See* unpublished orders in *Byrd v. Skipper*, No. 18-2021 (Nov. 4, 2019); *Etherton v. Rivard,* No. 14-1373 (Sept. 25, 2015); *Blackston v. Rapelje,* No. 12-2668 (May 19, 2015); *Donald v. Rapelje,* No. 12-2624 (Sept. 17, 2014); *McClellan v. Rapelje*, No. 11-1841 (Apr. 3, 2013); *Lancaster v. Metrish*, No. 10-2112 (Sept. 12, 2012); *Perkins v. McQuiggin*, No. 09-1875 (May 3, 2012); *Rice v. White*,

No. 10-1583 (Feb. 6, 2012); *Walker v. McQuiggin*, No. 10-1198 (Dec. 2, 2011); *Miller v. Stovall,* No. 08-2267 (Oct. 8, 2010); *Cooper v. Lafler,* No. 09-1487 (June 10, 2010); *Lett v. Renico,* No. 07-2174 (June 22, 2009); *Smith v. Berghuis,* No. 06-1463 (Feb. 24, 2009).

7. Respondent plans to raise the following important questions in its petition for a writ of certiorari:

a. Did the Sixth Circuit's panel majority misinterpret *Davis v. Ayala*, 576 U.S. 257 (2015), by following its own precedent holding that it need not explicitly apply the deference for habeas cases demanded under 28 U.S.C. § 2254(d) and finding that the error in state court was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)?

b. Did the Sixth Circuit's review under the *Brecht* standard run contrary to the habeas principles of finality, comity, and federalism when it determined that the jury must have been influenced by the defendant's unconstitutional shackling, despite the jurors' own statements to the contrary and the overwhelming evidence of guilt produced at trial?

8. The standard of review employed by this Court conflicts with the statutory language of the Antiterrorism and Effective Death Penalty Act (AEDPA), as well as the Supreme Court's decision in *Ayala*.

9. Under AEDPA, a federal court may not grant habeas relief on a claim that was adjudicated on the merits by a state court unless the state court's determination "was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). A state court's harmless-error determination is an adjudication on the merits. *Ayala*, 576 U.S. at 269. Thus, under the plain language of the statute, Davenport can only receive habeas relief if the Michigan courts' determinations that the shackling error was harmless were contrary to, or unreasonable applications of, Supreme Court precedent.

9. In *Ayala*, the Supreme 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.

10. This Court did not analyze Davenport's shackling claim in this case under AEDPA's highly deferential standard of review. Indeed, this Court explicitly determined that it could "go straight to *Brecht*" because "*Brecht* handles the work of both tests." Slip op., p. 8. The 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.

Slip op, p. 34 (READLER, J., dissenting).

11. In finding *Brecht* met here, the panel majority not once discussed the reasonableness of the state court decisions. Instead, it made its own independent findings stemming from a nine-year-old state-court evidentiary hearing, ignored the state courts' findings

following that hearing, and came to its own independent conclusion that a prejudicial error must have occurred. Such an approach contradicts both AEDPA and Supreme Court precedent.

12. The panel majority's approach also runs contrary to many decisions of the other federal Courts of Appeals. The circuit split is explained in exhausting detail in both Judge Readler's dissent from the panel majority's opinion and in Judge Thapar's dissent from this Court's order denying respondent's petition for rehearing en banc. (Slip op. at 37–39 (Readler, J., dissenting); 9/15/20 Order Den. Pet. for Reh'g En Banc at 25–26 (Thapar, J., dissenting).) And as explained by Judge Griffin in his dissent from the order denying rehearing en banc, the decision here also runs afoul of this Court's own precedent. (9/15/20 Order Den. Pet. for Reh'g En Banc at 12–13, 14 (Griffin, J., dissenting).)

13. This issue is exceptionally important. Indeed, a majority of the judges on this Court have already expressed their belief that further review is warranted. (*See* 9/15/20 Order Den. Pet. for Reh'g En Banc at 10 (Sutton, J., concurring) ("I suspect every federal judge in the country would welcome guidance in the area."), 14 (Griffin, J., dissenting) ("Because our litigants, attorneys, and judges need guidance from our

en banc court on these issues of exceptional importance, I would grant respondent's petition for rehearing en banc."), 26 (Thapar, J., dissenting) ("Given the deep confusion within and among the circuits, the question presented here is ripe for further review.").) In total, 9 of the 15 judges that considered the petition for rehearing en banc found the panel majority's decision wrong—or were at least skeptical of its correctness.

14. Had the panel majority applied the correct standard governing review of state-court harmless-error determinations, the outcome would have been different. As more fully explained in Judge Readler's dissent from the panel majority's decision and Judge Thapar's dissent from the order denying rehearing en banc, there is no Supreme Court precedent that prohibits state courts from accepting juror testimony definitively stating that a defendant's shackling played no role in deliberations. (Slip op. at 40–43 (Readler, J., dissenting); 9/15/20 Order Den. Pet. for Reh'g En Banc at 22–23 (Thapar, J., dissenting).) And considering the juror testimony alongside the overwhelming evidence presented at trial showing that Davenport committed first-degree premeditated murder—the forensic pathologist inferred that

Davenport continued to choke the victim, Annette White, for several moments after she lost consciousness; he had earlier choked another woman until she lost consciousness; he inexplicably disposed of her body and later burglarized her apartment; and he told countless lies to the police—the state court determinations that the shackling error was harmless were not contrary to, or unreasonable applications of, clearly established federal law.

16. Finally, even if the panel majority's decision to cast aside AEDPA was correct, its holding that Davenport was actually prejudiced under *Brecht* was incorrect. The jurors testified that Davenport's shackling did not affect their verdict. And, as already described, there was overwhelming evidence that Davenport was guilty of first-degree premeditated murder. Simply put, the shackling error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623.

14. Because the panel majority failed to follow AEDPA and Supreme Court precedent, because there is a split in and among the Courts of Appeals, and because this issue is exceptionally important,

this Court should stay the mandate so that respondent can file a petition for certiorari in the Supreme Court.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, respondent respectfully requests that this Court grant this motion and stay the mandate.

Respectfully submitted,

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Dated: September 22, 2020

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Certificate of Compliance with Page Limitation, Typeface Requirements, and Type Style Requirements

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CERTIFICATE OF SERVICE

I certify that on September 22, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Appendix D

State's Emergency Motion to Reconsider (Nov. 22, 2020)

No. 17-2267

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERVINE LEE DAVENPORT,
Petitioner-Appellant,
v.
DUNCAN MACLAREN, Warden,
Respondent-Appellee.

** **DECISION REQUESTED BY NOVEMBER 25** **

Appeal from the United States District Court
Western District of Michigan, Southern Division
Magistrate Judge Janet T. Neff

RESPONDENT-APPELLEE'S EMERGENCY MOTION TO RECONSIDER THIS COURT'S ORDER DENYING MOTION TO STAY THE MANDATE, REQUEST TO RECALL THE MANDATE, AND REQUEST FOR EXPEDITED CONSIDERATION

Respondent-Appellee Duncan MacLaren, by his attorneys, Dana Nessel, Attorney General for the State of Michigan, and Jared Schultz, Assistant Attorney General, and pursuant to Federal Rule of Appellate Procedure 27 and Sixth Circuit Rule 27(f), (g), asks this Court to reconsider its order denying Respondent's motion to stay the mandate. Respondent also asks this Court to recall the mandate and expedite its consideration of this motion and requests a decision by November 25.

Specifically, the State of Michigan currently must release or retry Ervine Davenport within 180 days from the date of the original panel opinion, which expires on December 27, 2020. The State plans to file its petition for certiorari 90 days after the denial of its en banc petition, *i.e.,* on December 14, 2020. But the petition will not even be set for conference in the U.S. Supreme Court before December 27, 2020. And due to the COVID-19 pandemic, the State is *prohibited* from commencing a retrial by that date. Absent a stay, and because of the current moratorium on jury trials, the State will have to release Davenport from his first-degree murder conviction – and he was convicted of a brutal first-degree murder by strangling his female victim to death and was sentenced to life imprisonment – before the Supreme Court weighs in. This would not only pose a danger to the public but would render moot the State's petition for certiorari. This Court should stay the 180-day period within which Davenport must be released or retried, ruling that the 180-day time period will begin to run from the final disposition of the State's petition for certiorari in that court.

Respondent argues the following in support of its motion for reconsideration:

1. Ervine Davenport filed a habeas corpus petition alleging that he was unconstitutionally shackled during his jury trial for first-degree premeditated murder. (9/25/14 Pet., R. 1, Page ID #4.)

2. The district court denied the petition, rejecting Davenport's shackling claim. (9/26/17 Op. and Order, R. 11, Page ID #2946.) Davenport appealed.

3. On June 30, 2020, in a two-to-one decision, a three-judge panel of this Court reversed the district court's decision denying habeas relief and granted Davenport "a conditional writ of habeas corpus that will result in his release from prison unless the State of Michigan commences a new trial against him within 180 days *from the date of this opinion*." (6/30/20 Op., Doc. 35-2, Pages 25–26 (emphasis added).) Judge Readler dissented.

4. On July 28, 2020, the State filed a timely petition for rehearing en banc, arguing that the panel majority applied the wrong standard for reviewing a state court's harmless-error determination. (7/28/20 Pet. for Reh'g, Doc. 39.) On September 15, 2020, this Court issued a published order denying the petition. (9/15/20 Order Den. Pet. for Reh'g En Banc, Page 2.) Four separate opinions were attached.

Six judges found rehearing unwarranted because the panel majority applied the correct standard (*id.* at 3–7 (Stranch, J., concurring)); seven judges found rehearing *was* warranted because the panel majority applied the wrong standard (*id.* at 12–14 (Griffin, J., dissenting), 15–28 (Thapar, J., dissenting)), and two judges were skeptical that the panel majority applied the correct standard, but nevertheless voted to deny rehearing for other reasons (*id.* at 8–11, (Sutton, J., concurring)).

5. On September 22, 2020, the State filed a motion to stay the mandate, explaining that it planned to file a petition for a writ of certiorari and that there were compelling reasons to grant the petition. (9/22/20 Mot. to Stay the Mandate, Doc. 44, Pages 3–4.)

6. Forty-three days later, on November 5, 2020, this Court, in a single-judge order issued by Judge Stranch (who wrote the panel majority opinion and the lead concurrence in the denial of en banc rehearing) denied the motion to stay the mandate. (11/5/20 Order, Doc. 47-1.) The order reasoned that (1) the State never alleged or discussed whether there was good cause to stay the mandate, (2) the State had not yet filed a petition for certiorari in the Supreme Court despite

having had "several weeks to do so," and (3) the mandate issuing would not prevent the State from filing a petition for certiorari. (*Id.*) The mandate issued that same day, on November 5, 2020. (11/5/20 Mandate, Doc. 48.)

7. The order's reasoning demonstrates a misunderstanding of the effect of the original conditional habeas grant on the progression of this case. None of the reasons given contemplates the undeniable choice of undesirable outcomes that will occur without a stay of the mandate and the 180-day period, either of which will moot the State's petition for certiorari and deprive the State of an opportunity to appeal the panel's decision. Either the State will have to retry Davenport before December 27, 2020 while the petition for certiorari is pending or the State will have to vacate Davenport's conviction and release him from his first-degree murder conviction, and Michigan's law on bond would govern his status as a pretrial criminal defendant. *See* 1963 Mich. Const., art 1, § 15; Mich. Comp. Laws § 765.1 *et seq.*

8. On the question of good cause, the need for a stay is inherent in the posture of the case. In all of its pleadings, the State has challenged this Court's order conditionally granting habeas relief. Once that relief

– release or retrial – occurs, no controversy would remain because the State would have to vacate Davenport's conviction so that he would no longer be "in custody" on the first-degree murder conviction pursuant to the alleged constitutional violation unless it retried him. *See* 28 U.S.C. § 2254(a). *See also Eddleman v. McKee,* 586 F.3d 409, 413 (6th Cir. 2009) (noting that "the unconstitutional judgment is gone" "in a typical case where a prisoner's conviction is vacated"). Good cause was apparent when the State explained that it would appeal the panel's opinion – that ordered either the release or retrial of Davenport – to the U.S. Supreme Court.

9. The Supreme Court provides 90 days to appeal a conditional habeas grant (which has been extended to 150 days in light of the current COVID-19 pandemic). (3/19/20 Order, available at https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf (last accessed November 10, 2020).) The State plans to file the petition for certiorari within the ordinary 90-day period, on December 14, 2020. Neither Federal Rule of Appellate Procedure 41(d) nor Sixth Circuit Rule 41 provides that the moving party's failure to expedite its petition for certiorari has any bearing on the decision to grant a stay. Indeed,

the purpose of Rule 41 is to allow the mandate to be stayed "pending the *filing* of a petition for a writ of certiorari in the Supreme Court." Fed. R. App. P. 41(d)(1) (emphasis added). And once the petition has been filed (and the moving party notifies the clerk of this Court), the stay is automatically continued. Fed. R. App. P. 41(d)(2)(B)(*ii*). Thus, requiring the State to file a petition before the 90-day period has run in order to stay the mandate swallows Rule 41(d) whole.

10. And although the mandate issuing does not prevent the State from filing a petition, the failure to grant a stay practically renders any appeal moot because the State will place Davenport into a pretrial posture by vacating his conviction – releasing him from the conviction found to be unconstitutional and allowing Michigan law to govern his pretrial status – if it cannot obtain a stay. According to the panel decision, Davenport must be released or retried within 180 days "from the date of [the] *opinion*." (6/30/20 Op., Doc. 35-2, Page 26 (emphasis added).) The effect of this Court's opinion means that the State must release or retry Davenport by December 27, 2020, less than two weeks after the petition is due by the ordinary operation of the U.S. Supreme Court rules. Even if the State files a petition before that date, it is

unlikely that the Supreme Court will decide whether to grant the petition before December 27. And, should the high court *deny* the petition, that decision certainly would not come in enough time for the State to initiate retrial proceedings and commence a new trial by that date.

11. Davenport's retrial and reconviction would moot the matter. It is important to note that even if the State could conceivably initiate retrial proceedings, schedule a new trial date, and begin a new trial before December 27, the circumstances created by the current COVID-19 pandemic preclude it from doing so. Specifically, given the spread of the virus in Kalamazoo County (the jurisdiction in which Davenport was tried and convicted), the State is prohibited from conducting a jury trial. *See* Mich. S. Ct. Admin. Order No. 2020-19, available at https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2020-08_2020-06-26_FormattedOrder_AO2020-19.pdf (requiring courts to obtain approval from the State Court Administrative Office before jury trials may commence) (last accessed November 13, 2020); Kalamazoo Cir. Ct. Admin. Order No. 2020-08J, available at https://courts.michigan.gov/

News-Events/covid19-resources/COVID19/JuryLAOs/KalamazooC09D08P39CJT.pdf (requiring that the 7-day average number of cases per day per million people in the county be 70 or less, or fewer than 20 total) (last accessed November 13, 2020); Health Data Kalamazoo, KALAMAZOO CNTY. GOVERNMENT, available at https://www.kalcounty.com/hcs/datahub/covid19.php (showing a 7-day average of 131 positive cases as of November 9, 2020) (last accessed November 13, 2020); QuickFacts, Kalamazoo Cnty, MI, UNITED STATES CENSUS BUREAU, available at https://www.census.gov/quickfacts/kalamazoocountymichigan (showing a population estimate of 265,066) (last accessed November 13, 2020).

12. Thus, the State is left with only one option to comply with the panel's directive: to release Davenport from prison. But releasing him from custody will endanger the public, as even the panel majority suggested that Davenport is a murderer. *See* 6/30/20 Op., Doc. 35-2, Pages 18–22) (discussing the difference between first- and second-degree murder in Michigan and noting that "[t]he jury easily could have found that this was second-degree murder"). The State may thus seek to hold Davenport as a pretrial detainee under Michigan law on bail

awaiting trial, *see Eddleman,* 586 F.3d at 413, 414 (noting that when "a state fails to retry [him] by the deadline set in a conditional writ, the state is not precluded from rearresting petitioner and retrying him under the same indictment" and that "[n]o federal power authorized the district court to release Eddleman from pretrial detention on a legitimate state charge") (internal quotes omitted). But doing so would require the State to first vacate Davenport's conviction. And vacating his conviction would moot the petition. *See St. Pierre v. United States*, 319 U.S. 41, 42 (1943) ("A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it."). All told, without a stay, if the State complies with this Court's opinion, its petition for a writ of certiorari presenting an important issue in habeas law will become moot. Therefore, it is apparent that there is good cause to support the grant of the stay. And without reiterating arguments filed in the original motion to stay the mandate (9/22/20 Mot., Doc. 44, Pages 4–8), the State contends that that this issue presents a substantial question of habeas law for the U.S. Supreme Court.

13. Therefore, to ensure that the State has an opportunity to file a timely petition for a writ of certiorari in the Supreme Court, this Court should recall the mandate and stay its issuance as well as staying the 180-day requirement during which Davenport must be released or retried, ordering that the 180-day time period will instead begin to run from the final disposition of the State's petition for certiorari in that court.

14. Alternatively, if this Court does not grant this relief while the State files a timely petition, this Court should clarify that the 180-day period runs from the date of the mandate, which issued on November 5, 2020, not the date of the opinion. *See Mason v. Mitchell*, 729 F.3d 545, 550–51 (6th Cir. 2013) (noting that the State was required to comply with the conditional writ within 180 days from the date that the judgment became final, and finding that the judgment did not become final and the clock did not begin running until the mandate was issued).

15. If this Court does not stay the 180-day period or clarify that the period runs from the date of the mandate, this Court should alternatively toll the 180-day period during the time that the State's motion for rehearing en banc and motion to stay the mandate were

pending. If rehearing had been granted and ultimately decided in the State's favor, the conditional grant would have been reversed, averting the requirement to release or retry Davenport. And the State's position was not frivolous, as demonstrated by the fact that 7 of 15 judges dissented, and only 6 of 15 judges agreed with Davenport on the merits. The potentially meritorious motion pending, if granted, would have afforded the State full relief and obviated the need for retrial. But because the majority panel's language indicated that the time for release or retrial ran "from the date of [the] *opinion*," the State's time to comply still ran. The State sought a stay after rehearing was denied, but this Court denied that motion 43 days after the State filed it. To remedy the State's lost time, this Court may toll the 180-day period during the time that the State's motion for rehearing (49 days) and motion to stay (43 days) were pending (92 days total), which would extend the December 27 date to March 29, 2021.

16. Finally, as discussed above in paragraph 11, the State is currently prohibited from providing Davenport with a new jury trial in Kalamazoo County. In the interests of justice, this Court should, if

nothing else, extend the 180-day period for an additional 120 days so that Davenport may be properly retried when it is safe to do so.

17. The State therefore respectfully requests that this Court recall the mandate and stay its issuance while the State files a timely petition for a writ of certiorari in the Supreme Court, ordering that the 180 days begin to run from the final disposition of the State's petition for certiorari.

Alternatively, the State respectfully requests that this Court clarify that the 180-day period runs from the date of the mandate, or that this Court extend the period for release or retrial by at least 120 days. Because the 180-day period is currently set to expire on December 27, the State requests that this Court expedite consideration of this motion, issuing a decision by November 25, 2020, so that the State may seek timely relief in the U.S. Supreme Court if this Court does not grant any relief.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the State respectfully requests that this Court grant this motion to reconsider the order denying the motion to stay the mandate, recall the mandate, and order that the 180 days in which the State may retry or release Ervine Davenport begins to run from the date the State's petition reaches final disposition or grant some other relief as requested here. The State also respectfully requests that this Court expedite consideration of this motion and provide a decision by November 25, 2020.

Respectfully submitted,

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