No. 20-826

IN THE

Supreme Court of the United States

MIKE BROWN, ACTING WARDEN,
Petitioner,

v.

ERVINE DAVENPORT,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly granted habeas relief based on its findings that the visible shackling of respondent during his criminal trial resulted in actual prejudice under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), and that the state court's harmlessness determination was therefore necessarily unreasonable.

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INTRODUCTION

Ervine Davenport was visibly shackled at the waist, wrist, and ankles during his 2008 trial. As the State concedes (Pet. 25), it is "uncontroverted that [Mr.] Davenport's shackling was 'inherently prejudicial' and was error," as this Court clearly established in *Deck* v. *Missouri*, 544 U.S. 622 (2005). After carefully considering juror testimony and the evidence at trial—particularly the "closeness of the case" regarding Mr. Davenport's state of mind, Pet. App. 32a—the court of appeals concluded that the unconstitutional shackling was not harmless under *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993) (habeas relief should be granted if underlying constitutional error "had substantial and injurious effect or influence in determining the jury's verdict," meaning that it resulted in "actual prejudice"). Pet. App. 38a. The court granted a conditional writ of habeas corpus.

The State's petition does not challenge the court's finding of actual prejudice under *Brecht*. And it concedes (Pet. 12) that a federal habeas court need not "*formally* appl[y]" both *Brecht*'s "actual prejudice" standard and AEDPA's inquiry into the reasonableness of the state court's harmlessness determination under *Chapman* v. *California*, 386 U.S. 18 (1967). The State nevertheless asks this Court to grant certiorari to impose precisely that requirement, contending that the court of appeals erred by granting relief "solely" under *Brecht* without separately considering the reasonableness of the state court's harmlessness determination under AEDPA (*i.e.*, without "formally applying" both tests). Pet. i. That issue does not warrant review, and even if it did, this case would be a poor vehicle in which to consider it.

The State asserts that the court of appeals' approach contravenes this Court's decision in *Davis* v. *Ayala*, 576 U.S. 257 (2015). But *Ayala* confirms—exactly as the court of appeals held—that "the *Brecht* test subsumes the limitations imposed by AEDPA" and that federal habeas courts therefore "need not 'formal[ly]' apply both *Brecht* and 'AEDPA/*Chapman*.'" *Ayala*, 576 U.S. at 268, 270. As *Ayala* explains, satisfying AEDPA's deferential standard remains a "'precondition to the grant of habeas relief,'" *id.* at 268; but a federal habeas court may ensure compliance with AEDPA by applying the more stringent test articulated in *Brecht*, *id.* at 270. That is because a habeas petitioner "necessarily cannot satisfy" *Brecht*'s actual prejudice requirement if, under AEDPA, any "fairminded jurist could agree" with the state court's harmlessness determination under *Chapman*. *Id.*

The court of appeals faithfully applied *Ayala*. It acknowledged that "both *Brecht* and AEDPA must be satisfied for a habeas petitioner to show that a constitutional error was not harmless." Pet. App. 17a. Following *Ayala*, however, the court explained that it was not required to "'formal[ly] apply'" both tests, Pet. App. 14a (quoting *Ayala*, 576 U.S. at 268), because where, as here, a habeas petitioner establishes actual prejudice under *Brecht*, a state court's finding of harmlessness is "necessarily objectively unreasonable" under AEDPA, Pet. App. 17a (citing *Ayala*, 576 U.S. at 268-270); *see also* Pet. App. 11a, 13a-14a, 17a-18a, 22a, 25a. The decision below thus poses no conflict with *Ayala*. It also does not conflict with any decision of another court of appeals. To the contrary, other courts agree that if an unconstitutional trial error resulted in actual prejudice under *Brecht*, a state court finding of harmlessness under *Chapman* is necessarily unreasonable. And the

State cites no decision in any circuit denying relief under AEDPA—in conflict with the court of appeals here—to a habeas petitioner who showed actual prejudice under *Brecht*.

In any event, the question on which the State seeks certiorari is not presented in this case. 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 was unreasonable under [AEDPA]." Pet. i. But there is no "state court[] *Chapman* application" here. *Id.* The Michigan Supreme Court did not apply *Chapman*, but instead applied a different, erroneous standard in purporting to evaluate harmlessness. 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*, Mr. Davenport would still be entitled to relief because the state court's application of a harmlessness standard that contradicts the governing law as established by this Court is unreasonable by definition and merits no deference. *See Williams* v. *Taylor*, 529 U.S. 362, 405 (2000) (O'Connor, J., opinion). The State's response—that the state supreme court's decision should be disregarded in favor of the intermediate appellate court's decision—contradicts the State's position below, and only confirms that yet another premise of the petition rests on tenuous grounds at best. The petition should be denied.

STATEMENT

A. State Proceedings

In July 2008, the State of Michigan tried Mr. Davenport before a jury 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. Pet. App. 2a, 5a. The trial court made no on-the-record finding to justify the shackling. Pet. App. 5a.

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 on the day of her death; Ms. White was intoxicated, having smoked crack cocaine and consumed alcohol; and Ms. White was agitated. Pet. App. 3a-5a. 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.*

Mr. Davenport testified at trial that he acted in self-defense after Ms. White attacked him while he was driving. Pet. App. 3a, 5a. Mr. Davenport explained that Ms. White repeatedly tried to grab the steering wheel and, each time, Mr. Davenport pushed her back. Pet. App. 3a. She then started yelling and kicking and pulled out a boxcutter, which she swung at Mr. Davenport, cutting his arm. *Id.* Mr. Davenport testified that he was afraid of the boxcutter and was simultaneously trying to avoid oncoming traffic. *Id.* As he continued to drive, Mr. Davenport pinned Ms. White against the side of the car with his hand extended against her neck. *Id.* At some point, he realized she was no longer struggling and had stopped breathing. *Id.*

As the prosecution conceded, the "only real issue" for the jury was 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. Pet. App. 5a. As evidence of premeditation and deliberation, the prosecution relied primarily on the testimony of the forensic pathologist who conducted Ms. White's autopsy. Pet. App. 4a-5a. The pathologist testified that the cause of death was strangulation and opined that the internal injuries to Ms. White's neck were "more consistent with choking than … broad pressure there." *Id.* In closing, the prosecution argued for premeditation and deliberation based on the amount of time that strangulation would have taken. Pet. App. 31a. After deliberating for six hours over the course of two days, the jury found Mr. Davenport guilty of first-degree murder. Pet. App. 5a. 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 Mr. Davenport's shackles and, if they did, whether this error was harmless. Pet. App. 6a.

The trial court held an evidentiary hearing in which all twelve jurors testified. Pet. App. 6a-7a. Although three years had passed since the trial, five jurors testified that they recalled seeing Mr. Davenport's waist chain, handcuffs, or ankle shackles during jury selection or trial, and two additional jurors testified that they heard other jurors commenting about the restraints. Pet. App. 7a. Several jurors also recalled that the shackles prompted them to think Mr. Davenport might

be dangerous. *Id.* When asked, the jurors also testified that the shackling did not affect their deliberations. *Id.*

The trial court found that, although the jurors were able to observe the shackles at trial, the prosecution had proved beyond a reasonable doubt that Mr. Davenport's shackles did not affect the verdict. Pet. App. 7a.[1] In so holding, the trial court relied heavily on the jurors' testimony that Mr. Davenport's shackling was not discussed during deliberations and did not affect their verdict. Pet. App. 7a-8a.

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." Pet. App. 95a-99a. The court based its conclusion on—and devoted nearly all of its three-page opinion to considering—the juror testimony. *Id.*[2]

The Michigan Supreme Court denied leave to appeal. But in doing so, it rejected the Michigan Court of Appeals' analysis. Pet. App. 93a-94a. In particular, the

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[1] 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 do not dispute that the proper standard for considering the harmlessness of a shackling error on direct review is the *Chapman* standard.

[2] In a two-sentence footnote, the Michigan Court of Appeals asserted that the evidence at trial was "overwhelming … and belied [Mr. Davenport's] contention that he killed [Ms. White] in self-defense." Pet. App. 99a n.2. The court did not address the strength of the evidence of premeditation and deliberation necessary for first-degree murder. *Id.* Moreover, the court did not find that the strength of the evidence supported a finding of harmlessness beyond a reasonable doubt. Pet. App. 95a-99a.

Michigan Supreme Court held that the appellate court's reliance on juror testimony was error under *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), which held that where courtroom security procedures are inherently prejudicial, "little stock need be placed in jurors' claims to the contrary," because "jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." *Id.* at 570; Pet. App. 93a-94a. Having rejected the intermediate court's reasoning, the state supreme court supplied its own reasoned explanation for rejecting Mr. Davenport's claim, concluding that his unconstitutional shackling was harmless because, "[g]iven the substantial evidence of guilt presented at trial, [the court could not] conclude that there was an unacceptable risk of impermissible factors coming into play." Pet. App. 94a (applying *Holbrook*, 475 U.S. at 570).

B. Federal Habeas Proceedings

Mr. Davenport filed a habeas petition under 28 U.S.C. § 2254, claiming that his visible shackling during trial violated his due process rights. The district court denied relief. Pet. App. 71a-76a. The U.S. Court of Appeals for the Sixth Circuit reversed and granted a conditional writ of habeas corpus, finding that Mr. Davenport was unconstitutionally shackled during trial and that the shackling was not harmless error. Pet. App. 1a-38a.

The parties did not dispute that Mr. Davenport's visible shackling at trial, with no on-the-record justification, violated the Due Process Clause under *Deck* v. *Missouri*, 544 U.S. 622 (2005). Pet. App. 21a. Such shackling is "inherently prejudicial," in part because it "undermines the presumption of innocence and the related fairness of the factfinding process" by "sug-

gest[ing] to the jury that the justice system itself sees a need to separate a defendant from the community at large." Pet. App. 20a-21a (quoting *Deck*, 544 U.S. at 630, 635). The only dispute was whether that error was harmless under the standards applicable on collateral review. Pet. App. 21a.

In analyzing harmlessness, the court of appeals applied the standard this Court adopted in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993). *Brecht* held that *Chapman*'s harmless error standard for direct review—under which trial error requires reversal of a criminal conviction unless the State proves the error was harmless beyond a reasonable doubt—should not apply in evaluating harmlessness on collateral review, because allowing habeas relief to be granted based on a mere "reasonable possibility" that trial error affected the verdict, as *Chapman* requires, would "undermine[] the States' interest in finality and infringe[] upon their sovereignty over criminal matters." *Id.* at 637. Rather, in deference to "the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights," *id.* at 635 (quotation marks omitted), the Court held that trial error requires reversal on collateral review only where the error resulted in actual prejudice—meaning that, in light of the record as a whole, the error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 638.

The court of appeals discussed at length the relationship between *Brecht* and AEDPA, which provides that a federal court shall not grant habeas relief to a state prisoner on a claim that was adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or was

"based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2); *see* Pet. App. 9a-20a, 22a-23a, 25a-27a. Drawing on this Court's decision in *Davis* v. *Ayala*, 576 U.S. 257 (2015), the court of appeals held that "both *Brecht* and AEDPA must be satisfied" before relief may be granted, and that a federal habeas court may find both standards satisfied by applying the more stringent *Brecht* test because where a petitioner can demonstrate actual prejudice under *Brecht*, a state court finding of harmlessness, "even though insulated by AEDPA deference," is "necessarily objectively unreasonable." Pet. App. 17a; *see also* Pet. App. 13a ("where a habeas petitioner can succeed under the more demanding *Brecht* test, the state court's 'harmlessness determination itself is unreasonable,' which shows that both tests are satisfied." (quoting *Ayala*, 576 U.S. at 269)); Pet. App. 17a-18a ("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."). *Brecht* thus "subsumes the limitations imposed by AEDPA," and a "federal habeas court need not 'formal[ly]' apply both *Brecht* and "AEDPA/*Chapman*." Pet. App. 14a (quoting *Ayala*, 576 U.S. at 268, 270).

Applying *Brecht*, the court of appeals found that Mr. Davenport's visible shackling resulted in actual prejudice because "the State ha[d] failed to carry its burden to show that the shackles did not have a 'substantial and injurious effect or influence in determining the jury's verdict.'" Pet. App. 38a (quoting *Brecht*, 507 U.S. at 637). In reaching that conclusion, the court examined the trial evidence at length, emphasizing the "closeness of the case" on the critical issue of intent.

Pet. App. 27a-33a. To convict on first-degree murder under Michigan law, the prosecution had to prove premeditation and deliberation. Pet. App. 29a-30a. The "only evidence of premeditation and deliberation the prosecution pointed to in its closing was the time that strangulation would have taken," but "under Michigan law, evidence of manual strangulation alone is not enough to prove premeditation." Pet. App. 31a (citing *People* v. *Johnson*, 597 N.W.2d 73, 79 (Mich. 1999)). The court of appeals concluded that "[t]he evidence of premeditation and deliberation was therefore not overwhelming"—a conclusion bolstered by the fact that the jury had to deliberate for approximately six hours over the course of two days even though this was a "simple[]" case in which the "only disputed fact at trial" was Mr. Davenport's state of mind. Pet. App. 32a. The strength of the evidence therefore did not show that Mr. Davenport's unconstitutional and inherently prejudicial shackling did not affect the jury's verdict. Pet. App. 33a.

The court of appeals also considered and rejected the State's reliance on the jurors' testimony, three years after trial, that Mr. Davenport's shackling did not affect their verdict. Pet. App. 34a-38a. As the court explained, "the Supreme Court has made clear that jurors' subjective testimony about the effect shackling had on them bears little weight." Pet. App. 34a (citing *Holbrook*, 475 U.S. at 570); *see also* Pet. App. 35a ("it was the Supreme Court in *Holbrook* that stated the danger of relying on after-the-fact juror conclusions regarding 'inherently prejudicial' actions such as shackling because jurors may not be fully aware" of how such measures "[a]ffect 'their attitude toward the accused'" (quoting *Holbrook*, 475 U.S. at 570)). If anything, the court explained, the jurors' testimony pointed in the

opposite direction: that most of the jurors "still remembered," three years after the fact, "that they either saw [Mr. Davenport's] restraints or heard another juror remark on his shackles … suggests the shackles made an impression." Pet. App. 35a. Moreover, "several jurors" expressly testified that viewing the shackles led them to conclude that Mr. Davenport was "dangerous." *Id.* The shackling thus "'inevitably undermine[d] the jury's ability to weigh accurately all relevant considerations'" in precisely the manner this Court foresaw and clearly established in *Deck*. Pet. App. 37a (quoting *Deck*, 544 U.S. at 633). The court of appeals therefore concluded that the shackles "branded [Mr.] Davenport as having a violent nature in a case where the crucial point of contention was whether he engaged in deliberate and premeditated murder." Pet. App. 38a. As a result, "[g]iven the closeness of this question, the number of jurors who observed the restraints, and the inherently prejudicial nature of shackling," Mr. Davenport's unconstitutional shackling was not harmless under *Brecht*. *Id.*

The State sought rehearing en banc, which was denied. Pet. App. 101a-137a.

ARGUMENT

No "compelling reason[]" for granting certiorari exists here. Sup. Ct. R. 10. Contrary to the State's assertions, the court of appeals' decision is consistent with both *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. In any event, the question on which the State seeks certiorari is not presented in this case, and resolving it would not alter the outcome.

I. THE COURT OF APPEALS FAITHFULLY APPLIED *AYALA*, WHICH CONFIRMS THAT COURTS NEED NOT FORMALLY APPLY BOTH *BRECHT* AND AEDPA/*CHAPMAN*

The State's principal contention is that the decision below conflicts with *Davis* v. *Ayala*, 576 U.S. 257 (2015), and with the deferential standard of review in AEDPA, 28 U.S.C. § 2254(d). But the court of appeals relied extensively on *Ayala*, explaining why *Ayala* supported its application of *Brecht*'s actual prejudice standard. Indeed, the true target of the State's petition is not the decision below, but *Ayala* itself.

In *Ayala*, this Court reaffirmed the relationship between *Brecht* and AEDPA/*Chapman*, holding that while both standards apply on federal 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. The Court explained that AEDPA "sets forth a precondition to the grant of habeas relief," *id.*, but that applying *Brecht* "subsumes" AEDPA's requirements because a habeas petitioner who shows "actual prejudice" under *Brecht*'s stringent test necessarily demonstrates that no fairminded jurist could find the state court's harmlessness determination reasonable, *id.* at 270. That is, "if a fairminded jurist could agree with the [state court's] decision that [the trial error] met the *Chapman* standard of harmlessness"—such that relief would be foreclosed under AEDPA—then the petitioner "necessarily cannot satisfy" *Brecht* by "show[ing] that he was actually prejudiced." *Id.*

Ayala drew on the Court's prior decision in *Fry* v. *Pliler*, 551 U.S. 112 (2007), which considered whether AEDPA's enactment required a departure from *Brecht*. The Court held emphatically that it did not. While recognizing that "a federal court may not award habeas

relief under § 2254 unless *the harmlessness determination itself* was unreasonable," *id.* at 119, the Court concluded that it would "certainly make[] no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*)," *id.* at 120. Instead, given that "AEDPA limited rather than expanded the availability of habeas relief," the Court found it "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." *Id.* at 119-120 (citation omitted). Because *Brecht* is "less onerous" for a State to meet than *Chapman*, *id.* at 117, it "obviously subsumes" AEDPA's standard, *id.* at 120—*i.e.*, satisfying *Brecht* necessarily satisfies AEDPA.[3]

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*, 507 U.S. at 637; *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) (quotation marks omitted)). This standard requires "more

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[3] The State questions *Fry*'s relevance (Pet. 11-12), but this Court in *Ayala* found it controlling: "In [*Fry*], 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.

than a 'reasonable possibility' that the error was harmful." *Id.* at 268 (quoting *Brecht*, 507 U.S. at 637).

AEDPA, on the other hand, requires a federal 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, where the state court determined that a trial error was "'harmless beyond a reasonable doubt,'" a habeas court may not grant relief unless it determines that the state court's decision was an unreasonable application of *Chapman—i.e.*, that no fairminded jurist could agree with the state court's conclusion that the error was harmless beyond a reasonable doubt. *Ayala*, 576 U.S. at 267. By definition, however, if there is more than a reasonable possibility that the error was in fact harmful (as *Brecht* requires), then no fairminded jurist could agree with the state court's finding that the error was harmless beyond a reasonable doubt. As *Ayala* therefore recognized, a finding of "actual prejudice" under *Brecht* means that the AEDPA/*Chapman* standard is necessarily met as well. *See id.* at 270. That is why a federal habeas court "need not 'formal[ly]' apply both." *Id.* at 268 (quoting *Fry*, 551 U.S. at 120).[4]

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[4] As *Ayala* put it, "[a habeas petitioner] must show that he was actually prejudiced by [the error], a standard that he necessarily cannot satisfy if fairminded jurists could agree with the [state court] decision that [the error] met the *Chapman* standard of harmlessness." 576 U.S. at 270. In other words, if AEDPA/*Chapman* is not satisfied, then *Brecht* is necessarily not satisfied—or, as expressed in symbolic logic notation, if ~A, then ~B. The logical equivalent of this statement, under the rule of transposition in the discipline of formal logic, is: If *Brecht* is satisfied, then AEDPA/*Chapman* is necessarily satisfied (or, if B, then A). *See*

The court of appeals' decision was thus entirely consistent with *Ayala*. Far from disregarding AEDPA, the court of appeals acknowledged that satisfying AEDPA "remains a precondition to habeas relief." Pet. App. 11a. And, following *Ayala*, the court applied *Brecht* to ensure that AEDPA's requirements were met, recognizing—as *Ayala* recognized—that "where a habeas petitioner can succeed under the more demanding *Brecht* test, the state court's 'harmlessness determination itself [wa]s unreasonable,' which shows that both tests are satisfied." Pet. App. 13a (quoting *Ayala*, 576 U.S. at 269); *see also* Pet. App. 17a ("[I]t is significantly harder for a habeas petitioner to meet *Brecht*'s actual prejudice standard than *Chapman*'s defendant-friendly standard or, in other words, easier for the State to prevail under *Brecht* than under AEDPA/*Chapman*. So much so that where a state court finds an error harmless under *Chapman* and the defendant is later able to surmount the imposing *Brecht* hurdle, the state court's *Chapman* analysis (even though insulated by AEDPA deference) is necessarily unreasonable."); Pet. App. 19a ("AEDPA deference may be exacted through *Brecht*'s demanding standard").

The State is thus compelled to concede (Pet. 12) that, under *Ayala*, a federal habeas court is not required to apply both *Brecht* and AEDPA/*Chapman*. It nonetheless argues that the court of appeals erred by failing to do exactly that, contending that by relying

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Copi *et al.*, *Introduction to Logic* 357 (15th ed. 2019) ("We know that if any conditional statement is true, then if its consequent is false its antecedent must also be false. Therefore any conditional statement is logically equivalent to the conditional statement asserting that the negation of its consequent implies the negation of its antecedent.").

solely on *Brecht*, the court disregarded the state court's harmlessness determination. That is not an argument that the decision below conflicts with *Ayala*; it is an argument that *Ayala* was wrongly decided. *Ayala* explains why applying *Brecht* alone necessarily affords deference to the state court's decision. *Supra* pp. 12-14.

Indeed, as the court of appeals recognized, *Brecht* "not only contains AEDPA's stringent commands of deference to state court merit determinations but also its spirit of federalism, comity, and finality." Pet. App. 19a; *see also Brecht*, 507 U.S. at 637 (rejecting *Chapman* in favor of more stringent test for collateral review to protect States' "'interest in finality' … [and] 'sovereignty over criminal matters'"); *Fry*, 551 U.S. at 117 (because *Brecht* rejected *Chapman* out of deference to state interests that "appl[y] with equal force whether or not the state court reaches the *Chapman* question, it would be illogical to make the standard of review turn upon that contingency"). And it is not merely a "single clause" of *Ayala* that says so, *cf.* Pet. 11, but *Ayala*'s entirely correct recognition that a habeas petitioner "necessarily cannot satisfy" *Brecht* if any "fairminded jurist could agree" with the state court's harmlessness determination. 576 U.S. at 270.[5] The court of appeals correctly applied that holding here.

II. THERE IS NO CIRCUIT CONFLICT

The State contends (Pet. 14) that courts in the Second, Third, Seventh, Ninth and Tenth Circuits "have

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[5] That *Ayala* "appli[ed] … the AEDPA/*Chapman* standard to the case at hand," Pet. 11, does not undermine this point. *Ayala* did not prohibit federal courts from applying both tests; it merely confirmed that doing so is not required.

rejected the Sixth Circuit's *Brecht*-only approach."[6] That is incorrect. The Sixth Circuit and its sister circuits agree that a federal habeas court owes deference to a state court harmlessness determination (if it made one) and that satisfying AEDPA is a precondition to habeas relief. *E.g.*, Pet. App. 17a. But as the State concedes (Pet. 12), this does not mean that both tests must be "formally applied." Other courts agree with the Sixth Circuit that applying *Brecht* alone can ensure that AEDPA is satisfied because where a petitioner shows actual prejudice, no fairminded jurist could agree that the error was harmless beyond a reasonable doubt. Indeed, as examined below, 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*. While there are few post-*Ayala* cases in which a circuit court *granted* relief (under any test) after a state court concluded that a constitutional error was harmless, the infrequency of such decisions is not evidence of conflict—it is merely evidence that the petition identifies no issue of recurring significance.

Second Circuit. The State cites (Pet. 14) the Second Circuit's observation that a federal habeas court owes deference to a state court's harmlessness determination. The Sixth Circuit agrees. Pet. App. 17a. Neither of the two Second Circuit cases the State cites conflicts with the decision here. In *Orlando* v. *Nassau County District Attorney's Office*, the state court made

[6] 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," and that "*Brecht*'s test covers both because it requires the petitioner to show enough poison to be fatal under either test." Pet. App. 17a-18a.

no harmlessness determination, and the Second Circuit granted relief after finding that the error was not harmless under *Brecht*. 915 F.3d 113, 130 (2d. Cir. 2019), *cert. denied*, 140 S. Ct. 2792 (2020). And in *Spencer* v. *Capra*, 788 F. App'x 21 (2d. Cir. 2019)—an unpublished decision without precedential effect—the court denied relief because neither AEDPA/*Chapman* nor *Brecht* was satisfied. *Id.* at 23-24.

Third Circuit. Neither Third Circuit decision the State cites denied relief under AEDPA even though *Brecht* was satisfied. In *Johnson* v. *Lamas*, the court denied relief because neither *Brecht* nor AEDPA/*Chapman* was satisfied. 850 F.3d 119, 137 (3d Cir. 2017). In reaching this conclusion, the Third Circuit described the relationship between *Brecht* and AEDPA/*Chapman* in a manner consistent with the court of appeals' decision here, finding that the petitioner failed to satisfy AEDPA/*Chapman* and "[t]herefore … 'necessarily cannot satisfy' *Brecht*." *Id.* In *Johnson* v. *Superintendent, Fayette SCI*, the state court made no harmlessness determination, so the Third Circuit applied *Brecht* alone in granting habeas relief. 949 F.3d 791, 798-799 (3d Cir. 2020).

The State suggests (Pet. 16) that the divergence between the outcomes in the two Third Circuit cases is attributable to the fact that AEDPA/*Chapman* applied in *Lamas* but not in *Superintendent Fayette SCI*. But the Third Circuit emphasized another distinction, which was the relative strength of the evidence in the two cases: while *Lamas* involved "two eyewitnesses whose identifications corroborated *each* other," *Superintendent Fayette SCI* involved the testimony of two witnesses who "*contradicted* each other." 949 F.3d at 804. In other words, the Third Circuit found the error in *Lamas* harmless because of the strong evidence of

guilt, but found actual prejudice in *Superintendent Fayette SCI* in light of the weaker evidence of guilt. The Third Circuit nowhere held that AEDPA/*Chapman* could foreclose relief even where *Brecht* was satisfied.

Seventh Circuit. Like the Sixth Circuit, the Seventh Circuit agrees that a state court harmlessness finding must be unreasonable to warrant habeas relief. *Compare Johnson* v. *Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009), *with* Pet. App. 17a. And like the Sixth Circuit, the Seventh Circuit recognizes (in precedent the State overlooks) that a petitioner who satisfies *Brecht* "necessarily satisfies the AEDPA standard of an unreasonable application of the *Chapman* harmless error standard." *Jensen* v. *Clements*, 800 F.3d 892, 908 (7th Cir. 2015) (granting habeas relief under *Brecht*); *see also Armfield* v. *Nicklaus*, 985 F.3d 536, 543-544 (7th Cir. 2021) (application of *Brecht* satisfies AEDPA requirements).

None of the decisions the State cites is to the contrary. *Acevedo* denied relief under AEDPA/*Chapman* without addressing *Brecht*. *See* 572 F.3d at 406. In *Welch* v. *Hepp*, the Seventh Circuit denied relief because neither *Brecht* nor AEDPA/*Chapman* was satisfied. 793 F.3d 734, 738-739 (7th Cir. 2015). In *Richardson* v. *Griffin*, the court granted habeas relief after finding both that the state court's harmlessness determination was unreasonable and that the petitioner was actually prejudiced under *Brecht*. 866 F.3d 836, 843-845 (7th Cir. 2017).[7] And in *Czech* v. *Melvin*, the court

[7] That some courts 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.

denied relief because the petitioner failed to satisfy *Brecht*, explaining that *Brecht* applies "'regardless of whether the state appellate court determined that the error was harmless beyond a reasonable doubt under *Chapman*.'" 904 F.3d 570, 577 (7th Cir. 2018).

Ninth Circuit. Like the Sixth Circuit, the Ninth Circuit recognizes that a federal habeas court "need not apply both a *Brecht* review and an AEDPA/*Chapman* review because [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." *Hall* v. *Haws*, 861 F.3d 977, 992 (9th Cir. 2017) (quotation marks omitted); *see also Deck* v. *Jenkins*, 814 F.3d 954, 985 (9th Cir. 2016) (noting that "it is sufficient to apply *Brecht* alone" and that "a separate AEDPA/*Chapman* determination is not required"); *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*).

The State cites only *Ford* v. *Peery*, in which the court granted habeas relief after finding that both AEDPA/*Chapman* and *Brecht* were satisfied. 976 F.3d 1032, 1044-1045 (9th Cir. 2020). But that case did not discuss the relationship between *Brecht* and AEDPA/*Chapman*, nor did it purport to depart from the Ninth Circuit's consistent holdings that "if 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." *Sifuentes* v. *Brazelton*, 825 F.3d 506, 535 (9th Cir. 2016).

Tenth Circuit. Finally, the State cites (Pet. 18) the Tenth Circuit's statement in *Malone* v. *Carpenter* that a petitioner must satisfy AEDPA/*Chapman* as "a necessary condition for relief." 911 F.3d 1022, 1030 (10th Cir. 2018). As explained, the Sixth Circuit agrees. Pet. App. 17a. The Tenth Circuit denied relief in *Malone* because neither *Brecht* nor AEDPA/*Chapman* was met, while underscoring that a habeas court "need not 'formally apply both.'" 911 F.3d at 1030.

Accordingly, none of the cases cited by the State conflict with the court of appeals' decision to grant relief here on the ground that *Brecht* was satisfied and that AEDPA/*Chapman* was therefore necessarily met as well. The State does not cite, and Mr. Davenport is not aware of, a single case that took the approach the State advocates here—*i.e.*, none applied AEDPA/*Chapman* to deny relief even where actual prejudice existed under *Brecht*. To the contrary, as explained above, several courts have explicitly held since *Ayala*, in agreement with the court of appeals here, that satisfying *Brecht* also satisfies AEDPA/*Chapman*.

III. THIS CASE IS A POOR VEHICLE FOR CONSIDERING THE QUESTION PRESENTED

As explained above, the question presented does not warrant review. But even if it did, this would be a poor case in which to consider it. The question as the State has framed it is not even implicated in this case. And the State's efforts to portray this case as a good vehicle for determining the deference owed to a state court's harmlessness determination in fact contravene the state supreme court's own decision.

A. The Issue Raised In The Petition Is Not Presented In This Case, And Resolving It Would Make No Difference To The Outcome

The State 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 *Chapman* 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 Mr. Davenport's visible shackling was harmless because the court "c[ould not] conclude that there was an unacceptable risk of impermissible factors coming into play." Pet. App. 94a. The absence of any "state court[] *Chapman* application," Pet. i, eliminates the premise of the petition.

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" that was clearly established by this Court in *Chapman* and *Deck* v. *Missouri*, 544 U.S. 622 (2005). *See Williams* v. *Taylor*, 529 U.S. 362, 405 (2000) (O'Connor, J., opinion). Under *Deck*, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury," the error requires reversal on direct review unless "the State … prove[s] 'beyond a reasonable doubt that the

[shackling] error complained of did not contribute to the verdict obtained.'" 544 U.S. at 635 (quoting *Chapman*, 386 U.S. at 24). Instead of requiring the State to meet that burden, however, the Michigan Supreme Court, citing *Holbrook*, asked whether Mr. Davenport had shown, in light of the trial evidence, that an "unacceptable risk of impermissible factors coming into play" had resulted from his visible shackling. Pet. App. 94a. But as the State concedes (Pet. 25), *Holbrook* was not a harmless error case at all. It articulated the "unacceptable risk" test not to identify when shackling may be excused as harmless on direct review, but to evaluate whether other courtroom security measures—specifically, the seating of uniformed officers in the spectator section at trial—are unconstitutional in the first place. 475 U.S. at 568. Because the presence of the uniformed officers did not present "an unacceptable risk … of impermissible factors coming into play," their presence was not "so inherently prejudicial" as to deprive the defendant of his due process rights. *Id.* at 570.

Holbrook's test thus bore no relevance to Mr. Davenport's entitlement to relief on direct appeal because it was already clearly established under *Deck* that Mr. Davenport's visible shackling was an inherently prejudicial violation of his due process rights. The parties did not dispute that Mr. Davenport's constitutional rights had been violated, so *Holbrook*'s test for determining whether a constitutional violation had occurred should have been irrelevant. Yet the Michigan Supreme Court applied that test, rather than holding the State to its burden under *Chapman*—indeed, without even citing *Chapman*—to hold that Mr. Davenport's shackling was harmless. Pet. App. 94a. A state court decision that thus "applies a rule that contradicts the

governing law" warrants no deference and poses no bar to relief under AEDPA. *Williams*, 529 U.S. at 406 (O'Connor, J., opinion). Rather, a federal habeas court is "unconstrained" by 28 U.S.C. § 2254(d)(1) where the state court failed to apply the legal standard clearly established by this Court. *Id.*

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

In its reply in support of its stay application, the State responded that the Michigan Supreme Court was "free to utilize" the *Holbrook* test because "*Chapman* is a general standard entitled to substantial leeway by state courts." Reply Br. 7, No. 20A116 ("Stay Reply"). But as discussed, and as the State concedes (Pet. 25), *Holbrook* is not a variation on *Chapman*'s test for harmless error—it is a test for whether a constitutional violation occurred at all—and thus, did not apply in this case where the constitutional violation was clearly established under *Deck*. Alternatively, the State invited this Court simply to assume that the Michigan Supreme Court implicitly applied *Chapman*. Stay Reply 7-8. But as the State's own authority notes, such an assumption would be appropriate only if the Michigan Supreme Court's decision were "'unaccompanied by an explanation.'" *Id.* at 8 (quoting *Harrington* v. *Richter*, 562 U.S. 86, 98 (2011)). Where the state court does supply an explanation, the federal habeas court "reviews the specific reasons given by the state court." *Wilson* v. *Sellers*, 138 S. Ct. 1188, 1192 (2018); *see id.* at

1191-1192 (federal habeas court should "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims"). And here, the Michigan Supreme Court did supply an explanation—that Mr. Davenport's shackling was harmless under *Holbrook*. Pet. App. 94a.

The State's stay reply finally asserted that the Michigan Supreme Court's order is not the relevant state court decision for AEDPA purposes because it denied discretionary review rather than granting review and rejecting Mr. Davenport's claim on the merits. Stay Reply 6; *see Shinn* v. *Kayer*, 141 S. Ct. 517, 524 n.1 (2020) (per curiam) (AEDPA "calls for review of the last state-court adjudication on the merits" (quotation marks omitted)). But the State took the opposite position below:

> The Michigan Supreme Court did begin by saying leave was denied because the court was not persuaded it should review the question presented. If that had been all the Court said, the decision would be considered unexplained and this court would apply a presumption that the unexplained order rejecting the claim rested upon the same ground as that set forth by the Michigan Court of Appeals. However, as previously mentioned, the Michigan Supreme Court added language to its opinion finding that the Court of Appeals failed to apply the test from *Holbrook*[.] . . . The added language by the Michigan Supreme Court should probably be deemed a reasoned explanation of why [Mr.] Davenport was denied relief, notwithstanding the initial statement that the Court was not persuaded it should review the question presented.

Response to Habeas Pet. 35-37, No. 14-1012 (W.D. Mich.), Dkt. 7.

The State's position on that point in the district court was correct. A denial of an application for leave to appeal may be an adjudication on the merits for purposes of habeas review. *See Shinn*, 141 S. Ct. at 524 n.1 (considering state court denial of review and noting that "[u]nreasoned dispositions by appellate courts sometimes qualify as adjudications on the merits"); *Werth* v. *Bell*, 692 F.3d 486, 493-494 (6th Cir. 2012) (holding that "AEDPA deference applies to Michigan orders like the orders in this case" where "the Michigan appellate courts specified that they denied [defendant's] application for reasons involving the substance of his claims"). The Michigan Supreme Court did not deny review on boilerplate grounds or without explanation, but instead rejected the lower court's analysis and reached its own independent conclusion on harmlessness. Pet. App. 93a-94a. By reversing its position on which decision would warrant deference under AEDPA, the State only underscores the vehicle problems in this case.

B. The State's Arguments That This Is An "Ideal Vehicle" Misrepresent Both The State Court And Sixth Circuit Decisions

The State highlights three aspects of the decision below to support its contention that this case is a good vehicle, however these factors show the opposite. In particular, these arguments reveal that the State's plea for deference to the state court's decision in fact completely disregards the state court's analysis, while also mischaracterizing the decision below.

1. The State primarily criticizes the Sixth Circuit for treating the state court's reliance on juror testimony as improper. Pet. 22-25. But it was the Michigan Supreme Court, not only the Sixth Circuit, that found excessive reliance on juror testimony to be improper under *Holbrook*. Pet. App. 93a-94a. By arguing that AEDPA required the Sixth Circuit to place greater weight on whether the jurors "'actually articulated a consciousness of some prejudicial effect,'" Pet. App. 94a (quoting *Holbrook*, 475 U.S. at 570), the State disregards both *Holbrook* and the state supreme court's own decision, undermining the very interests of comity and federalism that are central to both AEDPA/*Chapman* and *Brecht*.

The State's other criticisms of the court of appeals' discussion of juror testimony also fail. Contrary to the State's characterization (Pet. 25), the court of appeals did not hold that consideration of juror testimony is "prohibited" when determining whether a constitutional violation is harmless—indeed, the court noted aspects of the juror testimony indicating that the shackling had made an impression on them suggesting that Mr. Davenport was dangerous. Pet. App. 35a-37a. Instead, the court cautioned, just as the state supreme court did, "that jurors' subjective testimony about the effect shackling had on them bears little weight." Pet. App. 34a. And in doing so, the court did not rely on social science research to "discredit" the jurors' testimony, *cf.* Pet. 22, but relied on this Court's own determination in *Holbrook* that "jurors will not necessarily be fully conscious of the effect" that inherently prejudicial, visible shackling "will have on their attitude toward the accused." Pet. App. 34a (quoting *Holbrook*, 475 U.S. at 570). The social science data simply confirmed *Holbrook*'s conclusion. *Id.*

Nor did the court of appeals improperly "extend" *Holbrook*. Pet. 24-25. The State argues that *Holbrook's* holding was limited to juror testimony that "occurred before trial" and does not apply in determining whether a shackling error was harmless. *Id.* That argument contradicts *Holbrook*, which found generally that "[i]f a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process"—which visible shackling indisputably does—then "little stock need be placed in jurors' claims to the contrary" because "jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." Holbrook, 475 U.S. at 568, 570. This observation had nothing to do with the timing of the juror testimony relative to trial, but was a general statement about "inherently prejudicial" practices.[8]

Moreover, the reason for limiting AEDPA review to federal law that is clearly established by this Court's precedents is to limit the intrusion of federal habeas courts into the state courts' own efforts to recognize and correct constitutional errors. *See Williams* v. *Taylor*, 529 U.S. 420, 436 (2000); *see also Brecht*, 507 U.S. at 635. Here, the Michigan Supreme Court did recognize that the Michigan Court of Appeals' excessive reliance on juror testimony was error under *Holbrook*, and the Sixth Circuit (unlike the State's petition) gave proper effect to that analysis.

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[8] That the Court in *Holbrook* found juror testimony about the effects of inherently prejudicial practices to be "*especially*" unreliable when jurors are "questioned at the very beginning of proceedings," 475 U.S. at 570 (emphasis added), in no way limits *Holbrook*'s caution to juror testimony that occurs before trial.

2. The State also faults the court of appeals for citing its own circuit precedent in determining whether Mr. Davenport had established actual prejudice under *Brecht*, suggesting that it would have been improper to do so in an AEDPA/*Chapman* analysis. Pet. 22. But the legal principles governing Mr. Davenport's habeas claim are clearly established by this Court's own decisions. In *Deck*, this Court clearly established that "shackling is 'inherently prejudicial,'" that it "will often have negative effects" that "'cannot be shown from a trial transcript,'" and that "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, … [t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" 544 U.S. at 635. The relevant clearly established law is that a shackling error invalidates a conviction unless the State on direct review proves harmlessness beyond a reasonable doubt under *Chapman*.

Those are the clearly established precedents the court of appeals considered in this case. Pet. App. 20a-27a. As explained, the state court failed to apply *Chapman*, and that failure alone rendered its decision unreasonable under AEDPA. *Williams*, 529 U.S. at 406 (O'Connor, J., opinion). But even if the state court had applied *Chapman*, it would not have been improper for the court of appeals to review its own precedent in determining whether the state court's application of that clearly established standard was unreasonable (or whether Mr. Davenport established actual prejudice under *Brecht*). Doing so does not alter the framework of clearly established federal law that governs a habeas claim.

3. Finally, the State contends that the court of appeals ignored the state court's decision or failed to give

it proper "leeway." Pet. 26-29. But in reaching its decision, the court of appeals considered at length the only two justifications for a finding of harmlessness offered by the state appellate courts (and highlighted by the State in its brief opposing habeas relief): the strength of the evidence of first-degree murder at trial and the juror testimony at the evidentiary hearing. Pet. App. 27a-38a. And as this case comes to the Court, there is no dispute that Mr. Davenport's unconstitutional shackling resulted in "actual prejudice"—*i.e.*, that the record establishes that the unconstitutional shackling had "substantial and injurious effect or influence in determining the jury's verdict." *O'Neal*, 513 U.S. at 436. As *Ayala* explains, that conclusion necessarily establishes that the state court's harmlessness determination—even if it had applied the correct legal standard—would have been objectively unreasonable.

The State's factbound arguments to the contrary (Pet. 27-28) do not establish error and certainly do not show this case to be a good vehicle for considering the question presented. Instead, they again disregard the state supreme court's disclaimer of reliance on the juror testimony; and they ignore that the question for the federal habeas court under AEDPA/*Chapman* is not whether it was reasonable for a state court to conclude that there was sufficient evidence of guilt, but whether it was reasonable for the state appellate court to conclude that the error was harmless beyond a reasonable doubt. The State's efforts to misconstrue the AEDPA/*Chapman* standard do not undermine the court of appeals' determination—uncontested in the petition—that the unconstitutional shackling of Mr. Davenport was actually prejudicial under *Brecht*. Therefore, any finding of harmlessness beyond a reasonable doubt

(even if the state court had applied the correct standard) would have been objectively unreasonable.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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