No. 20-826

In the Supreme Court of the United States

MIKE BROWN, ACTING WARDEN, PETITIONER

v.

ERVINE DAVENPORT

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In *Brecht* v. *Abrahamson*, this Court held that the test on habeas review for determining whether a constitutional error was harmless is whether a federal court may independently conclude that the habeas petitioner suffered "actual prejudice." 507 U.S. 619, 637 (1993). When Congress enacted 28 U.S.C. § 2254(d)(1) three years later, the statute's language and this Court's interpretations of that language demanded a high level of deference to a state court's merits adjudication. Although this Court noted in *Davis* v. *Ayala* that the *Brecht* test "subsumes" § 2254(d)(1)'s requirements, it nevertheless declared that those requirements are still a "precondition" for relief and that a state court harmlessness determination under *Chapman* v. *California*, 386 U.S. 18 (1967), still retains "significance." 576 U.S. 257, 268 (2015). The question presented is:

> May a federal habeas court grant relief based *solely* on its conclusion that the *Brecht* standard is satisfied, as the Sixth Circuit held below, or must it also find that the state court's *Chapman* application was unreasonable under § 2254(d)(1)?

PARTIES TO THE PROCEEDING

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

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JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

And 28 U.S.C. § 2254 provides:

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

INTRODUCTION

This case boils down to the language of an oft-litigated statute—28 U.S.C. § 2254(d)(1), a key provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This statute fundamentally altered federal habeas jurisprudence. It fashions the starting point for any federal court analyzing a claim that has already been denied by a state court counterpart. And it has given rise to numerous decisions from this Court, many of which have taken pains to warn federal courts not to engage in error correction, but instead to afford respect to state court decisions unless there is no reasonable dispute that they were wrong. Two-and-a-half decades after AEDPA's enactment, this Court's decisions have made one thing abundantly clear—habeas review is not de novo review.

To say this was a change from pre-AEDPA habeas jurisprudence is an understatement. Even though this Court's earlier decisions acknowledged the limited availability of relief on collateral review, they nevertheless allowed federal courts to conduct an independent review of the record. That substantially different jurisprudence formed the legal landscape when this Court decided *Brecht* v. *Abrahamson* in 1993. Establishing a standard for evaluating the harmlessness of a constitutional error on habeas review, *Brecht* and its progeny made clear that application of the standard was within the "mind" of the reviewing judge, not any other jurist. The *Brecht* standard did not consider—and could not possibly have considered—the habeas limitations that AEDPA imposed three years later.

So the question becomes: Does *Brecht*'s pre-AEDPA, independent standard provide the all-encompassing test to apply on habeas review when a state court finds that a constitutional error was harmless? Or must a federal court nevertheless consider the landscape-altering limitations that AEDPA demands before granting habeas relief?

Answering "yes" to the former question would ignore the legal shift that took place when AEDPA was enacted. Yet that is exactly what the Sixth Circuit did below when it granted habeas relief to Respondent Ervine Davenport. Expressly stating that *Brecht* "handles the work of both tests," that court justified its conclusion by seizing on this Court's language in two post-AEDPA decisions—*Fry* v. *Pliler* and *Davis* v. *Ayala*. But neither decision did what the Sixth Circuit said they both did—eliminate the need to apply AEDPA's deferential standard when actual prejudice under *Brecht* is met. In *Fry*, the Court held that *Brecht* is the appropriate standard to apply when a state court did *not* conduct a harmless-error analysis, 551 U.S. 112, 120 (2007)—an entirely different situation not at issue here. And in *Ayala*, the Court made clear that *Brecht* did not eliminate AEDPA's limitations. 576 U.S. 257, 268 (2015). Under this Court's modern habeas jurisprudence, one thing is certain: AEDPA's limitations are distinct from the *Brecht* standard, and where, as here, a state court conducted a harmlessness review, both tests must be met before habeas relief is granted.

Bound by those limitations, the Sixth Circuit should have denied habeas relief in this case. It erred in ruling otherwise.

Although Davenport was unconstitutionally shackled at trial, the Michigan appellate courts reasonably determined that the error was harmless considering the overwhelming evidence of his guilt. Not only did Davenport manually strangle a woman one-third his size for four minutes (at least), but he also stole from the now-dead woman's home after casually tossing her body in a field. Coupled with additional evidence showing that Davenport had previously strangled another woman and said he would do it again, fairminded jurists could find that the partially visible shackling was irrelevant to the jury's determination that Davenport premeditated the murder. No precedent from this Court clearly says otherwise.

That conclusion precludes habeas relief. Even if a federal court could disagree with the state courts—indeed, even if a federal court could independently review the record and find that Davenport was actually prejudiced (which he was not)—that is not enough. Because *both* the *Brecht* and AEDPA tests were not satisfied, this Court should reverse.

STATEMENT OF THE CASE

Annette White was killed on January 13, 2007. J.A. at 16, 58–59. The subsequent investigation inescapably pointed to Ervine Davenport as the killer. After a seven-day jury trial in July 2008 in Kalamazoo County Michigan, Davenport was convicted as charged of first-degree premeditated murder.

The trial

On the night of her death, White attended a gathering with Davenport. J.A. at 136. White was 5′2″ tall, 103 pounds, and had a broken wrist, while Davenport was 6′5″ tall and weighed nearly 300 pounds. J.A. at 19–20, 53–54, 348, 638–39. They each used cocaine. J.A. at 155–56. A witness testified that he had asked White to leave that night because she was "goofing off" and "talking . . . crazy," though she had not been violent. J.A. at 138, 153. Davenport drove her home. J.A. at 509–10.

There was no dispute at trial that Davenport killed White. He testified in his own defense, explaining what led to White's death. While he was driving, White became agitated and tried to grab the steering wheel, but he pushed her back. J.A. at 511–13. Davenport claimed that White then pulled out a box cutter and cut his arm. J.A. at 514–16. According to Davenport, he extended one arm and pinned her back against the passenger side of the car, with his hand under her chin. J.A. at 520–22. He asserted that White dropped the box cutter but then tried to kick him, so he kept her pinned. J.A. at 522. Davenport eventually noticed that White had stopped struggling. J.A. at 524–25. Discovering that she was no longer breathing, he claimed that he panicked and left her body in a field. J.A. at 525–27.

Davenport's testimony was significantly undermined at trial. He had bragged that, if he had a problem with someone, he would choke them. J.A. at 175–78. And days before the murder, he had done just that—strangled a woman until she lost consciousness and urinated on herself. J.A. at 218, 231–33.

Moreover, Davenport later admitted to killing White, saying he "off[ed] her." J.A. at 172–73. And, despite his claim that he merely panicked after realizing White was dead, he nevertheless went to her home afterward and stole her property. J.A. at 297–99, 565–66, 590–94.

When the police questioned Davenport, he gave differing stories. He first asserted that he was not involved in White's death. J.A. at 290. At one point, he claimed that he helped dispose of White's body but that another person had killed her. J.A. at 291–97. Then he admitted he had killed White but claimed he did so in self-defense. J.A. at 303–05. *Id*. Although the police found a box cutter in the trunk of his car, no blood was found on the tool. J.A. at 85–89. And Davenport admitted at trial that he lied to the police, even testifying, "[I]t's not gonna help me any to tell the truth." J.A. at 613.

Additionally, a forensic pathologist examined White's body and opined that she died of manual strangulation. J.A. at 27. The pathologist explained that a strangled victim could lose consciousness after 30 seconds. J.A. at 26. But death does not occur until the victim is without air for at least four to five minutes. J.A. at 26–27. After Davenport testified that he merely kept his arm extended across White's neck to hold her back, the forensic pathologist, on rebuttal, explained that Davenport's account was not possible. J.A. at 659. White's injuries were on both sides of her neck, consistent with strangulation and inconsistent with broad force being applied across the front of her neck. J.A. at 659–60.

At trial, Davenport was shackled. He had one hand cuffed and shackles around his waist and ankles. J.A. at 7, 10, 12–13. But his other hand was not cuffed, allowing him to write notes to counsel. J.A. at 10. And a privacy curtain was placed around the defense table. J.A. at 10, 13. He was not shackled when he testified. J.A. at 476–81, 656–57. The trial court did not explain on the record why the shackling was necessary.

Direct appeal

Davenport appealed and argued that his due process rights were violated when he was shackled during his trial. J.A. at 667. The Michigan Court of Appeals agreed but determined that the error was harmless. J.A. at 668–71. The Michigan Supreme Court, however, remanded the case to the trial court, explaining that an evidentiary hearing was warranted to determine whether the jury saw the shackles and, if so, whether the error was harmless beyond a reasonable doubt. J.A. at 687–88.

On remand, the trial court heard testimony from all twelve jurors. J.A. 701–815, 837–56. Five of them testified that they saw Davenport's shackles during the trial. J.A. at 703–04, 730, 745–46, 784, 805. Seven jurors testified that they did not recall seeing Davenport in shackles. J.A. at 716, 759–60, 777, 799–800, 838–39, 845–56, 852. And some of the jurors remembered another juror commenting on the shackles. J.A. at 744, 758–59, 784–85, 808, 852. Three jurors testified that they believed that Davenport might be dangerous, but all three explained that this belief was based on the first-degree murder charge itself, not the

shackling. J.A. at 740, 795–96, 814. Moreover, "all [twelve] jurors testified that [Davenport]'s shackles were not discussed during deliberations and did not influence the verdict." Pet. App. at 96a; see also J.A. at 705, 724, 731–32, 748–49, 761–62, 780, 789–91, 800, 808–11, 839, 846, 852. The trial court found that the prosecution had proved beyond a reasonable doubt that the shackling did not affect the jury's verdict. J.A. at 862–63.

Davenport appealed again.

The Michigan Court of Appeals discussed the jurors' testimony in detail. Pet. App. at 97a–98a. It found that "[a]ll of the evidence indicated that the shackling did not affect the verdict in any way." Pet. App. at 98a. The court also found that "it was proper for the jurors to testify regarding how viewing the shackles affected their deliberations." Pet. App. at 99a. Ultimately, the court held that "[t]he trial court did not err in finding that the prosecution proved beyond a reasonable doubt that the shackling error did not affect the verdict." Pet. App. at 100a.

The Michigan Supreme Court subsequently denied Davenport's application for leave to appeal. Pet. App. at 93a–94a. In that order, the court opined that the Michigan Court of Appeals had erred by considering the hearing testimony of the jurors as to their own belief about whether their judgment was affected by seeing the shackles, and that this consideration was contrary to this Court's holding in *Holbrook* v. *Flynn*, 475 U.S. 560, 570 (1986). *Id*. The Michigan Supreme Court went on to conclude, however, that that "error was harmless under the facts of this case." *Id*. The court explained: "Given the substantial evidence of

guilt presented at trial, we cannot conclude that there was an unacceptable risk of impermissible factors coming into play." Pet. App. at 94a.

Federal habeas proceedings

Davenport sought federal habeas relief on his shackling claim. A magistrate judge recommended that the district court deny habeas relief. Pet. App. at 91a–92a. The magistrate discussed the evidence of Davenport's guilt along with the jurors' testimony at the evidentiary hearing and found that Davenport had failed to meet the stringent standard under AEDPA because he did not demonstrate that the state courts' harmlessness determinations were unreasonable. Pet. App. at 87a–91a. The district court adopted the report and recommendation and denied habeas relief. Pet. App. at 76a.

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

shackling error was not harmless and granted relief. Pet. App. at 38a.

Judge Readler dissented. He would have held that a habeas court must engage in both inquiries before granting habeas relief based on a prejudicial constitutional error. Pet. App. at 39a–40a. Failing to do so, Judge Readler reasoned, contradicts this Court's decision in *Ayala*. Pet. App. at 39a. Applying AEDPA's limitations to this case, Judge Readler opined that the state court harmless-error determinations were not unreasonable applications of Supreme Court precedent; thus, habeas relief was not warranted. Pet. App. at 59a–64a.

The State filed a petition for rehearing en banc, arguing that the panel majority applied the wrong standard for reviewing a state court's harmless-error determination. The Sixth Circuit denied rehearing by an 8-to-7 vote. Pet. App. at 101a–102a. Four separate opinions were attached to the order denying rehearing.

Judge Stranch (who also wrote the panel majority opinion) wrote a concurring opinion joined by five other judges. Pet. App. at 103a–109a.

Judge Sutton, joined by Judge Kethledge, wrote a separate concurring opinion expressing skepticism that the panel majority had applied the correct standard. Pet. App. at 109a–114a. He nevertheless voted to deny rehearing, in part because of his belief that it would be "inefficien[t]" to rehear the case en banc given that this Court has the "final" say on the matter. Pet. App. at 114a.

Judge Griffin wrote a dissenting opinion explaining that rehearing en banc was the appropriate remedy to correct the panel majority's erroneous decision. Pet. App. at 114a–118a.

And Judge Thapar wrote a separate dissenting opinion (joined by five other judges), rejecting the approach taken by the panel majority. Pet. App. at 118a–137a. According to Judge Thapar, that approach—that "federal judges can simply ignore AEDPA's guardrails whenever they find that a petitioner has suffered actual prejudice under *Brecht*"—"casts aside AEDPA and misinterprets Supreme Court precedent." Pet. App. at 119a. To demonstrate why application of AEDPA deference is required even if the *Brecht* test is met, Judge Thapar discussed the differences between the two standards. Pet. App. at 129a–133a.

In summarizing those differences, Judge Thapar explained that AEDPA prohibits extending Supreme Court precedent, forbids relying on circuit precedent, gives state courts broad discretion when applying a general standard from the Supreme Court, and prohibits considering evidence from outside the state court record, while the *Brecht* test does not require adherence to these clear rules. Pet. App. at 129a–133a. "Jettisoning these clear, rule-based requirements will make appellate review in habeas cases more difficult and unpredictable." Pet. App. at 133a (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989)). And in this case, Judge Thapar said, applying those requirements would have necessitated a different result. See Pet. App. at 128a–133a.

The State then filed a petition for a writ of certiorari. This Court granted the State's petition.

SUMMARY OF ARGUMENT

Although Davenport was unconstitutionally shackled at trial, the Michigan state courts concluded that the error was harmless beyond a reasonable doubt. On federal habeas review, there is no dispute that the standard for harmless-error review is less onerous on the prosecution. But two standards are applicable: (1) the "actual prejudice" test announced in *Brecht* v. *Abrahamson*, and (2) the requirement under AEDPA that a state court's merits adjudication be contrary to, or an unreasonable application of, clearly established federal law. The Sixth Circuit held that the *Brecht* standard obviates the need to evaluate the reasonableness of the state court's decision under AEDPA. In doing so, the court found that the shackling error here was not harmless, despite the finding of the state courts that there was overwhelming evidence of Davenport's guilt. That analysis contravenes a validly enacted statute and this Court's precedents.

Importantly, *Brecht*'s actual-prejudice standard allows for independent review by a federal court. Habeas law at the time of that decision provided for "independent federal consideration." *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985). Although *Brecht* enacted a tough standard for habeas petitioners to meet, it did not change the independent nature of the federal court's review. Indeed, this Court clarified that nature in *O'Neal* v. *McAninch*, when it held that the *Brecht* standard is met if there is "grave doubt" in "the judge's mind" about whether the error is harmless. 513 U.S. 432, 435 (1995). This jurisprudence lacks any deference to a state court's harmlessness determination.

AEDPA, on the other hand, fundamentally changed habeas law. Even if a federal court disagrees with a state court decision, relief is unavailable unless the decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). This statutory standard demands deference to state court adjudications and bears little resemblance to the independent *Brecht* standard. The two standards are significantly different.

This Court's latest federal habeas harmless-error decisions do not erase that difference, they embrace it. *Mitchell* v. *Esparza* outlined the approach when a state court denies a claim on harmless-error grounds—AEDPA applies, and relief is appropriate only if the state court's decision was an unreasonable application of *Chapman* v. *California*, 386 U.S. 18 (1967). 540 U.S. 12, 18 (2003). Conversely, *Fry* v. *Pliler* outlined the approach when a federal court is the first to recognize a constitutional error and review it for harmlessness—*Brecht* applies, and relief is proper if the court finds actual prejudice. 551 U.S. at 120. And *Davis* v. *Ayala* clarified the interplay between the two standards—habeas relief is never available unless the *Brecht* standard is met, but if the state court adjudicated the harmlessness of the claim, "AEDPA's highly deferential standards kick in." 576 U.S. at 269.

That is exactly what should have happened here when the state courts found the shackling error in this case was harmless: AEDPA's limitations should have "kick[ed] in."

In other words, the federal court should have evaluated whether the state court unreasonably applied *Chapman*. In so doing, the federal court should have asked whether it was reasonable to conclude that the overwhelming evidence of Davenport's guilt removed any prejudicial effect of the error. The court should have looked at whether fairminded jurists could agree that the error was harmless given Davenport's *four-minute* (or longer) strangulation of his victim, his admission that he killed the woman, his decision to discard the body and posthumously steal from her, and his announcement that he would choke someone if he had to and had actually done so at least once before. The Sixth Circuit should have viewed all this under AEDPA's highly deferential lens. Had the court done so, even if it disagreed that the error was harmless, the unmistakable conclusion would have been that reasonable jurists could have agreed with the state court.

The Sixth Circuit instead granted habeas relief solely on its conclusion that the shackling error actually prejudiced Davenport. In doing so, it disregarded the limitations that AEDPA imposes. Using a *Brecht*-only approach, the Sixth Circuit extended the holdings of this Court, used circuit precedent to find support for its conclusions, conducted an independent review of the record without considering whether a rational jurist could make a different determination, and consulted extra-judicial social-science studies within its opinion. These analytic tactics may be permitted when determining actual prejudice under *Brecht*, but they are expressly prohibited by AEDPA.

Because Davenport did not overcome AEDPA's limitations, the Sixth Circuit should have denied habeas relief. The court's grant based solely on its independent, actual-prejudice finding was contrary to AEDPA and contrary to this Court's precedents. This Court should reverse.

ARGUMENT

I. *Brecht*'s independent harmlessness standard serves different considerations and does not account for AEDPA's highly deferential requirements.

Before Congress enacted AEDPA, *Brecht* provided the sole standard for determining whether a constitutional error was harmless on federal habeas review. But after AEDPA was enacted, the standard for determining whether harmless error occurred when a state court addressed the harmlessness of the error necessarily became a two-step process. It had to be in order to be consistent with AEDPA's text and this Court's landscape-altering decisions that have interpreted that text.

A. Before AEDPA, harmless-error review under *Brecht* in habeas cases was independent and de novo.

In *Brecht*, this Court sought to adopt a harmless-error standard that would advance the considerations underlying then-applicable habeas jurisprudence. 507 U.S. at 633. To understand why the *Brecht* Court adopted its standard, some background on harmless-error rules is necessary.

This Court first articulated a workable harmless-error test 75 years ago, in *Kotteakos* v. *United States*, 328 U.S. 750 (1946). The *Kotteakos* Court was tasked with determining whether several criminal defendants in a federal conspiracy case were properly convicted of a single charge presented in the indictment. *Id*. at 752. Because the proofs showed that there were

actually many *separate* conspiracies, the Court discussed the federal harmless-error statute then in effect, which prohibited reversal on appeal based on " 'technical errors' " that did " 'not affect the substantial rights of the parties.' " *Id*. at 757 (quoting the federal harmless-error statute). Within its analysis, the Court discussed the background of the statute: legal scholars at the time were concerned with "the multiplicity of loopholes" that allowed retrials for those who had been "fairly convicted." *Id*. at 759–60.

With this background in mind, the Court directed judges to review the entire record to determine "whether the error itself had substantial influence" on the jury's verdict. *Id*. at 764–65. "If so, or if one is left in grave doubt, the conviction cannot stand." *Id*. at 765. Ultimately, *Kotteakos* found that the error in that case "had substantial and injurious effect or influence in determining the jury's verdict." *Id*. at 776.

Moving on from the technical into the substantive, this Court in *Chapman* v. *California* sought to answer whether a federal constitutional error could be deemed harmless. 386 U.S. 18, 20 (1967). The Court decided that it could, then discussed the correct rule to apply. *Id*. at 22–23. After reviewing the purposes of harmless-error rules, the *Chapman* Court announced a clear test: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id*. at 24. The burden of demonstrating such an error was placed on the beneficiary of the constitutional error—thus, in review of criminal convictions, the prosecution. *Id*.

But what of habeas review? Different considerations govern, the Court pointed out in *Brecht*. 507 U.S. at 633–35. The writ of habeas corpus is "an extraordinary remedy," and "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id*. at 633–34 (internal quotation marks and citations omitted). Comity, federalism, and a State's interest in the finality of convictions are features that distinguish collateral attacks from direct review. *Id*. at 635.

Therefore, the *Brecht* Court held that a different standard should govern when determining the effect of a constitutional error on habeas review. *Id*. at 636. The Court adopted the *Kotteakos* standard, noting that there is an existing body of case law for federal courts to consult. *Id*. at 637–38. The standard, *Brecht* declared, "is whether the error had substantial and injurious effect or influence in determining the jury's verdict"; in other words, the petitioner must establish that the error resulted in "actual prejudice." *Id*. at 637 (quotation marks and citations omitted).

But *Brecht* left unanswered a critical question: Did it shift the burden to the petitioner to prove that a constitutional error was harmful? This Court answered that question in *O'Neal*, 513 U.S. at 436–37, holding that it did not. Instead, *Brecht* created a legal standard for the reviewing judge to apply: "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *Id*. The Court conceptualized this by providing an internal question: " 'Do I, the

judge, think that the error substantially influenced the jury's decision?' " *Id.* at 437 (quotation marks and citation omitted). If the "conscientious answer" to that question is, " 'It is extremely difficult to say,' " then relief must be granted. *Id.* at 442.

This is undoubtedly a tough standard for a habeas petitioner to meet. But it is entirely subject to the views of a federal court upon *independent* review of the record. Indeed, *Brecht* was decided pre-AEDPA, when questions of constitutional law raised on habeas review were subject to "independent federal determination." *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985). In the Term immediately preceding the *Brecht* decision, the Court sought to reconsider that rule. See *Wright* v. *West*, 502 U.S. 1021 (1991) (order adding an additional question to be briefed and argued: whether a federal court should give deference to the state court's application of law). But none of the five opinions from a fractured Court held that deference was required under the then-applicable habeas jurisprudence. See *Wright* v. *West*, 505 U.S. 277, 294–95 (1992) (opinion of Thomas, J.) (questioning the continued rationale of *Miller* but nevertheless declining to reach the issue); *id.* at 305 (opinion of O'Connor, J.) ("We have always held that federal courts, even on habeas, have an independent obligation to say what the law is."); *id.* at 309 (opinion of Kennedy, J.) (opining that recent retroactivity caselaw "provides added justification for retaining *de novo* review, not a reason to abandon it").

Although *Brecht* made it tougher for a habeas petitioner to obtain relief when constitutional error occurs, it did so at a time when even a harmlessness determination was "subject to plenary federal review."

Miller, 474 U.S. at 112. That a standard imposes a tough burden does not necessitate that it also provides deference to the underlying state court decision. Justice Stevens—writing to explain why *Brecht* correctly adopted the *Kotteakos* standard—offered this characterization:

> [T]hat standard accords with the statutory rule for reviewing other trial errors that affect substantial rights; places the burden on prosecutors to explain why those errors were harmless; requires a habeas court to review the entire record de novo in determining whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts.

Brecht, 507 U.S. at 640–41 (Stevens, J., concurring).

Justice Stevens's concurrence was quoted favorably in *O'Neal*, 513 U.S. at 439, where this Court left no doubt as to the independent nature of the *Brecht* standard. Whether a federal court judge exhibits "grave doubt" as to the prejudicial nature of an error within "*the judge's mind*," *id*. at 435 (emphasis added), is a standard that affords deference to no other jurist or decision. It is a review of the question anew.

Brecht imposes a demanding—but ultimately de novo—standard for reviewing harmlessness. It demands no deference to a state court decision, requiring instead that a federal court independently review the record before making a harmless-error determination.

B. Congress then enacted AEDPA, which demands deference to state court decisions.

Three years after *Brecht*, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). As part of the Act, Congress amended 28 U.S.C. § 2254, the statute governing a federal court's power to grant a writ of habeas corpus. It provides:

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

The statute thus makes clear that habeas relief "shall not be granted . . . unless": (1) the state court's decision was "contrary to" clearly established federal law, (2) the state court's decision was an "unreasonable application of" clearly established federal law, or (3) the state court's decision was based on an "unreasonable determination of the facts." § 2254(d). All three of these bases for relief focus on the state court's

adjudication of the claim. That is, § 2254(d) enacted a required deference to state courts, by forbidding a federal court from granting habeas relief based on its independent belief that a constitutional violation has occurred unless it also first finds that the state court acted unreasonably in rejecting that claim.

Section 2254(d) covers all claims adjudicated on the merits by a state court and does not admit of any exceptions. Nor does the plain language of the statute purport to split claims up into components, such that some components might be reviewed deferentially and others de novo. That is, nothing in AEDPA's plain language permits a court to apply deference to a state court's adjudication as to whether a constitutional violation occurred but ignore a state court's decision as to whether a constitutional violation was harmless. If a *claim* (not a component of a claim) was adjudicated on the merits, then the *adjudication* (not a component of the adjudication) must be contrary to or an unreasonable application of clearly established federal law, or based on an unreasonable determination of facts. Otherwise, habeas relief is barred.

AEDPA has resulted in significant litigation that has reached this Court, fundamentally altering federal habeas jurisprudence.

In *Williams* v. *Taylor*, this Court pointed out the seismic shift: "Under § 2254(d)(1)[ ] . . ., a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." 529 U.S. 362, 411 (2000). This Court has further described this

high standard as "difficult to meet." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). Indeed, to obtain relief under the amended statute, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*.

Not only did AEDPA eliminate the "independent federal determination" requirement, *Miller*, 474 U.S. at 112, but it also imposed further limitations. For instance, "clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions." *White* v. *Woodall*, 572 U.S. 415, 419 (2014) (brackets, internal quotation marks, and citations omitted). Where no Supreme Court case has confronted "the specific question presented" by the habeas petitioner, "the state court's decision [cannot] be contrary to any holding from this Court." *Woods* v. *Donald*, 575 U.S. 312, 317 (2015) (internal quotation marks and citation omitted). And "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.' " *Kernan* v. *Cuero*, 138 S. Ct. 4, 9 (2017) (per curiam) (quoting *Glebe* v. *Frost*, 574 U.S. 21, 23 (2014)) (per curiam) (in turn quoting 28 U.S.C. § 2254(d)(1))). These limitations "bear[ ] only a slight connection" to pre-AEDPA habeas jurisprudence. See *Williams*, 529 U.S. at 412. Unlike *Brecht*, AEDPA "demands that state-court decisions be given the benefit of the doubt." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002).

C. This Court has affirmed that AEDPA forms a "precondition" to habeas relief—even when reviewing for harmlessness.

The Sixth Circuit panel majority and the opinions supporting the denial of en banc review glossed over the differences between the *Brecht* and AEDPA standards, justifying this action by pointing to this Court's precedents after AEDPA was enacted. But those precedents make clear that deference to state court harmless-error determinations is *required*, not merely an alternative analysis that can be ignored.

This Court first considered AEDPA's edicts in the harmless-error context in *Mitchell* v. *Esparza*, 540 U.S. 12 (2003). The state court in *Esparza* had denied a claim of constitutional error, finding that any error was harmless. *Id.* at 14–15. After rejecting the Sixth Circuit's conclusion that the error was not the type that could be subject to harmless-error analysis, this Court cited § 2254(d)(1) and *Chapman* and highlighted the critical limitation that governed the prisoner's claim: "habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Id.* at 18 (quoting *Lockyer* v. *Andrade*, 538 U.S. 63, 75–77 (2003)). Because this Court could not conclude that the state court's adjudication was objectively unreasonable, it denied habeas relief. *Id.* at 19.

Focusing on the AEDPA/*Chapman* inquiry, *Esparza* made no mention of *Brecht*. So, several Terms later, a state prisoner argued that "§ 2254(d)(1), as interpreted in *Esparza*, eliminate[d] the requirement that a petitioner also satisfy *Brecht*'s standard." *Fry*, 551 U.S. at 119. "We think not," stated the Court. *Id.*

Critically, the *Fry* Court made clear that it was deciding a much different question than the one here. *Id.* at 114, 120. AEDPA's effects on the standard of review were not at issue in *Fry*. The state prisoner was trying to avoid the *Brecht* test in favor of the *Chapman* standard, which—without AEDPA's limitations—is undisputedly more onerous on the prosecution. See *Brecht*, 507 U.S. at 637. While *Fry* pointedly remarked that the AEDPA/*Chapman* test is "more liberal" and that it is "subsume[d]" by *Brecht*, that language was included in a case that fell outside of § 2254(d)(1)'s deferential limitations. The *Fry* Court had no reason to decide the standards applicable when a *state* court recognized an error but found it harmless.

After *Fry*, the interplay between *Brecht* and AEDPA/*Chapman* was apparent. The Seventh Circuit provided this concise analysis:

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

> *Brecht* standard to determine whether the error was harmless. . . .

Johnson v. *Acevedo*, 572 F.3d 398, 404 (7th Cir. 2009) (Easterbrook, J.).

The Ninth Circuit interpreted *Fry* differently. That court held that *Fry* "clarified" that the *Brecht* standard is the correct test to apply even when a state court had determined that any error was harmless. *Ayala* v. *Wong*, 756 F.3d 656, 674 n.13 (9th Cir. 2014) (opining that, had the case been heard on appeal before *Fry*, the court would have applied AEDPA/*Chapman*).

Accordingly, the Ninth Circuit in *Ayala*, in reviewing the harmlessness of a prosecutor's use of race-based peremptory challenges in jury selection under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), stated that it "appl[ied] the *Brecht* test without regard for the state court's harmlessness determination." *Id.* at 674 (quotation marks and citation omitted).

This Court held that the Ninth Circuit's approach was incorrect: "The *Fry* Court did not hold—and would have had no possible basis for holding—that *Brecht* somehow abrogates the limitation on federal habeas relief that § 2254(d) plainly sets out." *Davis* v. *Ayala*, 576 U.S. at 268. Indeed, *Ayala* reaffirmed language in *Fry* indicating that "AEDPA nevertheless 'sets forth a precondition to the grant of habeas relief.' " *Id.* (quoting *Fry*, 551 U.S. at 119–120). Thus, while reiterating that "the *Brecht* test subsumes the limitations imposed by AEDPA," *id.* at 270, it clarified that AEDPA's limitations still *must* be overcome before relief is granted.

Importantly, in reaching its conclusion, the *Ayala* Court laid out in detail AEDPA's proscriptions and analyzed the claim through AEDPA's highly deferential lens. Instead of conducting an independent review of the trial court transcripts, the *Ayala* Court sought to determine whether the record sufficiently supported the state court's determinations. See, e.g., *id.* at 276 ("In ordering federal habeas relief based on *their* assessment of the responsiveness and completeness of [the juror's] answers, the members of the panel majority misunderstood the role of a federal court in a habeas case.") (emphasis added). And each time *Ayala* mentioned that the *Brecht* standard had not been met, it additionally and separately referenced the state court's decision and concluded that the habeas petitioner had not overcome AEDPA's deferential limits. *Id.* at 270–86.

Insofar as the "subsumes" sentence in *Ayala* can be interpreted to signify that a finding of actual prejudice under *Brecht* necessarily means the state court's harmlessness finding was objectively unreasonable under AEDPA, this Court should clarify. In the end, the statutory language of AEDPA—and the appropriate reading of *Ayala*—requires that the AEDPA/*Chapman* standard must be met before a federal court may *grant* habeas relief.

II. AEDPA's deferential limitations are not contemplated by the *Brecht* standard.

Suffice it to say that the independent review allowed by *Brecht* and the elevated deference demanded by AEDPA are two distinct standards. Judge Thapar, dissenting from the Sixth Circuit's order denying rehearing en banc, highlighted in depth the differences between the two standards. He pointed out four "distinct inquiries," each of which is discussed below. Pet. App. at 128–133a.

A. AEDPA limits applicable law to clearly established Supreme Court holdings.

Section 2254(d)(1) references "clearly established Federal law, as determined by the Supreme Court of the United States." This limits the availability of habeas relief to state court merits decisions that contravene or unreasonably apply the *holdings* of this Court. *Woodall*, 572 U.S. at 419. Looking at dicta within this Court's decisions will not do. *Id.* Nor will holdings in analogous circumstances. Unless this Court has confronted "the specific question presented" by the habeas petitioner, habeas relief is unavailable under AEDPA. *Donald*, 575 U.S. at 317 (cleaned up).

Under the *Brecht* standard, on the other hand, a petitioner can show actual prejudice by arguing that a Supreme Court decision should be expanded to a different context. See, e.g., *Blackston* v. *Rapelje*, 780 F.3d 340, 360 (6th Cir. 2015) (citing *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959), which prohibited the prosecution from knowingly using false testimony to secure a conviction, and using it as support to find that a Confrontation Clause error was not harmless under *Brecht*).

B. AEDPA does not allow circuit precedent to form the basis for relief.

Explicitly referencing law established by *this* Court, AEDPA prohibits relying on precedent from *other* courts to support a finding that habeas relief should be granted. Indeed, this Court has repeatedly addressed that prohibition, stating that "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.' " *Cuero*, 138 S. Ct. at 9 (quoting *Frost*, 574 U.S. at 23 (in turn quoting § 2254(d)(1))).

The *Brecht* standard does not call for that prohibition. See, e.g., *Reiner* v. *Woods*, 955 F.3d 549, 557 (6th Cir. 2020) (citing circuit precedent to support its finding that the prosecution's reliance on inadmissible testimony during closing argument renders prejudicial a Confrontation Clause violation).

C. AEDPA gives state courts substantial leeway when applying general principles of constitutional law.

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

Brecht does not focus on a state court's reasoning; it is an independent standard that gives no deference to any other jurist's decision. The leeway required under AEDPA is therefore missing when reviewing for harmlessness under *Brecht*.

D. AEDPA limits review to the record before the state court.

This Court has held that "§ 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen* v. *Pinholster*, 563 U.S. 170, 181 (2011). In other words, when deciding whether AEDPA's deferential limitations have been overcome, a federal court may not look to "facts not before the state court." *Id*. at 183.

Again, *Brecht* does not contain such a limitation. See Pet. App. at 132a–133a. *Brecht* never indicated that extra-record research may not support a conclusion that a petitioner was actually prejudiced.

E. The differences between *Brecht* and AEDPA matter.

After outlining the four distinct differences that he found, Judge Thapar aptly concluded, "[T]he differences between *Brecht* and AEDPA matter." Pet. App. at 133a. Other judges and scholars have also recognized the importance of those differences.

Dissenting from the panel majority below, Judge Readler explained the differences: "AEDPA, remember, does not simply articulate a prejudice standard. It also cabins federal habeas review by preventing habeas courts from extending grounds for relief beyond

those explicitly required by Supreme Court precedent, independent of any prejudice those errors may have caused." Pet. App. at 48a. *Brecht*'s independent federal review standard, Judge Readler went on, "does not capture this critical feature of AEDPA"; instead, it "writes largely on a clean slate[,] [u]nchecked by then-existing Supreme Court precedent." Pet. App. at 49a. In other words, a habeas prisoner may convince a federal judge conducting an independent review of the record that he or she has shown actual prejudice, even if clearly established Supreme Court precedent did not preclude the state court's harmlessness determination.

Judge Griffin, in his own opinion dissenting from the Sixth Circuit's order denying rehearing en banc, underscored this point. "While a constitutional error resulting in actual prejudice is sufficient under *Brecht*," he said, "AEDPA requires more." Pet. App. at 117a. Judge Griffin pointed out that a standard that places the burden of disproving actual prejudice on the State is "materially different" from AEDPA's deferential limitations. Pet. App. at 116a–117a. Those limitations prohibit habeas relief "unless the petitioner also sustains *his* burden under AEDPA of proving that the state court ruling was 'an unreasonable application[ ] of clearly established Federal law, as determined by the Supreme Court of the United States.' " Pet. App. at 117a (quoting § 2254(d)(1)).

These observable differences between the two standards are not limited to the minds of some Sixth Circuit judges. One scholar noted that the standards are "entirely different in kind." John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 Hous. L. Rev.

59, 113 n.297 (2016). The *Brecht* standard "looks at the likelihood of a different result had the trial error not occurred, while the AEDPA/*Chapman* test focuses on whether appellate judges reasonably could conclude that the error was harmless under *Chapman*." *Id.*; see also Brandon L. Garrett, *Patterns of Error*, 130 Harv. L. Rev. F. 287, 290–91 (2017) (noting that AEDPA "tightened" harmless-error review and that it "more broadly restricts relief on the merits"). The two standards "are not logically interrelated; they are apples and oranges." Greabe at 113 n.297.

As many have discussed, the *Brecht* standard does not (indeed, could not) encompass the strict demands that AEDPA imposed on habeas review. In fact, language in *Brecht* suggests that it was not meant to be an all-encompassing test. When considering what harmless-error standard to impose, the Court reasoned: "As always, in defining the scope of the writ, we look first to the considerations underlying our habeas jurisprudence, and then determine whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefits of its application on collateral review." *Brecht*, 507 U.S. at 633. Those considerations have been refined since AEDPA was enacted. AEDPA provided an additional filter through which habeas claims must be analyzed, demanding that federal courts give a high level of deference to their state counterpart's adjudication of the same claim. This filter has provided the cornerstone of habeas jurisprudence for the last two-and-a-half decades. This valid act of Congress cannot be ignored because a "grave doubt" exists within "the judge's mind." *O'Neal*, 513 U.S. at 435.

In short, the two standards are significantly different in multiple ways. Because AEDPA imposes limitations not contemplated by the *Brecht* standard, the statute must be applied before a federal court may grant habeas relief.

III. Because fairminded jurists could agree with the Michigan courts' harmlessness determinations, the Sixth Circuit should have denied habeas relief.

The Sixth Circuit's reasoning below confirms the differences between the two standards and why it was wrong to apply only *Brecht*. Davenport cannot show that he is entitled to relief in applying the required deference under AEDPA to the case at hand, which illustrates the limited nature of AEDPA review.

Davenport cannot point to any Supreme Court precedent that clearly establishes that his partially visible shackles amounted to prejudicial error requiring reversal. The Supreme Court precedent at issue here is *Chapman*—whether the shackling error was harmless beyond a reasonable doubt. Although *Deck* v. *Missouri* provided a framework for identifying a shackling error, it did *not* discuss *how* to analyze such an error under the *Chapman* standard. 544 U.S. 622, 635 (2005). It simply mentioned that the *Chapman* standard governs when reviewing the prejudicial effect of the error. *Id*. Thus, the general principles announced in *Chapman* will guide a federal court's review of a state court's determination that a shackling error was harmless.

In the majority opinion below, while it discussed the juror testimony from the decision of the Michigan Court of Appeals, the Sixth Circuit did not expressly identify which state court decision was the last reasoned one for review. (The majority refused to defer to any state court's harmlessness analysis under its improper *Brecht*-only approach.)

There are significant arguments to support a finding that the Michigan Court of Appeals' opinion was the last reasoned decision. This is because that court provided a full review of the issue and the Michigan Supreme Court denied leave. The Michigan Supreme Court's decision to deny the application for leave to appeal was not an adjudication of the claim; rather, it was a decision *not to adjudicate* the claim, notwithstanding that it provided brief reasoning in support of that decision. See *Greene* v. *Fisher*, 565 U.S. 34, 40 (2011) (describing a state court's order as "a decision by the state supreme court not to hear the appeal—that is, not to decide at all."); *Ylst* v. *Nunnemaker*, 501 U.S. 797, 805–06 (1991) ("[T]he discretionary denial of review on direct appeal" by the Michigan Supreme Court "is not even a 'judgment.' ").

Davenport argued in his brief in opposition that the Michigan Supreme Court issued the last reasoned decision. Br. in Opp. 25–26. Even if true, that decision would then be entitled to AEDPA deference.[1]

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[1] The State originally contended in district court that the Michigan Supreme Court "probably" issued the last reasoned decision. Res. to Pet. 35–37 (W.D. Mich.), Dkt. 7. But the State has never equivocated on the key point: whichever state court issued the last merits decision, that court is entitled to AEDPA deference.

In either case, the Sixth Circuit erred because both state courts applied a harmless-error analysis to deny relief, and the Sixth Circuit failed to determine whether that analysis was objectively unreasonable before granting habeas relief.

A. The Michigan Court of Appeals' harmlessness determination was not objectively unreasonable.

Beginning with the premise that the Michigan Court of Appeals' opinion denying relief was the last reasoned decision, that decision was not contrary to, or an unreasonable application of, clearly established federal law. Along with noting the "overwhelming[ ]" evidence of Davenport's guilt, the court discussed the unequivocal testimony from each juror denying that the shackling played any role during deliberations. Pet. App. at 97a–98a.

The Sixth Circuit relied on *Flynn*, holding that the Michigan Court of Appeals improperly relied on the juror testimony, stating that "the Supreme Court has made clear that jurors' subjective testimony about the effect shackling had on them bears little weight." Pet. App. 34a. But this Court did not adopt that holding.

In *Flynn*, this Court reviewed whether the presence of uniformed state troopers in the courtroom was so "inherently prejudicial" so as to deny a fair trial. 475 U.S. at 562, 569. It noted that many of the prospective jurors were asked about the troopers' presence during *voir dire* and the trial court found that the answers indicated that the troopers' presence did not create an inference of guilt. *Id*. at 565. Finding the "as-

sessment of jurors' states of mind cannot be dispositive here," the Court said "[e]ven though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." *Id*. at 570. But this did not foreclose the approach taken here by the state courts for three reasons.

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

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

Second, like the *Deck* Court, the *Flynn* Court limited its discussion to whether there was an underlying constitutional violation. 475 U.S. at 570. The Court did not employ a harmless-error analysis. Although juror testimony cannot be considered when determining whether a courtroom security practice violates a

defendant's constitutional rights, it does not necessarily follow that juror testimony cannot be considered when determining whether that practice was harmless error.

Here, it is uncontroverted that Davenport's shackling was error; the question was whether that error was harmless. *Flynn* does not prohibit considering juror testimony in answering that question.

Third, the discussion about juror testimony in *Flynn* was not a holding at all. In determining that the troopers' presence in the courtroom was not a due-process violation, the Court pointed out that it was *not* considering the jurors' own assessments of their states of mind. 475 U.S. at 570. Put differently, the juror testimony played no role in the Court's conclusion. Thus, it was not a holding of this Court and not clearly established federal law. See *Woodall*, 572 U.S. at 419.

Considering the juror testimony here as the Michigan Court of Appeals did, it would be a tall order to assert that no fairminded jurist could conclude that the shackling error was harmless beyond a reasonable doubt given these facts. Along with the incriminatory time-consuming circumstances of the killing, the post-murder conduct and statements, and the prior strangulation, the court also heard unequivocal testimony from all twelve jurors that the shackling played no role in their deliberations. Pet. App. at 97a–99a. A reasonable jurist could conclude, after weighing all these factors suggesting that the jury's first-degree murder verdict was unaffected by the shackles, that the prosecution proved beyond a reasonable doubt that the error was harmless.

B. The Michigan Supreme Court's harmlessness determination was not objectively unreasonable.

If the Michigan Supreme Court's order denying leave to appeal was the last reasoned decision in this case, then it was not an unreasonable application of clearly established federal law, because it applied *Chapman*'s general principles in an objectively reasonable manner.

To fully grasp the state court's summary reasoning, it is important to remember the posture of the case in the state court. The Michigan Supreme Court initially remanded the case to the trial court to "determine whether the prosecution can demonstrate beyond a reasonable doubt that the shackling error did not contribute to the verdict." J.A. at 688. On remand, both the trial court and the Michigan Court of Appeals found that the prosecution met its burden. J.A. at 862–63; Pet. App. at 98a. But, in doing so, the lower state courts cited as support the testimony from the jurors at the evidentiary hearing explaining that the shackling played no role in the deliberations and had no effect on their verdict. J.A. at 862; Pet. App. at 97a–99a. The Michigan Supreme Court, citing this Court's decision in *Flynn*, 475 U.S. at 570, found that reliance on the juror's testimony was improper. Pet. App. at 93a–94a. Nonetheless, the court concluded, "the substantial evidence of guilt presented at trial" rendered any error harmless. Pet. App. at 94a.

That decision did not cite *Chapman*. Nor did it cite *Deck*. But no such citations were needed to obtain AEDPA deference. See *Richter*, 562 U.S. at 98 ("[A]s this Court has observed, a state court need not cite or

even be aware of our cases under § 2254(d)."); *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (stating that satisfying AEDPA's standard "does not require citation of [the Supreme Court's] cases. . . so long as neither the reasoning nor the result of the state-court decision contradicts them"). The Michigan Supreme Court's citation to *Flynn* does not change things; the court was free to utilize the analysis from a related context to determine whether the error was harmless—without contravening *Chapman*. Indeed, it is evident that the court conducted a *Chapman* analysis considering that it initially remanded the case to determine whether the error was harmless beyond a reasonable doubt.

That analysis was reasonable. Notably, the *Chapman* standard is exceptionally general. Again, "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough*, 541 U.S. at 664. To constitute an unreasonable application of *Chapman*, this Court would have to find that no fairminded jurist could conclude that the shackling error was harmless beyond a reasonable doubt.

That phrase is difficult to utter given the facts of this case. Indeed, there was no dispute that Davenport killed Annette White, and his claim that he acted in self-defense could all but be rejected out of hand. To strangle White, Davenport must have had his hands around her neck, depriving her of air, for several minutes after she had already lost consciousness.[2] See

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[2] Michigan law does not require a determinate minimum length of time to establish premeditation for first-degree murder; it requires that a reasonable person have time to take a "second look." *People* v. *Johnson*, 597 N.W.2d 73, 79 (Mich. 1999) (quotation

J.A. at 26–27. After the killing, Davenport discarded White's body, stole property from her home, and told an acquaintance that he had "off[ed]"her. J.A. at 172–73, 525–27, 590–94. Then he repeatedly lied to police, only later admitting that he had killed White. J.A. at 290–97, 303–05. Tellingly, this was not even the first time he strangled a woman—he choked another woman until she lost consciousness and urinated. J.A. at 218, 231–33. And he announced that choking people was his choice technique. J.A. at 175–78.

Whether visibly shackled or not, it was clear to every reasonable juror that Davenport did not act in self-defense but rather with a premeditated intent to kill.

C. The Sixth Circuit's *Brecht*-only approach ignored AEDPA's limitations and confirmed that the differences between the two standards matter.

The Sixth Circuit panel majority did not discuss the state court decisions under AEDPA. It never explained why those decisions were contrary to or unreasonable applications of this Court's precedents. Instead, it looked to other resources—and in doing so failed to abide by AEDPA's limitations before granting habeas relief.

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marks and citation omitted). See also *People* v. *Gonzalez*, 664 N.W.2d 159, 163 (Mich. 2003) ("Manual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look.' Moreover, a defendant's attempt to conceal the killing can be used as evidence of premeditation.") (citing *Johnson*, 597 N.W.2d at 79, which also noted that "manual strangulation alone is [not] sufficient to show premeditation.").

1. Contrary to AEDPA, the Sixth Circuit failed to limit its focus to this Court's holdings.

The Sixth Circuit did not even attempt to abide by AEDPA's proscription against granting habeas relief unless a state court's decision runs afoul of a holding of this Court. See *Woodall*, 572 U.S. at 419. Instead, noting that it could disregard AEDPA and "jump directly to *Brecht*," Pet. App. at 12a, the court relied extensively on *Deck* for its finding that the shackling in this case was prejudicial, see Pet. App. at 20a–24a.

But *Deck*, remember, was not a harmless-error case; it found only that visible shackling without an on-the-record justification is a due-process violation. 544 U.S. at 635. True, it held that such a violation was subject to harmless-error review, but it made no attempt to propound any guidelines for determining when shackling can be considered harmless. *Id.* at 635. Because the State concedes that a shackling error occurred here, the Sixth Circuit's heavy reliance on *Deck*'s statement that shackling is inherently prejudicial is misplaced in the harmless-error context. Indeed, relying on *Deck*'s due-process analysis in the harmless-error context swallows whole the rule that shackling errors can be harmless. Because the *holding* of *Deck* did not prohibit the state courts' harmlessness determination, the Sixth Circuit's analysis violated AEDPA.

The Sixth Circuit also erred when it applied *Flynn* to discredit the jurors' testimony. As discussed above in section III.B, because the *holding* of *Flynn* did not prohibit the Michigan Court of Appeals' harmlessness

determination, the Sixth Circuit's analysis again violated AEDPA.

2. Contrary to AEDPA, the Sixth Circuit relied on circuit court precedent.

To buttress its conclusion that the shackling error was not harmless, the Sixth Circuit improperly looked to circuit court precedent for support.

Relying on its own decision in *Ruimveld* v. *Birkett*, 404 F.3d 1006, 1017–18 (6th Cir. 2005), the court found that the "closeness of the case" is relevant when considering the prejudicial impact of the shackling error. Pet. App. at 32a. But nowhere in *Chapman* or *Deck* did this Court explain how a shackling error is impacted by the "closeness of the case."

Then, relying on precedent from a sister circuit in *Rhoden* v. *Rowland*, 172 F.3d 633, 637 (9th Cir. 1999), the Sixth Circuit found support for its proposition that a shackling error is not harmless where a defendant's propensity for violence is a critical issue. Pet. App. at 37a–38a. Again, though, the court did not point to any decision from this Court that suggests that a defendant's alleged propensity for violence makes a shackling error more likely to be prejudicial.[3]

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[3] In any event, the logic underlying this support as applied to this case is unsound. Davenport was charged with—and ultimately convicted of—*premeditated* murder, meaning the jury found that he had time to take a "second look" before deciding to kill White. See *Johnson*, 597 N.W.2d at 79 (quotation marks and citation omitted). Shackling implies that the defendant is an immediate danger and may become impulsively violent, even during a trial designed to allow him to prove his innocence. See *Deck*,

These lower court decisions may provide persuasive authority for determining whether the actual-prejudice standard was met, but they do not come into play at all when applying AEDPA/*Chapman*.

3. Contrary to AEDPA, the Sixth Circuit conducted an independent review of the record.

The Sixth Circuit majority recognized the highly incriminating facts at hand, but it suggested that they did not overwhelmingly prove that the murder was premeditated. Pet. App. at 31a ("The jury easily could have found that this was second-degree [non-premeditated] murder. . . ."). But to make that finding, the court focused on two unfounded suppositions: (1) that the murder occurred during a fight, and (2) that the only evidence of premeditation was the testimony that White was strangled, which is not enough under Michigan law to support a first-degree murder conviction, see *People* v. *Johnson*, 597 N.W.2d 73, 79 (Mich. 1999). Pet. App. at 30a–32a. Both ignore critical facts in Davenport's case.

The forensic pathologist who examined White's body did not opine merely that she was strangled to death. He also explained to the jury the *mechanics* of the strangulation, pointing out that a victim could lose consciousness after 30 seconds, but describing that death would not occur until the victim is completely

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544 U.S. at 633 (noting that the appearance of an offender in shackles implies that "court authorities consider the offender a danger to the community"). To suggest that the shackling error was especially egregious where the defendant was convicted of a non-impulsive crime makes little sense.

deprived of air for *at least four to five minutes*. J.A. at 26–27.

In other words, whether a fight occurred is largely irrelevant—White did not pose a threat when she was unconscious for several minutes while Davenport continued to strangle her.

On top of this expert testimony, the jury also heard from fact witnesses who described Davenport's penchant for strangulation. Before the murder, he bragged that he would choke someone he had a problem with. J.A. at 175–78. And he had already done so once, strangling another woman until she lost consciousness and urinated. J.A. at 218, 231–33. The record shows that Davenport knew the devastating impact of his actions and refused to let up until he achieved his goal—White's death. At bottom, there was significant evidence that Davenport had an opportunity to take a "second look," *Johnson*, 597 N.W.2d at 79 (internal quotation and citation omitted), and made a conscious decision to kill White.

Against that evidence, the jury's awareness of the shackling was limited. Only five jurors testified that they saw the shackles. J.A. at 703–04, 730, 745–46, 784, 805. Davenport's right hand was unshackled so that he could write notes to counsel. J.A. at 10. A curtain was placed around the defense table, limiting the visibility of the shackles. J.A. at 13. And he was not shackled when he testified. J.A. at 476–81, 656–57. The shackling error—though certainly a due-process violation—was not the kind that was so overly prejudicial that it negated the overwhelming evidence of guilt. See *Deck*, 544 U.S. at 634 (suggesting that the

"degree of the jury's awareness" of the restraints is evidence of "the kinds of prejudice that might have occurred").

Given the overwhelming evidence of guilt and the limited visibility of the shackles, a fairminded jurist could conclude beyond a reasonable doubt that the error had no effect on the jury's verdict. Whether a federal court might disagree with the state court's finding on habeas review is inconsequential. The Sixth Circuit's independent review conflicts with AEDPA.

4. Contrary to AEDPA, the Sixth Circuit considered social-science studies outside the state court record.

Instead of considering whether the Michigan Court of Appeals contravened or unreasonably applied this Court's precedents when it analyzed the testimony from the jurors that the shackling was not a part of their deliberations, the Sixth Circuit looked to extra-judicial evidence to discredit the jurors' self-evaluations. The court pointed to "a voluminous body of social-science research," Pet. App. at 34a, a practice forbidden by AEDPA. See *Pinholster*, 563 U.S. at 181 (stating that review under AEDPA is "limited to the record that was before the state court"); *Ramdass* v. *Angelone*, 530 U.S. 156 (2000) (rejecting petitioner's argument based on public opinion polls because the state supreme court "was not required to consult public opinion polls.").

The Sixth Circuit attempted to cloak its reliance on this extra-judicial research by stating that it "merely provides further support for the Supreme

Court's determination" in *Flynn* that shackling is "inherently prejudicial." Pet. App. at 35a. But AEDPA limits the sources on which to base a habeas grant to this Court's holdings—not post-opinion sociology that validates those holdings. And regardless, the Sixth Circuit's statement is hard to reconcile with the footnote inserted just three lines earlier, where it explicitly relied on a 2019 study to buttress its conclusion that shackling Davenport created a presumption of dangerousness and guilt because he is "a 6′5″ tall black man weighing approximately 300 pounds." Pet. App. at 34a n.13. This race and size component to the shackling harmless-error determination is found nowhere in *Flynn* or any other precedent from this Court.

5. The Sixth Circuit's decision is inconsistent with AEDPA and *Ayala*.

In sum, the Sixth Circuit below did exactly what the Ninth Circuit did in *Ayala*. Just as it was incorrect for the Ninth Circuit to "apply the *Brecht* test without regard for the state court's harmlessness determination," *Ayala* v. *Wong*, 756 F.3d at 674, it was also incorrect to conclude that "there is no reason to ask . . . whether the state court 'unreasonably' applied *Chapman* under AEDPA," Pet. App. at 10a. This *Brecht*-only approach is incompatible with *Ayala* and with AEDPA. The Sixth Circuit's decision cannot stand.[4]

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[4] Not only did it err in taking a *Brecht*-only approach, the court also erred in its application of the *Brecht* standard. Here, Davenport himself admitting to killing the victim and lying to police. J.A. at 511–27, 613. Along with evidence showing that he had a predetermined plan to strangle his foes, knew the devastating

An analysis of the case at hand would offer a helpful example of the differences between the two standards and would emphasize the point that those differences matter. This Court should therefore conclude that the state court did not unreasonably determine that the error was harmless and remand to the Sixth Circuit directing it to dismiss the habeas petition. Otherwise, this Court should vacate and remand to the Sixth Circuit directing it to apply AEDPA in the first instance.

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consequences of such a use of force, and had a complete disregard for the victim after the killing, J.A. at 175–78, 218, 231–33, 525–27, it cannot be said that the partially visible shackles had a substantial and injurious effect or influence on the verdict.

CONCLUSION

This Court should reverse the Sixth Circuit's judgment.

Respectfully submitted,

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Dated: JUNE 2021