No. 20-826

IN THE

Supreme Court of the United States

MIKE BROWN, Acting Warden,
Petitioner,

vs.

ERVINE DAVENPORT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May a federal habeas court grant relief based solely on its conclusion that the *Brecht* v. *Abrahamson* test is satisfied, as the Sixth Circuit held, or must the court also find that the state court's *Chapman* v. *California* application was unreasonable under 28 U. S. C. § 2254(d)(1).

TABLE OF CONTENTS

Question presented. i

Table of authorities. iv

Interest of *amicus curiae*. 1

Summary of facts and case. 2

Summary of argument. 4

Argument. 5

I. State courts and federal courts share jurisdiction over federal questions and their judgments are entitled to mutual respect from the other. 5

A. The coequal state courts. 5

B. State courts and harmless error. 7

II. AEDPA demands deference to be given to federal claims adjudicated on the merits in state court. 10

A. Collateral review and harmless error. 10

B. *Davis* v. *Ayala*. 17

III. Section 2254(d) should be regarded as a threshold question and decided at the beginning of the habeas case, absent a strong reason in judicial efficiency to do otherwise. 20

A. Order of decision rules. 20

B. Order of decision and AEDPA. 23

Conclusion. 26

TABLE OF AUTHORITIES

Cases

Arizona v. *Fulminante*, 499 U. S. 279 (1991). 8, 9

Ashwander v. *TVA*, 297 U. S. 288 (1936). 21

Atlantic Coast Line R. Co. v. *Locomotive Engineers*, 398 U. S. 281 (1970). 6

Berghuis v. *Thompkins*, 560 U. S. 370 (2010). 24

Bobby v. *Dixon*, 565 U. S. 23 (2011). 13

Brecht v. *Abrahamson*, 507 U. S. 619 (1993). 2, 3, 9, 10, 12

Brumfield v. *Cain*, 576 U. S. 305 (2015).. 25

Burt v. *Titlow*, 571 U. S. 12 (2013). 6, 11

Calderon v. *Coleman*, 525 U. S. 141 (1998). 12

Caspari v. *Bohlen*, 510 U. S. 383 (1994). 6, 21

Chapman v. *California*, 386 U. S. 18 (1967).. 8

Cullen v. *Pinholster*, 563 U. S. 170 (2011). 13, 19, 23

Davis v. *Ayala*, 576 U. S. 257 (2015). 12, 17, 18, 20, 25

Deck v. *Missouri*, 544 U. S. 622 (2005). 8

Edwards v. *Vannoy*, 593 U. S. __, 141 S. Ct. 1547 (2021). 10

Engle v. *Isaac*, 456 U. S. 107 (1982). 5, 6

Fry v. *Pliler*, 551 U. S. 112 (2007). 12, 14, 15, 16

Greene v. *Fisher*, 565 U. S. 34 (2011). 11

Harrington v. *Richter*, 562 U. S. 86 (2011). 11, 13, 16, 18

Kirtsaeng v. *John Wiley & Sons, Inc.*, 568 U. S. 519 (2013). 16

Kline v. *Burke Constr. Co.*, 260 U. S. 226 (1922). . . . 6

Lockyer v. *Andrade*, 538 U. S. 63 (2003). 13

Mapp v. *Ohio*, 367 U. S. 643 (1961). 22

Mitchell v. *Esparza*, 540 U. S. 12 (2003). 13

Pearson v. *Callahan*, 555 U. S. 223 (2009). 22

Penry v. *Lynaugh*, 492 U. S. 302 (1989). 21

People v. *Davenport*, 488 Mich. 1054, 794 N. W. 2d 616 (2011). 9

Robb v. *Connolly*, 111 U. S. 624 (1884). 6

Ruhrgas AG v. *Marathon Oil Co.*, 526 U. S. 574 (1999). 21

Saucier v. *Katz*, 533 U. S. 194 (2001). 21

Sawyer v. *Smith*, 497 U. S. 227 (1990). 7

Schriro v. *Landrigan*, 550 U. S. 465 (2007). 23

Steel Co. v. *Citizens for a Better Environment*, 523 U. S. 83 (1998). 20

Strickland v. *Washington*, 466 U. S. 668 (1984). 22, 24

Tafflin v. *Levitt*, 493 U. S. 455 (1990). 7

Teague v. *Lane*, 489 U. S. 288 (1989). 21

United States v. *Leon*, 468 U. S. 897 (1984). 22

Whatley v. *Warden*, 593 U. S. __, 141 S. Ct. 1299 (No. 20-363, April 19, 2021). 15

Williams v. *Taylor*, 529 U. S. 362 (2000). 11

Woodford v. *Garceau*, 538 U. S. 202 (2003). 11

Woodford v. *Visciotti*, 537 U. S. 19 (2002). 7

United States Constitution

U. S. Const., Amend. X. 6

U. S. Const., Art. III, § 1. 6

United States Statutes

28 U. S. C. § 2254(a). 10

28 U. S. C. § 2254. 3

28 U. S. C. § 2254(d)(1). 11

Secondary Authorities

Dodson, Habeas Review of Perfunctory State Court Decisions on the Merits, 29 Am. J. Crim. L. 223 (2002). 11

Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888 (1998). 6, 7, 10

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. Counsel for petitioner has filed a blanket consent. Counsel for respondent has consented to the filing of this brief.

   The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In this case, the Sixth Circuit refused to give any deference to the Michigan Supreme Court's well-reasoned determination that Davenport's partial shackling at trial was harmless error. Instead, the Sixth Circuit applied the test from *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), to substitute its own opinion for that of the state court to find that the complained-of error caused Davenport "actual prejudice" and was therefore not harmless. The Sixth Circuit's "*Brecht*-only" approach ignores the clear limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 and this Court's precedents and is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Ervine Lee Davenport was convicted by a Michigan jury of first-degree murder for the choking death of Annette White. App. to Pet. for Cert. 2a-3a. During the trial, Davenport was partially shackled. *Id.*, at 5a. On direct appeal, Davenport argued that his partial shackling at trial was unconstitutional. *Id.*, at 6a. The Michigan Court of Appeals agreed with Davenport, but found that he suffered no prejudice requiring reversal and affirmed. *Ibid.* The Michigan Supreme Court reversed and remanded to the trial court for an evidentiary hearing to determine if the jury saw Davenport in shackles. *Ibid*.[2] If yes, the trial court was to determine if the prosecution could " 'demonstrate beyond a reasonable doubt that the shackling error did not contribute to the verdict ....' " *Ibid*. (citing *Deck* v. *Missouri*, 544 U. S. 622, 635 (2005)).

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2. "Specifically, the court held that [Davenport] 'should have been permitted to develop the record on the issue of whether his shackling during trial prejudiced his defense.' " *Id.*, at 79a.

On remand, all 12 jurors testified at the evidentiary hearing. *Id.*, at 6a. Every juror testified that Davenport's partial shackling did not affect their deliberations. *Id.*, at 7a. After the hearing, the trial court ruled that the prosecution "proved beyond a reasonable doubt that the shackling did not affect the jury's verdict." *Ibid*. The Michigan Court of Appeals affirmed. *Id.*, at 95a-100a. The Michigan Supreme Court denied discretionary review stating that although "the Court of Appeals erroneously failed to consider defendant's claim in light of ... [*Holbook* v. *Flynn*] ..., the error was harmless under the facts of this case." *Id.*, at 93a-94a.

Davenport subsequently filed a petition for habeas corpus under 28 U. S. C. § 2254 in the U. S. District Court. *Id.*, at 8a. Because Davenport's shackling claim had been addressed by the state court, a magistrate judge analyzed it pursuant to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.*, at 81a (applying 28 U. S. C. § 2254(d)(1), (2)). The judge recommended denying habeas relief, finding that the state court's harmlessness determination was "neither contrary to, nor involve[d] an unreasonable application of clearly established federal law." *Id.*, at 91a. The District Court adopted the magistrate's recommendation in its entirety and denied habeas relief. *Id.*, at 9a.

On appeal, a divided panel of the Sixth Circuit reversed, implying that the District Court applied the incorrect standard for assessing harmless error. See *id.*, at 2a-3a. The majority found that *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), not AEDPA, supplies the correct standard of review. Based on *Brecht* alone, the majority held that the shackling error was not harmless and granted Davenport a conditional writ of habeas corpus that would result in his release from prison unless the state of Michigan retried him within 180

days. App. to Pet. for Cert. 38a.[3] Judge Readler dissented. *Id.*, at 39a. In his opinion, when a federal habeas court is reviewing a state court's harmlessness determination, the habeas court must apply both AEDPA and *Brecht* when granting habeas relief. *Id.*, at 58a-59a.

The Michigan Attorney General's Office filed a petition for a rehearing en banc. *Id.*, at 101a. The Sixth Circuit denied rehearing by an 8-7 vote. *Id.*, at 102a. Judges Griffin and Thapar (joined by five other judges) provided separate written dissents from the denial. Both rejected the "*Brecht*-only" approach utilized by the panel majority. *Id.*, at 117a-118a, 123a. Further, both dissenting Judges posited that a state court's harmless error determination is entitled to AEDPA deference, and similar to Judge Readler, opined that before a federal court can grant habeas relief, it must analyze the case pursuant to both AEDPA and *Brecht*. *Id.*, at 117a, 119a. This Court granted the Michigan Attorney General's petition for certiorari on April 5, 2021.

SUMMARY OF ARGUMENT

State courts and federal courts share a coequal duty to adjudicate questions of federal law. State courts rule on many constitutional claims while adjudicating criminal cases and are competent to decide federal questions. If a state prisoner files a petition for a writ of habeas corpus claiming constitutional error in federal court, he or she is entitled to relief only if the error is not harmless.

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3. On February 1, 2021, this Court granted the state of Michigan's application to stay the mandate of the Sixth Circuit pending resolution of this case.

AEDPA requires the federal court to give great deference to the state court's resolution of federal law, which includes a finding of harmless error. *Brecht*, which predates AEDPA, contemplates an independent determination by a federal habeas court without deference to the state court's harmlessness determination. *Davis* v. *Ayala* confirmed that both AEDPA and *Brecht* come into play when a federal court is reviewing a state court's harmless error determination.

Because AEDPA was enacted to reduce delay and is a prerequisite to habeas relief under this Court's precedents, the habeas court must review the state court's determination of harmlessness for reasonableness under its provisions first. If the habeas petitioner satisfied the demands of AEDPA at the threshold, he or she is not automatically entitled to relief, but rather *Brecht* must be applied. Thus, if a federal habeas court is going to grant relief, both AEDPA and *Brecht* must be addressed. It was erroneous for the Sixth Circuit to skip over the demands of AEDPA and jump straight to *Brecht* to grant relief.

ARGUMENT

I. State courts and federal courts share jurisdiction over federal questions and their judgments are entitled to mutual respect from the other.

A. The Coequal State Courts.

State governments have the primary authority to enact, enforce, and administer their own criminal laws. *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982). "Our Constitution and laws surround the trial with a multitude of protections for the accused." *Id*., at 127. As a result, adjudicating criminal cases requires state court judges

to rule on scores of federal constitutional claims. Thus, it is no secret that state courts "hold the initial responsibility for vindicating constitutional rights." *Id.*, at 128.

"The relationship between the state courts and the federal courts is one aspect of the intricate form of government created by the Constitution." Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 898 (1998). The Framers created only one Supreme Court which alone has appellate jurisdiction over both state and federal courts. See U. S. Const., Art. III, § 1; *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 285-286 (1970). Because this Court is the only federal court with appellate jurisdiction to directly review questions of federal law arising from state court decisions, if a state court decision on a federal question is challenged this Court alone has the power to review the question *de novo*. *Atlantic Coast Line R. Co.*, *supra*, at 286; see also Scheidegger, *supra*, at 892.

Each state retained the reserved power to establish and maintain its own judicial system, while Congress was given the express authority to "ordain and establish" lower federal courts. See U. S. Const., Amend. X; U. S. Const., Art. III, § 1. Both systems share jurisdiction over federal questions and both share a constitutional obligation to "guard, enforce, and protect every right granted or secured by the Constitution." *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884); *Burt* v. *Titlow*, 571 U. S. 12, 19 (2013); *Caspari* v. *Bohlen*, 510 U. S. 383, 395 (1994). The two judicial systems operate independent of one another, yet their "rank and authority ... are equal." *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 235 (1922).

This Court has reiterated time and again that "state courts have inherent authority, and are thus presump-

tively competent, to adjudicate" federal questions. *Tafflin* v. *Levitt*, 493 U. S. 455, 458-459 (1990). "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer* v. *Smith*, 497 U. S. 227, 241 (1990); see also *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) (*per curiam*).

Very early, Congress enacted the Full Faith and Credit Act to provide that

> "state court judgments have the same force as res judicata in every court in America as they have in the state's own courts.... [This] Court has consistently required the federal courts to respect final state judgments, regardless of whether the issue is one of state or federal law and regardless of whether the federal court agrees with the state court's decision. The only exceptions are those that Congress has made." Scheidegger, 98 Colum. L. Rev., at 912.

B. State Courts and Harmless Error.

In this case, the 6'5", 260-pound Davenport admitted to strangling 5'2", 100-pound Annette White to death. App. to Pet. for Cert. 120a. At trial, Davenport claimed he acted in self-defense. *Ibid*. It was his contention that while the two of them were driving high on crack cocaine, they got into an argument upon which White pulled out a box cutter. While continuing to drive, Davenport claimed he grabbed White by the neck and pinned her against the seat until she became unconscious. *Ibid.* He then proceeded to dump White's partially nude body face down in a field, drive to her house, eat her food, steal her stereo, and meet up with friends to smoke more crack cocaine. *Id.*, at 120a-121a.

A medical examiner testified at trial that it would have taken White about 30-40 seconds to pass out, and at least four minutes for her to die. *Id.*, at 120a. The jury rejected Davenport's claim of self-defense and convicted him of first-degree murder. *Id.*, at 121a.

On direct appeal, Davenport argued that his federal due process rights were violated because he was partially shackled at trial and the trial court made no findings of necessity. *Id.*, at 5a. As a general rule, a criminal defendant has the right to be unrestrained during the guilt and penalty phases of his or her trial. *Deck* v. *Missouri*, 544 U. S. 622, 633 (2005). The rule, however, is not absolute. *Ibid*. In certain situations, a judge may, on a case-by-case basis and in his or her discretion, "take account of special circumstances, including security concerns, that may call for shackling." *Ibid*.

When a defendant is shackled without "adequate justification" at trial, he or she is not entitled to an automatic reversal of his or her conviction on appeal. See *id*., at 635; see also *Chapman* v. *California*, 386 U. S. 18, 21-22 (1967). Like most federal constitutional errors, a shackling error is subject to harmless error review. *Deck*, 544 U. S., at 635; see also *Arizona* v. *Fulminante*, 499 U. S. 279, 306 (1991). This is because this

> "Court has been faithful to the belief that the harmless-error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' " *Fulminante*, *supra*, at 308 (quoting *Delaware* v. *Van Ardsall*, 475 U. S. 673, 681 (1986)).

Cases involving "trial errors," like the visible shackling of a defendant, occur during the presentation of the case and can be assessed in the context of other evidence to determine whether the error "was harmless beyond a reasonable doubt." *Fulminante*, 499 U. S., at 307-308. This Court held as much in *Deck*, a case that came to this Court on direct review. In that case, this Court held that when a defendant is shackled in the presence of the jury "without adequate justification," "[t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.' " *Ibid*. (quoting *Chapman*, 386 U. S., at 24). In this case, the Michigan Supreme Court relied on *Deck* when it remanded Davenport's case to the trial court for an evidentiary hearing to address whether Davenport's partial shackling was harmless error. *People* v. *Davenport*, 488 Mich. 1054, 794 N. W. 2d 616 (2011).

Neither party disputes that Davenport's partial shackling at trial was error. Brief for Petitioner 38. The sole issue addressed by the Michigan courts since Davenport's initial appeal in 2010 has been whether the shackling error was harmless beyond a reasonable doubt. App. to Pet. for Cert. 95a-96a. This Court understands that "state courts often occupy a superior vantage point from which to evaluate the effect of trial error." *Brecht* v. *Abrahamson*, 507 U. S. 619, 636 (1993). Eleven Michigan judges have concluded after thoroughly evaluating the details of Davenport's case that his partial shackling at trial was harmless error that did not affect his guilty verdict "in any way." App. to Pet. for Cert. 98a.

II. AEDPA demands deference to be given to federal claims adjudicated on the merits in state court.

A. Collateral Review and Harmless Error.

Direct appellate review is the primary method of challenging a criminal conviction. *Brecht* v. *Abrahamson*, 507 U. S. 619, 633 (1993). " 'When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence.' " *Ibid*. (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983)). Once all avenues of relief on direct review have been exhausted, a prisoner may continue to challenge his or her conviction via habeas corpus. A prisoner in custody pursuant to the judgment of state court may seek a writ of habeas corpus in federal court only on the ground that he or she "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254(a).

"[C]ollateral review serves the important function of correcting constitutional defects which cannot be corrected on [direct] appeal. These include claims that require for their decision facts outside the appellate record, such as ineffective assistance of counsel." Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 940 (1998). As this Court is well aware, however, "collateral review is different from direct review." *Brecht*, 507 U. S., at 633. The federal habeas court's role is " 'secondary and limited' " and it is not a forum " 'in which to relitigate state trials.' " *Ibid*. (quoting *Barefoot, supra,* at 887).

In 1996, Congress's enactment of AEDPA created "a comprehensive system for addressing federal habeas claims brought by state prisoners." *Edwards* v. *Vannoy*, 593 U. S. __, 141 S. Ct. 1547 (2021) (Thomas J., concurring) (slip. op., at 4). The statute "places a new con-

straint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits by a state court." *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000); see also *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003). As a general rule, a federal habeas court is prohibited from granting relief "with respect to *any* claim that was adjudicated on the merits in State court ... *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 this Court. 28 U. S. C. § 2254(d)(1) (emphasis added). AEDPA imposes a partial, not complete, "bar on federal-court relitigation of claims already rejected in state proceedings." *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011). The exception that makes the bar less than complete, though, "is difficult to meet ... because it was meant to be." *Ibid*. "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt* v. *Titlow*, 571 U. S., at 19; see also *Greene* v. *Fisher*, 565 U. S. 34, 38 (2011).

Prior to AEDPA, federal habeas courts owed no deference to state court determinations of federal law and could grant a state prisoner's habeas petition if the federal habeas "court were to conclude in its independent judgment that the ... state court had erred on a question of constitutional law...." *Williams*, 529 U. S., at 402 (opinion of O'Connor, J.); see also Dodson, Habeas Review of Perfunctory State Court Decisions on the Merits, 29 Am. J. Crim. L. 223, 226 (2002). This lack of required deference was at play in *Brecht*—a pre-AEDPA case.

Because the harmless error doctrine is also applicable on federal habeas review of state court judgments, in *Brecht,* this Court was tasked with establishing the

appropriate standard of review for habeas courts to apply when evaluating whether a state prisoner's claim of constitutional error was harmless. 507 U. S., at 633.[4] This Court held that the *Chapman* standard (harmless beyond a reasonable doubt) that is applicable to cases on direct review is not the standard to be applied on federal habeas review. On *de novo* review, federal courts were permitted to give no deference to the state court's harmlessness determination and to decide from scratch whether the claimed error " 'had [a] substantial and injurious effect or influence in determining the jury's verdict.' " *Id*., at 637 (quoting *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946)). "Under this standard, habeas petitioners may obtain plenary review of the constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " *Brecht*, 507 U. S., at 637; see also *Calderon* v. *Coleman*, 525 U. S. 141, 145-146 (1998).

Congress enacted AEDPA three years after *Brecht* was decided. However, *Brecht* remains good law and was not "overruled" by AEDPA. See *Fry* v. *Pliler*, 551 U. S. 112, 119-120 (2007); see also *Davis* v. *Ayala*, 576 U. S. 257, 260 (2015) (stating its holding under both *Brecht* and § 2254(d)). The question that has confused federal habeas courts is how to apply these two standards when addressing harmless error. Is a state court's "harmless beyond a reasonable doubt" determination entitled to AEDPA deference? Can a habeas court skip straight to *Brecht* and, on *de novo* review, determine if the error caused "actual prejudice"? Or must a federal habeas court apply both? The answers to these ques-

4. *Brecht* noted that Congress had the ultimate authority to specify which errors would be considered harmless on habeas corpus, but until it did, this Court would fill the gap. *Ibid*.

tions depend largely on how the habeas case arrives at the federal court from the state court. The holdings, if not the dicta, of this Court's precedents guide the answers to all three questions.

In *Mitchell* v. *Esparza*, 540 U. S. 12, 18 (2003) (*per curiam*), this Court held that when a state court determines that a constitutional error is harmless beyond a reasonable doubt under the *Chapman* standard, "habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." This standard requires the habeas petitioner to "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." *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011); see also *Bobby* v. *Dixon*, 565 U. S. 23, 24 (2011) (*per curiam*); *Lockyer* v. *Andrade*, 538 U. S. 63, 75-76 (2003).

Esparza thus establishes that when a state court determines that a constitutional error is harmless under *Chapman,* AEDPA provides a threshold determination to be applied by federal courts considering a collateral attack on that judgment. In making that determination, the federal habeas court 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, 180-181 (2011).

Because *Esparza* found that the habeas petitioner did not prove that the state court's harmlessness determination satisfied the strict mandate of § 2254(d)(1), this Court held that habeas relief was not warranted and did not address *Brecht*. *Esparza*, 540 U. S., at 18-19.

In *Fry* v. *Pliler*, *supra*, this Court was presented with a situation where the state court did *not* make a harmless error determination. Unlike in *Esparza*, the constitutional error was first recognized by the federal habeas court. On federal habeas review, the district court found that the state court's failure to recognize the constitutional error itself was "an unreasonable application of clearly established law," but found that the error was not prejudicial under *Brecht* and was thus harmless. *Fry*, 551 U. S., at 115-116. The Ninth Circuit affirmed. The question presented to this Court was

> "whether a federal habeas court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in [*Brecht*], when the state appellate court failed to recognize the error *and did not review it for harmlessness* under the 'harmless beyond a reasonable doubt' standard set forth in [*Chapman*]." *Id*., at 114 (emphasis added).

In other words, "whether *Brecht* or *Chapman* provides the appropriate standard of review when constitutional error in a state court trial is *first recognized* by a federal court." *Id.*, at 120 (emphasis added).

Because in *Esparza* there was a state court harmlessness determination, and in *Fry* there was not, the habeas petitioner in *Fry* argued that the standard the habeas court must apply on federal habeas review "must change." *Id*., at 118. This Court disagreed, finding that *Brecht*'s adoption of a "less onerous standard on collateral review of state-court criminal judgments" was based on principles of finality, comity, sovereignty, and federalism. *Id.*, at 117. Because those concerns remain static in all collateral review cases, this Court found "it would be illogical to make the standard of review turn upon" whether the state court applied *Chapman*. *Ibid*.

Fry then turned his attention back to *Esparza* and argued that AEDPA "as interpreted in *Esparza*, eliminates the requirement that a petitioner also satisfy *Brecht*'s standard." *Id.*, at 119. This Court again disagreed stating, "[g]iven our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief, it is implausible that, without saying so, AEDPA replaced the *Brecht* standard of ' "actual prejudice," ' with the more liberal AEDPA/*Chapman* standard ...." *Id.*, at 119-120 (citations omitted).

The *Fry* opinion provided no explanation for its assertion that the "AEDPA/*Chapman* test" is invariably "more liberal" than the *Brecht* test. Certainly *Chapman* by itself is more favorable to the defendant and produces more reversals on direct appeal than the *Kotteakos* standard, on which *Brecht* is based, would provide. However, it is by no means certain that *Chapman* in combination with § 2254(d) will invariably be more favorable to the defendant than the *Brecht* standard applied *de novo* would be.

Such an assumption fails to take into account the breadth of disagreement among reasonable jurists that comes under § 2254(d)'s "unreasonable application" standard. It is not uncommon for different judges to view the significance of events at trial very differently. For example, just recently in *Whatley* v. *Warden*, 593 U. S. __, 141 S. Ct. 1299 (No. 20-363, April 19, 2021), a majority of the court of appeals thought that a certain shackling of the defendant was " 'trivial,' " while Justice Sotomayor thought this amounted to "disregard [of] this Court's clear precedent." *Id.*, 141 S. Ct., at 1301, 1303-1304 (slip op., at 4, 9) (Sotomayor, J., dissenting from denial of certiorari). However, when § 2254(d) applies, i.e., when the state court decided the issue on the merits, habeas relief may not be granted unless the

federal court finds the issue to be "beyond any possibility for fairminded disagreement." *Richter*, 562 U. S., at 103.

Given the very broad range of disagreement that comes under the big tent of § 2254(d) as explained in *Richter*, it is not beyond the realm of possibility that a judge might believe that a claim met the *Brecht* test yet acknowledge that a *fairminded* judge could conclude that it did not meet the *Chapman* test. The second judge might disagree very strongly with the first, but that is not enough to exceed the bounds of fairmindedness. For that reason, the next sentence of *Fry* is not only *obiter dictum*, but ill-advised dictum: "That said, it certainly makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." *Fry*, 551 U. S., at 120.

This statement is dictum because AEDPA/*Chapman* only applies when the state court has decided the *Chapman* issue on the merits. There was no such decision in *Fry*. The AEDPA standard properly applied in that case to the state court's decision that there was no constitutional error. The question of how to apply the two standards when the state court has considered the *Chapman* issue on the merits was not before the Court, and the Court did not fully "canvas the considerations," rendering the comment dictum. See *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U. S. 519, 548 (2013).[5]

Esparza held that *Chapman* holdings of harmless error are subject to the AEDPA standard. *Fry* held that a petitioner cannot obtain relief on a habeas corpus claim unless he clears the *Brecht* hurdle, even if the

5. "Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?" *Ibid*.

state court decision is found to be unreasonable for AEDPA in some respect. Both hurdles remain in effect. The statement in *Fry* that clearing one necessarily clears the other is dictum and subject to reconsideration. The issue was presented again in *Davis* v. *Ayala*, but it was not entirely cleared up.

B. Davis v. Ayala.

In *Ayala*, this Court confirmed that *Brecht* and AEDPA are both very much alive when a federal habeas court is reviewing a state court's determination (or lack thereof) of harmless error. In that case, the Ninth Circuit applied a "*Brecht*-only" approach to the state prisoner's federal claims, found on *de novo* review that the constitutional error complained of was not harmless, and granted habeas relief to a triple murderer. 576 U. S., at 266. This Court reversed.

This Court first reaffirmed that a federal habeas petitioner must "meet the *Brecht* standard" to obtain relief. *Id.*, at 268. This Court then acknowledged *Fry*'s "subsumes" statement but clarified that *Fry* "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." *Ibid.* "Section 2254(d) *demands* an inquiry into whether a prisoner's 'claim' has been 'adjudicated on the merits' in state court; if it has, AEDPA's highly deferential standard kicks in." *Id*., at 269 (emphasis added).

This Court then found that the habeas petitioner was required to "show that the state court's decision to reject his claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement.' " *Id.*, at 269-270 (quoting *Richter*, *supra*, 562 U. S., at 103).

Curiously, despite acknowledging that AEDPA " 'sets forth a precondition to the grant of habeas relief,' " and that the habeas petitioner was required to show that the state court's decision was unreasonable under AEDPA's terms, this Court concluded, "[i]n sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA." *Id*., at 268, 270. This Court then appears to apply the two standards in tandem to hold that the Ninth Circuit's failure to apply AEDPA's deference to the state court's harmless error determination was erroneous *and* that under *Brecht* there was "no basis for finding Ayala suffered actual prejudice." *Id.*, at 268, 286. That is, Ayala could not clear either hurdle.

No doubt, most claims of error will clear both hurdles or neither. But great caution is in order before announcing that a claim that clears one hurdle will *necessarily* clear another. There is a set of cases where the state court's application of *Chapman* was unreasonable. There is a set of cases where the petitioner establishes prejudice under the *Brecht* standard applied *de novo*. The two sets largely overlap, but can anyone say with confidence that one set is *necessarily* a proper subset of the other?

That might have been the case if Congress had enacted a narrower rule, but it chose to enact a broad one. Although often referred to as a standard of review, § 2254(d) is in reality a "modified res judicata rule," in the same category as the successive petition rule. See *Richter*, 562 U. S., at 102. The prior state adjudication of the issue precludes habeas relief unless an exception applies, and the relevant exception is an extremely high standard. Brief for Petitioner 23-24.

As the State of Michigan points out, the Sixth Circuit's "*Brecht*-only" approach in this case ignores *Ayala*'s mandate when it refused to apply AEDPA deference to the Michigan state court's harmless error determination. Brief for Petitioner 47. The Sixth Circuit erroneously believed that "*Brecht* handles the work of both tests" because "it is significantly harder for a habeas petitioner to meet *Brecht*'s actual prejudice standard than *Chapman*'s defendant-friendly standard ...." That is obviously true for *Chapman* applied *de novo*. It is not so obvious for another court's *Chapman* holding viewed through AEDPA's highly deferential lens. Cf. App. to Pet. for Cert. 17a. In the Sixth Circuit's opinion, because the "*Brecht* test subsumes the limitations imposed by AEDPA," it could skip straight to *Brecht*. *Id.*, at 22a.

According to the Sixth Circuit, when "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 objectively unreasonable under *Harrington* v. *Richter*." *Id.*, at 17a. In other words, if *Brecht* is satisfied, then the state court's *Chapman* determination is automatically unreasonable without further discussion. This was wrong under the holding of *Ayala*. Courts cannot take a "*Brecht*-only" approach. If a federal court were permitted to take a "*Brecht*-only" approach, then it would be given a clean slate to base its holding on the entire federal court record, which is contrary to AEDPA's mandate that a federal court's extremely deferential review on habeas is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen* v. *Pinholster*, 563 U. S., at 180-181.

Fry's statement that "formal" application of both tests is not required is difficult to square with *Ayala*'s recognition that the statute *demands* an AEDPA inquiry. *Ayala*, 576 U. S., at 269. To the extent of an inconsistency, the more recent decision, *Ayala*, should control.

The proper procedure in harmless error cases, *amicus* submits, is a special case of the general rule proposed in Part III, *infra*. There should be a general standard for order of decision in state-prisoner habeas cases, and we address that issue in the next part.

III. Section 2254(d) should be regarded as a threshold question and decided at the beginning of the habeas case, absent a strong reason in judicial efficiency to do otherwise.

A. Order of Decision Rules.

The party seeking relief often must clear multiple hurdles on the path to a final judgment. Sometimes there are fixed rules determining the order in which issues must be addressed, and sometimes there are not.

The most rigid order of decision rule is the requirement that a court establish its own jurisdiction before it decides anything else. This rule is " 'inflexible and without exception.' " *Steel Co*. v. *Citizens for a Better Environment*, 523 U. S. 83, 95 (1998) (quoting *Mansfield, C. & L. M. R. Co*. v. *Swan*, 111 U. S. 379, 382 (1884)). The reason for such rigidity goes to the fundamental nature of the judicial power. "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id*., at 101-102. Between subspecies of jurisdiction, though, there is "no unyielding jurisdictional hierar-

chy." A court can decide it has no personal jurisdiction over the defendant without deciding if it has jurisdiction of the subject matter. *Ruhrgas AG* v. *Marathon Oil Co*., 526 U. S. 574, 578 (1999).

Teague v. *Lane*, 489 U. S. 288, 316 (1989) (plurality), held that when a habeas corpus petitioner seeks relief under a proposed new rule, the court must first decide if that rule, if created, would apply retroactively to the petitioner and, if not, decline to address the merits. See also *Penry* v. *Lynaugh*, 492 U. S. 302, 313 (1989) (non-announcement rule endorsed in opinion of the Court). In *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994), the Court described *Teague* as a "threshold question in every habeas case."

Teague's order of decision rule " 'is rooted in our reluctance to decide constitutional questions unnecessarily.' " 489 U. S., at 316 (quoting *Bowen* v. *United States*, 422 U. S. 916, 920 (1975)). That is, it is consistent with the doctrine summarized in Justice Brandeis's oft-cited concurrence in *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936): "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."

Yet, in the qualified immunity area, *Saucier* v. *Katz*, 533 U. S. 194 (2001), announced a rule that stood *Ashwander* on its head. The "threshold question" according to *Saucier* was the constitutional question: "do the facts alleged [if true] show the officer's conduct violated a constitutional right? This must be the initial inquiry." *Id*., at 201. Only after answering that question could the court consider whether the right was sufficiently clearly established so as to defeat the qualified immunity defense. See *ibid*.

The *Saucier* rule met with intense criticism and was abandoned after only eight years. Part of the problem was practical.

> "[T]he rigid *Saucier* procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Pearson* v. *Callahan*, 555 U. S. 223, 236-237 (2009).

Another part of the problem was a matter of principle. Being backwards from the *Teague* rule, *Saucier* was also backwards from the *Ashwander* principle. See *id*., at 241 (citing *Ashwander*).

Pearson notes two other situations where this Court has declined to specify an order of decision. See *id*., at 241-242. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984), established a two-prong test for ineffective assistance: deficient performance and resulting prejudice. Courts may address them in either order and stop after finding one requirement not met. See *id*., at 697. *United States* v. *Leon*, 468 U. S. 897 (1984), established the good faith exception to the Fourth Amendment exclusionary rule for searches with a warrant. The validity of the warrant and the good faith of reliance on it may be decided in either order. See *id*., at 924-925. Neither example implicates the *Ashwander* principle. *Strickland* requires both prongs to make out a Sixth Amendment violation. See 466 U. S., at 687. The exclusionary rule has, rightly or wrongly, been considered a constitutional rule at least since *Mapp* v. *Ohio*, 367 U. S. 643 (1961), so both issues in *Leon* are constitutional.

In summary, deciding whether to establish a fixed order of decision of issues involves several principles. First and foremost is the legitimacy of the exercise of judicial power in the case. After that, the *Ashwander* principle of not deciding constitutional questions unnecessarily must be considered. Finally, the efficiency of disposing of cases on easily decided questions without need to decide more difficult ones must be considered.

B. Order of Decision and AEDPA.

This case, unlike the cases above, involves the implementation of a statute, and so the statutory purpose must be considered. "AEDPA's acknowledged purpose [is] 'reduc[ing] delays in the execution of state and federal criminal sentences.' " *Schriro* v. *Landrigan*, 550 U. S. 465, 475 (2007) (quoting *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003)). This purpose adds additional weight to the interest in judicial efficiency.

For the vast majority of claims, the AEDPA § 2254(d) question should be addressed before the merits of the claim. First, if the claim can be denied on that basis without addressing an underlying constitutional question, the *Ashwander* principle has been followed. Second, and of much greater practical importance, disposing of claims under § 2254(d) at the threshold will generally be much more efficient and result in substantial reduction of delay, the core purpose of AEDPA.

Under *Cullen* v. *Pinholster*, 563 U. S. 170, 185 (2011), the § 2254(d)(1) question must be decided on the state court record, and "evidence introduced in federal court has no bearing on" the issue. If new evidence is irrelevant, it follows that discovery is unnecessary. Applying § 2254(d) at the threshold will winnow the issues to those not decided on the merits by state

courts[6] and those very few for which the exceptions of that subdivision are met. It will winnow them before any discovery or any evidentiary hearings, for a major reduction in delay. For any claim where the state asserts § 2254(d) and the petitioner seeks discovery or an evidentiary hearing, decision of the § 2254(d) question before discovery should be mandatory in order to carry out the purpose of the statute.

Harmless error questions, however, often do not require any new facts and may be presented for decision of the merits, as well as on § 2254(d), on the trial record alone. Where that is true, there is no compelling efficiency argument for which prong to address first. The *Ashwander* principle is not implicated, as neither *Brecht* nor § 2254(d) is a constitutional rule.[7] The situation is therefore similar to *Strickland* v. *Washington*, 466 U. S., at 697. Petitioner must clear both hurdles, and if the court decides that his inability to clear one is more obvious than the other, the court can *deny* relief on that one alone and leave the other undecided. Section 2254(d) is a limitation on granting relief, not denying it, and it need not be addressed if relief is denied on another ground. See *Berghuis* v. *Thompkins*, 560 U. S. 370, 390 (2010) (court may deny, but not grant, on merits without resolving difficult § 2254(d) applicability question).

To *grant* relief, on the other hand, both requirements must be addressed. Section 2254(d) is a congressionally mandated prerequisite to habeas relief. If the statute "demands an inquiry" as to whether it applies,

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6. Most issues not decided by the state courts will be either unexhausted or procedurally defaulted, and many of them can be winnowed out at the threshold also.

7. See *supra*, at 12, n. 4.

see *Ayala*, 576 U. S., at 269, it surely demands an answer as to whether either exception to its general rule of issue preclusion has been met. If an exception is met, that does not entitle the petitioner to relief. It entitles him to have the claim decided on the merits in federal court. See *Brumfield* v. *Cain*, 576 U. S. 305, 307 (2015). The merits include the prejudice requirement of *Brecht*, which *Fry* established survived the enactment of AEDPA intact. See *supra* at pp. 14-15. To the extent that the dictum in *Fry* implies that a federal habeas court can grant, rather than deny, relief without addressing both prerequisites, it should be disapproved.

In practice, deciding both will not be a burden under the circumstances presented here. Any judge reviewing the trial record for a claim of error along with the state court's decision on the point will necessarily form an impression of the existence of error, the presence or absence of *Brecht* prejudice, and the reasonableness of the state court decision all at the same time. If a federal court is going to take the drastic action of negating a final decision of the coequal state judiciary, a paragraph on each of the conjunctive requirements for such an action is not too great a burden.

In any case where the petitioner seeks to bolster his *Brecht* claim with additional facts introduced for the first time in federal court, the usual rule of addressing the § 2254(d) question at the threshold should apply. There is no need for discovery or a hearing of additional facts if the claim can be denied on the state court record under § 2254(d), and conducting such proceedings unnecessarily is contrary to the core purpose of AEDPA to reduce delay.

Because the Court of Appeals skipped over a statutory mandate entirely to grant relief, its decision was erroneous. The District Court correctly applied *Esparza* by denying relief upon finding that the requirement of

§ 2254(d)(1) was not met. There was no need to also address *Brecht*.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

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Respectfully submitted,

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