No. 20-826

# In the Supreme Court of the United States

MIKE BROWN, ACTING WARDEN,

*Petitioner*,

v.

ERVINE DAVENPORT,

*Respondent*.

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

## BRIEF FOR JONATHAN F. MITCHELL AND ADAM K. MORTARA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


ADAM K. MORTARA
125 South Wacker Drive
Suite 300
Chicago, IL 60606
(773) 750-7154
adam@mortaralaw.com

TAYLOR A.R. MEEHAN*
*Counsel of Record*
THOMAS R. MCCARTHY
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
taylor@consovoymccarthy.com

* *Licensed in Illinois and the District of Columbia; supervised by principals of the firm licensed in Virginia pending admission to the Virginia bar.*


June 17, 2021

## QUESTION PRESENTED

28 U.S.C. § 2254(d) prohibits a court from granting habeas relief on any claim that was previously adjudicated on the merits in state-court proceedings, unless the state-court decision contravened or involved an unreasonable application of clearly established federal law as determined by this Court, or unless the state-court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding.

Ervine Davenport complains that he was partially shackled during his trial, but the state judiciary rejected his claim as harmless. The Sixth Circuit, however, refused to apply the relitigation bar of 28 U.S.C. § 2254(d)—even though it is undisputed that Davenport's "claim" had been "adjudicated on the merits in State court proceedings"—and granted habeas relief after concluding that the shackling had a "substantial and injurious effect" under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The Sixth Circuit held that *Brecht* supplies the sole criteria for evaluating "harmless error" in federal habeas proceedings, and that *Brecht* allows a federal habeas court to grant relief without further considering whether every fairminded jurist would agree that the state court's already-issued decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by this Court's precedents. The question presented is:

Did the Sixth Circuit err in refusing to apply 28 U.S.C. § 2254(d)'s relitigation bar when it is undisputed that Davenport's claim was adjudicated on the merits in State court proceedings?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Constitutional Provisions**

## STATEMENT OF INTEREST

*Amici curiae* have written and taught about this Court's criminal law and habeas corpus jurisprudence and have served as court-appointed amicus counsel in post-conviction litigation.† Jonathan F. Mitchell has taught federal habeas corpus as a professor and visiting professor at several law schools and is the former Solicitor General of the State of Texas. Mr. Mitchell recently served as a court-appointed amicus curiae in *In re Hall*, No. 19-10345 (5th Cir.). Adam K. Mortara is a Lecturer in Law at the University of Chicago Law School, where he has taught federal courts, federal habeas corpus, and criminal procedure since 2007. Mr. Mortara has also served as a court-appointed *amicus curiae* in criminal law and federal habeas cases, including by this Court in *Terry v. United States*, No. 20-5904 and *Beckles v. United States*, No. 15-8544, and by the Eleventh Circuit in *Wilson v. Warden*, No. 14-10681 and *Bryant v. Warden, FCC Coleman-Medium*, No. 12-11212. The arguments made herein are solely those of *amici* and are not necessarily the views of the law schools where *amici* have taught or their other faculty.

## INTRODUCTION & SUMMARY OF ARGUMENT

This is a simple case made unnecessarily complicated by today's habeas labyrinth. In the decades after *Brown v. Allen*, 344 U.S. 443 (1953), this Court created

---

† Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

various rules to recapture some amount of federal-court respect for the finality of state convictions. Congress for its part passed the Antiterrorism and Effective Death Penalty Act in 1996, fundamentally changing the federal habeas inquiry. Today, many of this Court's pre-AEDPA rules coexist alongside AEDPA. But every now and then, these pre-AEDPA rules are improperly invoked as a substitute for AEDPA's superseding text. *Compare*, *e.g.*, *Wilson v. Sellers*, 138 S. Ct. 1188, 1193-94 (2018) (borrowing "look through" presumption from *Ylst v. Nunnemaker*, 501 U.S. 797 (1991)), *and McQuiggin v. Perkins*, 569 U.S. 383, 396-97 (2013) (applying pre-AEDPA "miscarriage of justice" exception as an unwritten exception to AEDPA's statute of limitations), *with Edwards v. Vannoy*, 141 S. Ct. 1547, 1565-66 (2021) (Thomas, J., concurring) (explaining section 2254(d) displaced retroactivity exceptions in *Teague v. Lane*, 489 U.S. 288 (1989)), *and* U.S. Const. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land").

This is one of those cases. Nearly all federal habeas petitions involving claims previously adjudicated on the merits in state court, including the petition here, should be denied on section 2254(d) grounds. But what should otherwise be a straightforward statutory question under AEDPA becomes clouded by decisions attempting to contain the pre-AEDPA habeas regime, when plenary review for already-adjudicated claims was routine. *See Wright v. West*, 505 U.S. 277, 287-90 (1992) (opinion of Thomas, J.).

The pre-AEDPA case affecting the analysis here is *Brecht v. Abrahamson*, intended to make it "less onerous" for States to keep state convictions final on collateral review. 507 U.S. 619, 623 (1993). *Brecht*, like *Teague* and other pre-AEDPA rules, took small steps toward greater comity, by cabining the discretion purportedly authorized by *Brown*. *Brecht* rejected the idea that a federal habeas court could require a State to prove an error "was harmless beyond a reasonable doubt," as the State would have to on direct review. *Brecht*, 507 U.S. at 636; *see Chapman v. California*, 386 U.S. 18, 24 (1967). *Brecht* instead flipped the burden for collateral review, requiring the habeas petitioner to prove an error "had a substantial and injurious effect or influence in determining the jury's verdict" resulting in "actual prejudice." *Brecht*, 507 U.S. at 637 (quotation marks omitted).

After AEDPA, a habeas court need not consider *Brecht* when the relitigation bar of section 2254(d) precludes relief—and *Brecht* certainly does not allow a federal habeas court to disregard section 2254(d)'s statutory command. A habeas petition shall no longer "be granted with respect to any claim that was adjudicated on the merits in State court proceedings," unless the state-court decision contravened or involved an unreasonable application of clearly established Supreme Court precedent or the state court based its decision on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). *Brecht* may have a limited coexistence alongside that revised statutory text, but it is not a substitute for the deferential review that a federal court owes to a state court's already-issued decision. *See Davis v. Ayala*, 576 U.S. 257, 268-70 (2015). In almost every case, there will be no occasion to reach

*Brecht* because the already-issued decision will not be "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, 102-03 (2011).

Applied here, it is undisputed that Davenport's "claim" was "adjudicated on the merits" by the Michigan state judiciary, resulting in a decision denying relief for that claim. 28 U.S.C. § 2254(d). The state court already decided that any error was harmless, based on testimony by all 12 jurors that the partial shackling did not affect their deliberations (indeed some did not even see the shackles). Pet.App.6-7a. That means Davenport is statutorily precluded from habeas relief unless he can surmount section 2254(d)'s relitigation bar. That Davenport convinced a Sixth Circuit panel majority to see things differently after conducting its own *de novo* review is just not enough. Davenport must further show that *no* fairminded jurist would reach the same decision.

That level of deference is required for any state-court decision, be it one word or one paragraph or one hundred pages. States do not retry (or release) prisoners merely because one federal court would have written a different opinion. To warrant that extraordinary remedy, it must be obvious beyond debate that the result itself contravened this Court's then-existing precedents.

If a habeas petitioner can overcome section 2254(d), then there are circumstances in which this Court could also require the petitioner to overcome *Brecht*. For example, a petitioner might establish the state court's decision was based on an unreasonable

factfinding but nevertheless must show that the error had a "substantial and injurious effect" on the verdict. *Brecht*, 507 U.S. at 637. But there will hardly ever be a need to reach this issue. Few petitioners can surmount the relitigation bar of section 2254(d), applied properly to their claims, including any reasonable basis to deny relief on harmlessness grounds. Davenport is no exception. The Sixth Circuit erred by absolving Davenport of his obligations under section 2254(d).

## ARGUMENT

### I. The Relitigation Bar Is Concerned Only with the State Court's Already-Issued "Decision"

The central feature of AEDPA is its relitigation bar. *See* 28 U.S.C. § 2254(d). In amending section 2254(d), Congress settled a long-running dispute about whether federal courts may re-adjudicate a state habeas petitioner's already-decided constitutional claim. *See Wright*, 505 U.S. at 287-90 (opinion of Thomas, J.); *id.* at 301 (O'Connor, J., concurring in judgment); *id.* at 306 (Kennedy, J., concurring in judgment). The answer? Nearly never.

As amended, section 2254(d) generally precludes habeas relief for claims already decided by a state court. It "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," *Harrington*, 562 U.S. at 102, but it comes very close. The only path for relief is through section 2254(d)'s narrow exceptions.

The Sixth Circuit defied the relitigation bar of section 2254(d) and violated Article VI of the Constitution by failing to give effect to an act of Congress. It reviewed the harmlessness question *de novo* and never

asked whether the Michigan court's decision was "beyond any possibility of fairminded disagreement," *Harrington*, 562 U.S. at 103, despite AEDPA's focus on the reasonableness of the state court's "decision."[1]

### A. Section 2254(d)(1) bars habeas relief unless the state court's "decision" rejecting Davenport's claim was "unreasonable"

**1.** The key to understanding section 2254(d)'s relitigation bar is its textual focus on the earlier state-court "decision." When there has already been an adjudication on the merits in the state court, only the state court's "decision" is under review:

> (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

---

[1] The intermediate appellate court's decision is the relevant "decision" for AEDPA purposes. The Michigan Supreme Court has discretionary review over court of appeals' decisions and here exercised that discretion to deny leave to appeal, stating the court was "not persuaded that the question presented should be reviewed by this Court." *People v. Davenport*, 832 N.W.2d 389, 390 (Mich. 2013). Accordingly, the only "clearly established Federal law, as determined by the Supreme Court," would be that existing at the time of the court of appeals' decision in 2012. *Greene v. Fisher*, 565 U.S. 34, 40 (2011); 28 U.S.C. § 2254(d)(1).

> (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.

28 U.S.C. § 2254(d).

As this text shows, the "decision" is what "resulted" from the adjudication on the merits of the prisoner's claim; the "decision" is distinguishable from the adjudication itself. *See Harrington*, 562 U.S. at 98 ("The statute refers only to a 'decision,' which resulted from an 'adjudication.'"). It is the result, not the reasoning or process that preceded the arrival at that result. By putting all of the federal court's focus on that denial of relief in state court, section 2254(d) "ensure[s] that state proceedings are the central process, not just a preliminary step for a later habeas proceeding." *Id*. at 103.

Harmlessness decisions are no exception. *See Ayala*, 576 U.S. at 269-70. Applied here, as in *Ayala*, Davenport must show that the Michigan court's harmlessness decision "'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Ayala*, 576 U.S. at 269-70 (quoting *Harrington*, 562 U.S. at 103). That is, would *every* fairminded jurist find the state court's conclusion (that the error was harmless under *Chapman*) wrong beyond peradventure?

**2.** That question, focused on the objective unreasonableness of the state-court decision, is a different question from whether the error surpasses *Brecht* in the view of one federal court. *See*, *e.g.*, *Harrington*, 562 U.S. at 101 ("The pivotal question is whether the state

court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard."). Conflating that AEDPA question with *Brecht* ignores the statutory command that federal courts are constitutionally obligated to implement, and it waters down AEDPA's rarely applied exception for objectively unreasonable decisions by inviting a federal court to simply substitute its own harmlessness analysis in place of the state court's decision. The federal habeas court is not merely another direct review court asking whether the preceding decision was wrong. Even if a petitioner has "a strong case for relief" in a federal court's independent judgment, that "does not mean the state court's contrary conclusion was unreasonable." *Id*. at 102; *see also*, *e.g.*, *White v. Woodall*, 572 U.S. 415, 427 (2014) ("[T]here are reasonable arguments on both sides—which is all Kentucky needs to prevail in this AEDPA case.").

The Sixth Circuit's decision is proof of that. Its excuse for applying *Brecht* without considering the state court's decision was that it believed its analysis under *Brecht* to be an adequate substitute for AEDPA's focus on the "decision." Pet.App.10-12a. And yet, the Sixth Circuit granted the writ merely because it saw things differently from the Michigan court, without asking whether every other reasonable court would have seen things differently too. *Compare Brown*, 344 U.S. at 540 (Jackson, J., concurring in judgment) ("Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better

done."), *with Harrington*, 562 U.S. at 102-03. A harmlessness do-over might have been permissible before AEDPA. *See Wright*, 505 U.S. at 287-90 (opinion of Thomas, J.). It is not now.

Nor was this Court's statement in *Ayala*—that *Brecht* "subsumes the limitations imposed by AEDPA," 576 U.S. at 270—permission to flout AEDPA's text and skip past the state court's decision.[2] Citing *Harrington*, the Court in *Ayala* already said that "AEDPA's highly deferential standards kick in" when a state court has adjudicated harmlessness. *Id.* at 269. Overcoming section 2254(d), including on harmlessness, remains "a precondition to the grant of habeas relief." *Id.* at 268 (quotation marks omitted). That is exactly right. Federal courts cannot overwrite a state court's decision on the way to granting habeas relief, as *Ayala* exemplifies. *See*, *e.g.*, *id.* at 276 (role of federal habeas court is "not to apply *de novo* review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judge"); *id.* at 281 (rejecting "speculation" as a basis for unreasonableness); *id.* at 286 (concluding "decision of the California Supreme Court represented an entirely reasonable application of controlling precedent").

---

[2] *Ayala* was repeating what the Court said in *Fry v. Pliler*, 551 U.S. 112 (2007)—that *Brecht* "obviously subsumes" the "AEDPA/*Chapman*" inquiry. *Id.* at 120. This locution is confusing, especially after *Harrington*'s assurance that all available reasonable bases to deny relief—as to the error itself or harmlessness—should be considered before a petition is granted. 562 U.S. at 102. Under that searching standard, *Brecht* is likely surplusage except in instances where section 2254(d) does not apply (*e.g.*, procedurally defaulted claims). *See infra*, Part III.

A federal court can safely eschew the state-court decision only to deny relief.[3] That's always ok. Federal courts have finality-promoting discretion when it comes to petitions from state prisoners already convicted by a court of competent jurisdiction. *See Edwards*, 141 S. Ct. at 1573 (Gorsuch, J., concurring). But there is no discretion to order a retrial or release without first concluding that no fairminded jurist could have denied relief on the merits.

In this case, where a federal court interceded to grant the writ, what that court thought about Davenport's harmlessness arguments cannot be the end of the inquiry. The Sixth Circuit failed to complete the rest of the analysis—asking whether all other fairminded jurists would disagree with the denial of relief. *See Harrington*, 562 U.S. at 103; *Williams v. Taylor*, 529 U.S. 362, 411-12 (2000). That is the task, not substituting one court's reasoning for another's to justify habeas relief.

---

[3] Likewise, reasons offered in a lower state-court opinion followed by an unreasoned state supreme court opinion could offer a basis for denying federal habeas relief. *Wilson*, 138 S. Ct. at 1198-99 & n.1 (Gorsuch, J., dissenting); *see also*, *e.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1765 n.2 (2016) ("It is one thing to look to the reasoning of a lower state court's decision to confirm that the Court *lacks* jurisdiction. It is quite another for the Court to probe that lower state court's decision to *assure* itself of jurisdiction."). But the lower court's reasons cannot be the basis for overcoming section 2254(d)(1), as even the *Wilson* majority seemed to acknowledge. *See Wilson*, 138 S. Ct. at 1196 ("unreasonableness of the lower court's decision itself provides some evidence that makes it less likely the state supreme court adopted the same reasoning"); *see also id.* at 1204 (Gorsuch, J., dissenting).

### B. The "decision" is not the "reasoning"

**1.** Deciding whether the state court's "decision" was wrong beyond fairminded disagreement is not an exercise in checking the state court's work (its reasoning, if any) or comparing that reasoning against what the federal court would have written. AEDPA says the "*decision*" must have "involved an unreasonable application" of this Court's precedents, 28 U.S.C. § 2254(d)(1) (emphasis added), not that the accompanying reasoning was unreasonable.

A decision involves an unreasonable application of this Court's then-existing rules when it is "beyond doubt" that a factually analogous Supreme Court rule ought to have applied to the given facts, without any possibility for "fairminded disagreement." *White*, 572 U.S. at 427 (quotation marks omitted). Section 2254(d)(1) is agnostic to the state court's particular reasons for applying or not applying that rule—indeed the state court need not even cite it or be aware of it. *Early v. Packer*, 537 U.S. 3, 8 (2002). Reasoning might be an indication of whether there has been an unreasonable application, but bad reasoning alone cannot be grounds for granting federal habeas relief. After all, a state court need not offer any reasons at all. *See Harrington*, 562 U.S. at 98.

This is all because it's not the reasoning that matters. It's the "decision" itself under section 2254(d). A federal court might have written a different opinion full of different reasons. A federal court might even find the state court's reasons "erroneous" or "incorrect," *Williams*, 529 U.S. at 411, "flat-out wrong" or missing "subsidiary determinations (including factual assessments) necessary to support the correct theory,"

*Johnson v. Wilson*, 568 U.S. 289, 310 (2013) (Scalia, J., concurring in judgment). None of that matters. If there is any possibility that other fairminded jurists could reach the same result, albeit for different reasons, the decision stands. *See Wilson*, 138 S. Ct. at 1204 (Gorsuch, J., dissenting); *Johnson*, 568 U.S. at 310 (Scalia, J., concurring in judgment) ("what is accorded deference is not the state court's reasoning but the state court's judgment, which is presumed to be supported by whatever valid support was available").

Any alternative rule leaves a federal court guessing about what the state court *really* thought, and how much of what it said actually mattered to the result. The Court has waded into that pond—but to what end? No textual basis for poring over the state court's reasoning has been offered. This Court in *Early* said that a state court need not even show an "*awareness*" of the Court's cases—which makes sense given AEDPA's emphasis on the "decision." 537 U.S. at 8. And yet, *Early* confusingly added that the state court's "reasoning" shouldn't contradict the Court's cases. *Id.* That focus on "reasoning" is atextual. In *Wilson*, the Court invited even more reason-hunting. *Wilson*, in *dicta*, described the "straightforward" habeas inquiry as "simply review[ing] *the specific reasons given* by the state court" in cases where reasons are given "and *defer*[*ring*] *to those reasons* if they are reasonable." 138 S. Ct. at 1192 (emphasis added). And then *Wilson* adopted a presumption going a step further (sort of)—where no specific reasons are given by the last state court, federal courts can impute to it the reasoning of a lower state court opinion (except maybe when the reasoning is unreasonable). *Id.* at 1193-94, 1196. *Wilson* is wrongly decided, and if the presumption it

announced had any effect, *see id.* at 1204 (Gorsuch, J., dissenting), it would be worthy of express overruling. Certainly the *dicta* in the majority opinion should be exiled. Now is a good time for a clearing of that habeas arcanum with clear confirmation of a simpler bright-line rule: unreasonably bad decisions, not bad reasons, overcome the relitigation bar.

**2.** There is not a "bad reasons" exception hiding in section 2254(d)(1). Had Congress wanted federal courts to be "probing the judicial mind" of the state court as a basis for granting federal habeas relief, it could have said so. *Johnson*, 568 U.S. at 312 (Scalia, J., concurring in judgment). It didn't. Section 2254(d)(1) excepts "decision[s]" that "involved an unreasonable application" of Supreme Court caselaw. Compare that to section 2254(d)(2)'s noticeably different language, excepting decisions "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[4] Section 2254(d)(1)'s "involved" necessarily means something different than section 2254(d)(2)'s "based on." *See Russello v. United States*, 464 U.S. 16, 23

[4] The Sixth Circuit's decision also flouts section 2254(d)(2). Every single juror testified in an evidentiary hearing that Davenport's partial shackling did not affect their deliberations. Pet.App.6-7a. The state courts credited that testimony. The Sixth Circuit second-guessed it after assuming it knew the jurors' minds better than the jurors themselves based in part on social science articles. *See* Pet.App.34-38a. To the extent there was anything "unreasonable" in the proceedings below, it was the Sixth Circuit's own *de novo* review. *Compare Ayala*, 576 U.S. at 276 (rejecting federal habeas court's "*de novo* review of factual findings").

(1983). A decision involves an unreasonable application of the Court's precedents when no reasonable jurist could reconcile that decision with the Court's precedents; what the decision was subjectively "based on" does not matter for purposes of section 2254(d)(1). A state court's reasoned opinion might reveal its decision was "based on" a misunderstanding of Supreme Court precedent. It might even reveal it was "flat-out wrong." *Johnson*, 568 U.S. at 310 (Scalia, J., concurring in judgment). The decision itself can still be reasonable for purposes of section 2254(d)(1).

A "bad reasons" exception to AEDPA's relitigation bar is also no fit for the extraordinary habeas remedy. When a federal habeas court grants the writ, the case is not sent back to a lower federal court for better reasoning like some ordinary appeal. The case begins again in a separate state court. The State must conduct a new criminal trial—here, nearly 15 years after Davenport committed his crime—or release him. Pet.App.38a. That extraordinary remedy "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting). Indeed, the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible" such that "in practice, [a habeas writ] may reward the accused with complete freedom from prosecution." *Engle v. Isaac*, 456 U.S. 107, 127-28 (1982). Before a federal court can order the retrial or release of a state prisoner, there must be no doubt—no room for fairminded disagreement—that the existing state court judgment cannot stand.

## II. *Harrington* Already Provides the Test for Every Claim Already Adjudicated on the Merits

**1.** As described by *Harrington*, section 2254(d) precludes relief except in situations where *every* fairminded jurist would disagree with the state court's decision, not just when one court disagrees. 562 U.S. at 102-03; *see*, *e.g.*, *White*, 572 U.S. at 427 (arguments on both sides precludes relief). *Harrington*'s now-familiar test requires a habeas petitioner to show a state court's 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*, 562 U.S. at 103. It is a high bar, intentionally so, reflecting AEDPA's central aim of reserving federal habeas relief for only the most "extreme malfunctions in state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 102-03 (quotation marks omitted).

That "no fairminded disagreement" test has the most fidelity to AEDPA's text for any claim adjudicated on the merits, not just those resulting in unreasoned state-court decisions. *Harrington* correctly places all of the federal court's focus on the what the state court did and not what the state court said (if anything). It enables a federal court to get out of the bramble of the state court's reasoning and instead focus only on whether the decision itself cannot be reconciled, "beyond fairminded disagreement," with this Court's precedents. If there is any reasonable basis for the decision, *Harrington*, consistent with AEDPA, prohibits relitigation of the claim.

AEDPA demands the same deference for one-word decisions, one-paragraph decisions, one-hundred-page decisions, and all of those in between. *See*, *e.g.*, *White*, 572 U.S. at 419-21; *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (per curiam). The same benefit of the doubt given to the one-word decision in *Harrington* must also extend to any others resulting from an adjudication on the merits. Again, if there is *any* basis for upholding the state court's decision, even for reasons other than those the state court gave, the decision stands. When a state court supplies reasons for its decision, that is not a green light to a federal court to line-edit or substitute its own alternative reasons—as the Sixth Circuit did here under the veil of *Brecht*—as a basis for granting habeas relief. That leaves the state court worse off, receiving less deference than a state court that supplies no reasons. AEDPA's text does not distinguish between the two. A "decision" is a "decision."

**2.** The Court is nearly there already, applying *Harrington* time and again in cases involving both reasoned and unreasoned state-court decisions. *See*, *e.g.*, *Edwards*, 141 S. Ct. at 1565 ("It is not enough for a federal court to disagree with the state court. . . ."); *Mays*, 141 S. Ct. at 1149 ("there is no way to hold that a decision was 'lacking in justification' without identifying—let alone rebutting—all of the justifications"); *Shinn v. Kayer*, 141 S. Ct. 517, 523, 525 (2020) (per curiam); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2559-60 (2018) (per curiam); *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) (per curiam); *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (per curiam); *Woods v. Etherton*, 136 S. Ct. 1149, 1152-53 (2016) (per curiam); *White v. Wheeler*, 577 U.S. 73, 78-79 (2015) (per curiam); *Ayala*,

576 U.S. at 269; *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam); *White*, 572 U.S. at 419-20; *Nevada v. Jackson*, 569 U.S. 505, 508-09 (2013) (per curiam); *Parker v. Matthews*, 567 U.S. 37, 47 (2012) (per curiam); *Wetzel v. Lambert*, 565 U.S. 520, 524 (2012) (per curiam); *Cullen v. Pinholster*, 563 U.S. 170, 187-88 (2011).

But even some of these decisions unnecessarily distinguish between reasoned and unreasoned state-court decisions. *See*, *e.g.*, *Shinn*, 141 S. Ct. at 524 ("Insofar as the state court offered its conclusion on the prejudice question without articulating its reasoning supporting that conclusion, we 'must determine what arguments or theories . . . could have supported the state court's determination that Kayer failed to show prejudice."). That again sets up a world where the reasoned decision receives less deference (was the *reasoning* contrary to or involving an unreasonable application of this Court's precedents?) than the unreasoned (was the ultimate *decision* contrary to or involving an unreasonable application of this Court's precedents?). Ordinarily, it makes little difference, for courts are most often examining a state court's reasoning as an indication of those "fairminded" jurists and whether there is a basis for respecting the state court's decision. *Wilson*'s *dicta*, however, is in a different category, creating further confusion in the lower courts by suggesting that a state court's reasons might be grounds for invalidating that state court's decision. *See Wilson*, 138 S. Ct. at 1192.

The many cases in which this Court has applied *Harrington*'s exceedingly deferential standard of review override the passing suggestion in *Wilson* that

anything but the state court's ultimate decision matters. Limiting *Harrington* to its facts, as a minority of the Court has sought to do, *see*, *e.g.*, *Hittson v. Chatman*, 576 U.S. 1028, 1028 (2015) (Ginsburg, J., concurring in denial of certiorari), defies common sense. A one-word decision gets great deference under *Harrington*, but a one-hundred-page decision gets nitpicked for missteps in legal reasoning to justify the extraordinary remedy of a habeas writ? Worse—if there is a mistake in the reasoning on one of the one-hundred pages, then a late-arriving federal judge can order the prisoner's release even though alternative reasonable bases existed to deny relief? That view of section 2254(d) is wrongly biased toward uncertainty, not finality—just find the mistake and then one is free to engage in *de novo* review without deference. AEDPA does not ask federal courts to act like a super-state supreme court and address the *ratio decidendi* of the state court. And the necessary consequence of limiting *Harrington* in this way would be to encourage state courts to say less, even though saying more benefits present litigants, future litigants, and future habeas courts hoping to better understand a decision.

**3.** If the text left any doubt about whether *Harrington*'s level of deference applies to a decision like the Michigan court's, then as a matter of this Court's finality-promoting discretion, the Court ought to apply *Harrington* to every decision resulting from an adjudication on the merits. *See Edwards*, 141 S. Ct. at 1571 n.5, 1573 (Gorsuch, J., concurring).

Nothing requires this Court to extend habeas relief to a state prisoner convicted by a court of competent jurisdiction. The federal habeas statute

says the writ "'*may* be granted'—not that [it] *shall* be granted—and enjoins the court to 'dispose of the matter as law *and justice* require.'" *Withrow v. Williams*, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part) (quoting 28 U.S.C. §§ 2241(a), 2243). And here, it would be exactly backwards to permit a one-word California Court of Appeals decision to receive every bit of *Harrington*'s deferential standard but to subject reasoned decisions to more searching review. Imagine, for example, a state-court decision with a reasoned rejection of a *Strickland* claim but a one-word denial of an *Atkins* claim. Would the *Strickland* claim get less deference (checking the state court's reasoning against this Court's precedents) than the *Atkins* claim (asking whether there is any reasonable basis for the decision given this Court's precedents)? The question answers itself.

## III. *Brecht* Can Coexist with AEDPA's Relitigation Bar, But It Cannot Replace It

**1.** Understood in this way, at least in some cases it is *Harrington* that largely "subsumes" *Brecht* for claims that have been adjudicated on the merits in state-court proceedings. *Harrington* is an intentionally high bar. 562 U.S. at 102-03. And in close cases, *Harrington* will foreclose relief even if one federal court in its independent judgment believes that *Brecht* could be satisfied.

That does not mean *Brecht* serves no purpose post-AEDPA. Where a habeas petitioner's claim has never been adjudicated on the merits in state court, *Brecht* will still supply the harmlessness test. Even if a habeas petitioner's claim has been adjudicated on the merits and the petitioner manages to overcome

section 2254(d)'s relitigation bar—for example, by showing that the state-court decision was "based on" an unreasonable factfinding—there might still be other barriers to relief. *See Withrow*, 507 U.S. at 716 (Scalia, J., concurring in part and dissenting in part). For errors subject to harmless-error review, the Court could further require the petitioner to establish that the error had a "substantial and injurious effect" on the verdict. *Brecht*, 507 U.S. at 637. After all, the "writ of habeas corpus does not authorize federal courts to reopen a judgment issued by a court of competent jurisdiction once it has become final." *See Edwards*, 141 S. Ct. at 1573 (Gorsuch, J., concurring). And perhaps there are still other ways for *Brecht* to coexist alongside section 2254(d), but what is clear in this case is that *Harrington* has not been met.

**2.** This is not a close case. The reasonableness of the state court's harmlessness decision is self-evident. Every member of the jury testified that the partial shackling did not affect their deliberations, Pet.App.6-7, and multiple Michigan courts reviewing Davenport's claim found the evidence of his guilt to be "substantial." Pet.App.99a; *Davenport*, 832 N.W.2d at 390. And still, the Sixth Circuit bypassed those clear indications of reasonableness and used *Brecht* as its opening to reweigh evidence from a long-ago trial, Pet.App.27-32a, explore Michigan state law on premeditation, *id.* at 30-31a, draw new inferences from the duration of jury deliberations, *id.* at 32a, and marshal "social-science research" as a reason for doubting the jurors' own testimony, *id.* at 34-35a, all without ever considering what the state court thought about any of it.

The elaborateness of the Sixth Circuit's undertaking speaks for itself—in effect a retrial on a cold record by a federal court seven layers of review removed from the criminal trial. Opportunities for "fairminded disagreement" abound. When a state court's decision is as obviously unreasonable as section 2254(d) requires, it will be "beyond doubt." *White*, 572 U.S. at 427 (quotation marks omitted). It is not a scavenger hunt for finding something the state court missed. *See Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) ("Federal courts are not forums in which to relitigate state trials."); *Brown*, 344 U.S. at 540 (Jackson, J., concurring in judgment).

## CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

ADAM K. MORTARA
125 South Wacker Drive
Suite 300
Chicago, IL 60606
(773) 750-7154
adam@mortaralaw.com

TAYLOR A.R. MEEHAN*
*Counsel of Record*
THOMAS R. MCCARTHY
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Suite 700
Arlington, VA 22209
(703) 243-9423
taylor@consovoymccarthy.com

* *Licensed in Illinois and the District of Columbia; supervised by principals of the firm licensed in Virginia pending admission to the Virginia bar.*

June 17, 2021