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 RESPONDENT

CATHERINE M.A. CARROLL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

TASHA J. BAHAL
Counsel of Record
REUVEN DASHEVSKY
GARY B. HOWELL-WALTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
tasha.bahal@wilmerhale.com

QUESTION PRESENTED

Whether a federal habeas court considering the harmlessness of an undisputed constitutional violation at trial may ensure compliance with the limitations of 28 U.S.C. § 2254(d)(1) without engaging in a formal AEDPA/*Chapman* analysis, or whether a federal habeas court must always formally apply a separate and independent Section 2254(d)(1) analysis after finding actual prejudice under *Brecht*.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

STATUTES AND RULES

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

No. 20-826

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 RESPONDENT

INTRODUCTION

Ervine Davenport was visibly shackled at the waist, wrist, and ankles during his 2008 trial in violation of his due process rights. As the State concedes (Pet. 25), it is "uncontroverted that [Mr.] Davenport's shackling was 'inherently prejudicial' and was error," as this Court clearly established in *Deck* v. *Missouri*, 544 U.S. 622 (2005). The court of appeals found that Mr. Davenport was actually prejudiced by his unconstitutional shackling and granted Mr. Davenport a conditional writ of habeas corpus pursuant to the Antiterrorism and Death Penalty Act of 1996, 28 U.S.C. § 2254 ("AEDPA").

The State does not challenge the court of appeals' finding of actual prejudice under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993). Instead, it maintains that the court

of appeals was required to conduct a separate, formal analysis under AEDPA, which precludes federal habeas relief where the state court found an error harmless under *Chapman* v. *California*, 386 U.S. 18 (1967), unless the state court's harmlessness determination "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

This case thus turns on the narrow question of how a federal habeas court should ensure compliance with Section 2254(d) when faced with an undisputed violation of constitutional rights that actually prejudiced the defendant under *Brecht*. This Court has repeatedly explained that while both *Brecht* and AEDPA are preconditions of habeas relief, "a federal habeas court need not 'formal[ly]' apply both" because "the *Brecht* test subsumes the limitations imposed by AEDPA." *Davis* v. *Ayala*, 576 U.S. 257, 270 (2015); *see also Fry* v. *Pliler*, 551 U.S. 112, 120 (2007).

Consistent with that precedent and given the logical relationship between the two standards, the Court should hold that a federal habeas court may grant relief without a formal application of AEDPA/*Chapman* if its finding of actual prejudice under *Brecht* drew only on the legal and factual materials that may permissibly be considered under Section 2254(d). In that situation (like here), the federal habeas court's finding of actual prejudice under *Brecht* complies with the limitations set by Section 2254(d) and necessarily means that the state court's determination of harmlessness beyond a reasonable doubt was an objectively unreasonable application of *Chapman*. The State itself has acknowledged this to

be true, arguing to this Court in *Fry* that "when a federal habeas court finds that a constitutional error had a substantial and injurious effect [*i.e.*, actual prejudice under *Brecht*], it follows that (to the federal court) the state court unreasonably applied *Chapman* (if the state court did harmless error analysis)." 06-5247 Missouri et al. Amicus Br. 12-13, 2007 WL 621857, at *12-13 (filed Feb. 22, 2007).

If, however, a federal habeas court's *Brecht* analysis relies on legal or factual materials outside of AEDPA's limitations—*e.g.*, if the court relies on evidence presented in a Section 2254(e)(2) evidentiary hearing—the federal habeas court should then conduct a separate and formal AEDPA/*Chapman* analysis before awarding habeas relief. Here, the court of appeals did not transgress AEDPA's limits in applying *Brecht*, so neither the interest in judicial economy nor concerns of comity and federalism would be served by requiring a formal and separate AEDPA/*Chapman* analysis.

But even if this Court were to conclude that formal application of AEDPA/*Chapman* is always required in every case, the result here would be the same. The state court's finding of harmlessness beyond a reasonable doubt was "contrary to" and an "unreasonable application of" clearly established federal law. The Michigan Supreme Court did not apply *Chapman*, but instead applied a different, erroneous standard in purporting to evaluate harmlessness. Such a decision merits no deference. *See Williams* v. *Taylor*, 529 U.S. 362, 405 (2000).

Contradicting its prior position, the State suggests that the opinion of the Michigan Court of Appeals, and not the state supreme court, should be considered the last reasoned state-court decision. But the Michigan Supreme Court explicitly rejected the intermediate

appellate court's approach. The State's contention that this Court should defer to an analysis that the State's highest court expressly rejected is really no deference at all.

This Court should affirm the court of appeals' grant of habeas relief.

STATEMENT OF THE CASE

A. Trial And First Appeal

In July 2008, the State of Michigan tried Mr. Davenport before a jury on a charge of open murder (allowing the jury to consider both first- and second-degree murder) for the 2007 death of Annette White. During trial, Mr. Davenport was visibly shackled with a waist chain, a wrist shackle on his left hand, and ankle shackles. Pet. App. 2a, 5a. The trial court made no on-the-record finding to justify the shackling. Pet. App. 5a.

The general circumstances surrounding the night of Ms. White's death were largely undisputed and corroborated by witness testimony: Mr. Davenport and Ms. White were together on the day of her death; Ms. White was intoxicated, having smoked crack cocaine and consumed alcohol; and Ms. White was agitated. Pet. App. 3a-5a. There was a struggle between Ms. White and Mr. Davenport while they were driving alone in a car, and Mr. Davenport caused Ms. White's death during this struggle. *Id.*

Mr. Davenport testified at trial that he acted in self-defense after Ms. White attacked him while he was driving. Pet. App. 3a, 5a. Mr. Davenport explained that Ms. White repeatedly tried to grab the steering wheel and, each time, Mr. Davenport pushed her back. Pet. App. 3a. She then started yelling and kicking and pulled out a boxcutter, which she swung at Mr. Davenport, cutting

his arm. *Id.* Mr. Davenport testified that he was afraid of the boxcutter and was simultaneously trying to avoid oncoming traffic. *Id.* As he continued to drive, Mr. Davenport pinned Ms. White against the side of the car with his hand extended against her neck. *Id.* As he was about to let up his hand, she scratched him on the face, and he "pinned her back up against the other side of the car." *Id.* At some point, he realized she was no longer struggling and had stopped breathing. *Id.*

As the prosecution conceded, the "only real issue" for the jury was whether Mr. Davenport intentionally killed Ms. White with premeditation and deliberation (first-degree murder), intended to kill Ms. White but without premeditation and deliberation (second-degree murder), or acted in self-defense. Pet. App. 5a. As evidence of premeditation and deliberation, the prosecution relied primarily on the testimony of the forensic pathologist who conducted Ms. White's autopsy. Pet. App. 4a-5a. The pathologist testified that the cause of death was strangulation and opined that the internal injuries to Ms. White's neck were "more consistent with choking than … broad pressure there." *Id.* In closing, the prosecution argued for premeditation and deliberation based on the amount of time that strangulation would have taken. Pet. App. 31a. After deliberating for six hours over the course of two days, the jury found Mr. Davenport guilty of first-degree murder. Pet. App. 5a. Mr. Davenport was sentenced to mandatory life imprisonment without the possibility of parole.

On direct appeal, Mr. Davenport argued that his extensive shackling—at the waist, one wrist, and his ankles—in full view of the jury, without any justification on the record, violated the Due Process Clause under *Deck* v. *Missouri*, 544 U.S. 622 (2005). In *Deck*, this Court held that "the law has long forbidden routine use

of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." *Id.* at 626. The Michigan Supreme Court remanded the case to the trial court for an evidentiary hearing to determine whether the jurors saw Mr. Davenport's shackles and, if they did, whether this due process violation was harmless beyond a reasonable doubt. Pet. App. 6a.

B. Remand Proceedings And Second Appeal

On remand, the trial court held an evidentiary hearing in which all twelve jurors testified. Pet. App. 6a-7a. The hearing established—and it remains uncontested—that Mr. Davenport's shackles were visible to the jury. Some of the jurors testified that they observed the shackles during voir dire, while other jurors said they observed the shackles—and discussed them—during Mr. Davenport's eight-day trial. Some of these jurors saw the shackles on Mr. Davenport's hand, some jurors observed the waist chain, some jurors observed the ankle shackles, and some jurors observed more than one of the restraints. *See*, *e.g.*, JA709-710 (Juror Rooseboom); JA730-731, 735-737, 739 (Juror Jankord); JA744-746, 752-753 (Juror Lewis); JA784-790, 793-794 (Juror Vanderveen); JA805-807, 809 (Juror Whately).

In addition to the jurors who saw Mr. Davenport in shackles, at least two other jurors heard comments from other jurors about the restraints. Pet. App. 7a; JA744; JA758-759; JA767-771; JA784-785, JA788-790. The jurors discussed the shackles in the jury box, the jury room, at lunch, and in the hallway. JA747; JA752-753; JA758-759; JA773-774; JA807; JA852.

In total, although three years had passed since the trial, five jurors testified that they recalled seeing Mr.

Davenport's waist chain, handcuffs, or ankle shackles during jury selection or trial, and two additional jurors testified that they heard other jurors commenting about the restraints. Pet. App. 7a.

Several jurors expressed their view that they believed Mr. Davenport to be dangerous—a belief that was borne out by the shackles. Juror Jankord made this clear:

> Q. And what did you think the purpose was for him to be shackled and to have [deputies] in the courtroom?
>
> A. Security.
>
> Q. Did you think that he might be dangerous?
>
> A. Absolutely.

JA738.

Similarly, when Juror Vanderveen saw Mr. Davenport in shackles, he assumed that Mr. Davenport might be dangerous and felt "safer" knowing Mr. Davenport was restrained. JA793-795; *see* Pet. App. 7a. But when asked, the jurors who saw or heard about Mr. Davenport's shackles also testified that the shackling did not affect their deliberations. Pet. App. 7a.

The trial court found that, although the jurors observed the shackles at trial, the prosecution had proved beyond a reasonable doubt that Mr. Davenport's shackles did not affect the verdict. Pet. App. 7a. In so holding, the trial court relied solely on the jurors' testimony that Mr. Davenport's shackling was not discussed during deliberations and did not affect their verdict. Pet. App. 7a-8a; JA860-863 ("[t]he Prosecution has met its burden on this issue through the testimony of the jurors"). The court did not cite or discuss any other evidence,

including any trial evidence, to support its harmless-error finding.

The Michigan Court of Appeals affirmed, holding that the "trial court properly found that the prosecution met its burden of proving beyond a reasonable doubt that the error did not affect the jury's verdict." Pet. App. 95a-99a. The court based its conclusion on—and devoted nearly all of its three-page opinion to considering—the juror testimony. *Id.; see also* Pet. App. 99a (opining that "it was proper for the jurors to testify regarding how viewing the shackles affected their deliberations").

The Michigan Supreme Court denied leave to appeal. But in doing so, it rejected the Michigan Court of Appeals' analysis. Pet. App. 93a-94a. The Michigan Supreme Court held that the state appellate court's reliance on juror testimony was error under *Holbrook* v. *Flynn*, 475 U.S. 560 (1986). In *Holbrook*, this Court considered whether certain courtroom security procedures were so inherently prejudicial as to violate due process, and in holding that they were, the Court determined that "little stock need be placed in jurors' claims to the contrary," because "jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." *Id.* at 570; Pet. App. 93a-94a. Having rejected the intermediate court's reasoning, the state supreme court supplied its own reasoned explanation for rejecting Mr. Davenport's claim: his unconstitutional shackling was harmless because, "[g]iven the substantial evidence of guilt presented at trial, [the court could not] conclude that there was an unacceptable risk of impermissible factors coming into play." Pet. App. 94a (applying *Holbrook*, 475 U.S. at 570).

C. Federal Habeas Proceedings

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

The parties did not dispute that Mr. Davenport's visible shackling, with no on-the-record justification, violated the Due Process Clause under *Deck*. Pet. App. 21a. Such shackling is "inherently prejudicial," in part because it "undermines the presumption of innocence and the related fairness of the factfinding process" by "suggest[ing] to the jury that the justice system itself sees a need to separate a defendant from the community at large." Pet. App. 20a-21a (quoting *Deck*, 544 U.S. at 630, 635). The only dispute was whether that error was harmless under the standards applicable on collateral review. Pet. App. 21a.

The court of appeals discussed at length the relationship between *Brecht* and AEDPA. *See* Pet. App. 9a-20a, 22a-23a, 25a-27a. Under *Brecht*, an error must be disregarded as harmless on collateral review unless it resulted in "actual prejudice," meaning it had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. This requires more than a "reasonable possibility" that the error contributed to the verdict. *Id.* Conversely, AEDPA provides that a federal court may not grant habeas relief to a state prisoner on a claim that was adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2).

Drawing on this Court's decision in *Davis* v. *Ayala*, 576 U.S. 257 (2015), the court of appeals first held that "both *Brecht* and AEDPA must be satisfied" before relief may be granted. Pet. App. 17a. The court then concluded that a federal habeas court may find both standards satisfied by applying the more stringent *Brecht* test because, where a petitioner can demonstrate actual prejudice under *Brecht*, a state-court finding of harmlessness beyond a reasonable doubt—"even though insulated by AEDPA deference"—is "necessarily objectively unreasonable." *Id.*; *see also* Pet. App. 13a ("where a habeas petitioner can succeed under the more demanding *Brecht* test, the state court's 'harmlessness determination itself is unreasonable,' which shows that both tests are satisfied" (quoting *Ayala*, 576 U.S. at 269)); Pet. App. 17a-18a ("The tests of *Brecht* and AEDPA/*Chapman* … both seek traces of the same poison but *Brecht*'s test covers both because it requires the petitioner to show enough poison to be fatal under either test."). *Brecht* thus "subsumes the limitations imposed by AEDPA," and a "federal habeas court need not 'formal[ly]' apply both *Brecht* and "AEDPA/*Chapman*." Pet. App. 14a (quoting *Ayala*, 576 U.S. at 268, 270).

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

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

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

jurors' testimony pointed in the opposite direction: that most of the jurors "still remembered," three years after the fact, "that they either saw [Mr. Davenport's] restraints or heard another juror remark on his shackles … suggests the shackles made an impression." Pet. App. 35a. Moreover, "several jurors" expressly testified that viewing the shackles led them to conclude that Mr. Davenport was "dangerous." *Id.* The shackling thus "'inevitably undermine[d] the jury's ability to weigh accurately all relevant considerations'" in precisely the manner this Court foresaw and clearly established in *Deck*. Pet. App. 37a (quoting *Deck*, 544 U.S. at 633).

The court of appeals therefore concluded that the shackles "branded [Mr.] Davenport as having a violent nature in a case where the crucial point of contention was whether he engaged in deliberate and premeditated murder." Pet. App. 38a. As a result, the court of appeals concluded that Mr. Davenport's unconstitutional shackling was not harmless under *Brecht* and granted habeas relief. *Id.*

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

SUMMARY OF ARGUMENT

The State, Mr. Davenport, and the court of appeals all agree that a federal habeas petitioner must satisfy both *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), and 28 U.S.C. § 2254(d). Here, the court of appeals found—and the State does not contest—that Mr. Davenport was actually prejudiced under *Brecht* by his unconstitutional shackling. *See* Pet. App. 2a-38a. The court of appeals then assured itself that its finding of actual prejudice under *Brecht* necessarily meant that the state court's

finding of harmlessness beyond a reasonable doubt was "objectively unreasonable" under AEDPA. Pet. App. 17a (citing *Ayala* v. *Davis*, 576 U.S. 257, 268-270 (2015)); *see also* Pet. App. 11a, 13a-14a, 17a-18a, 22a, 25a. Because the court of appeals' *Brecht* analysis drew only on the legal and factual materials that may permissibly be considered under Section 2254(d), there was no need for the court to formally conduct a separate AEDPA analysis, and the decision should be affirmed.

As this Court has explained, there is no need to "'formal[ly]' apply both" *Brecht*'s actual-prejudice standard and AEDPA's inquiry into the reasonableness of the state court's harmlessness determination because "the *Brecht* test subsumes the limitations imposed by AEDPA." *Ayala*, 576 U.S. at 268, 270. Rather, where a federal habeas court conducts a *Brecht* analysis and finds actual prejudice based only on the legal and factual materials that a court may permissibly consider under AEDPA, the *Brecht* conclusion of actual prejudice—*i.e.*, that there is more than a reasonable possibility that the error was harmful—necessarily means that the state court's finding of harmlessness beyond a reasonable doubt was objectively unreasonable. Requiring a superfluous formal application of AEDPA/*Chapman* in such a case would burden the court and the interest in judicial economy without any offsetting benefit to the State's interests in finality. If the finding of actual prejudice under *Brecht*, however, rests on legal or factual materials outside of AEDPA's proscriptions, then the federal habeas court should conduct a separate and formal AEDPA inquiry before granting relief.

In this case, the court of appeals' finding of actual prejudice was based only on materials permitted under Section 2254(d). The court relied on the legal standards established in *Deck* v. *Missouri*, 544 U.S. 622 (2005), and

Chapman v. *California*, 386 U.S. 18 (1967), while citing circuit precedent and other materials only cumulatively to confirm its reliance on Supreme Court precedents that were already clearly established governing law. The court of appeals also considered at length the only two grounds relied on by the state court—the trial evidence and the juror testimony. The court did not consider new evidence outside the trial record, did not rely on arguments not previously advanced before the state court, and did not disregard the state court's analysis.

In any event, even if this Court were to agree with the State that a federal habeas court is always obliged to formally apply Section 2254(d) in addition to finding actual prejudice under *Brecht*, Mr. Davenport would still be entitled to relief. The last reasoned decision from the Michigan Supreme Court was "contrary to" clearly established federal law as determined by this Court. That court did not apply *Chapman*. Instead, the Michigan Supreme Court applied a different, erroneous standard in purporting to evaluate harmlessness, and a state court's application of a standard that contradicts the governing law as established by this Court merits no deference under AEDPA. *See Williams* v. *Taylor*, 529 U.S. 362, 405 (2000).

The State's response—that the state supreme court's decision should be disregarded in favor of the intermediate appellate court's decision—contradicts the State's position below and reflects a perverse concept of deference. The Michigan Supreme Court rejected the intermediate appellate court's analysis as erroneous; indeed, it specifically admonished the lower court for relying on juror testimony to establish harmless error. Pet. App. 93a. It would make no sense for this Court to defer to an intermediate appellate court's rationale that the State's highest court expressly rejected.

Moreover, even the lower court opinion of the Michigan Court of Appeals was "contrary to, or involved an unreasonable application of, clearly established Federal law." As the Michigan Supreme Court found, the Michigan Court of Appeals decision was contrary to *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), because the court relied nearly exclusively on jurors' testimony regarding the prejudicial effect of seeing Mr. Davenport in shackles. And it was objectively unreasonable to find the error harmless in light of the trial record given the scarce evidence of premeditation and deliberation.

Because the federal court of appeals did not disregard AEDPA or transgress its limitations, the court was correct to conclude that its finding of actual prejudice necessarily meant that the state court's finding of harmlessness beyond a reasonable doubt was objectively unreasonable. Indeed, formal application of Section 2254(d) to this case confirms that Mr. Davenport is entitled to habeas relief. The court of appeals' grant of a conditional writ of habeas should be affirmed.

ARGUMENT

I. A FEDERAL HABEAS COURT MAY ENSURE COMPLIANCE WITH SECTION 2254(d)(1)'S LIMITATIONS BY APPLYING *BRECHT* WITHOUT SEPARATE, FORMAL APPLICATION OF AEDPA/*CHAPMAN*

A. A Federal Habeas Court Need Not Formally Apply AEDPA/*Chapman* Where Its Finding Of Actual Prejudice Under *Brecht* Complies With AEDPA's Limitations On Legal And Factual Materials

Two standards set forth preconditions for habeas relief where the harmlessness of an undisputed constitutional violation at trial was previously adjudicated on the

merits in state court: (1) *Brecht*, which limits habeas relief to situations in which a constitutional violation at trial resulted in "actual prejudice," *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993); and (2) AEDPA/*Chapman*, which precludes federal habeas relief unless the state court's determination of harmlessness was "contrary to, or involved an unreasonable application of" *Chapman* v. *California*, 386 U.S. 18 (1967) (requiring reversal of a conviction unless prosecution proved constitutional violation was harmless beyond a reasonable doubt).[1]

While each standard must be satisfied, this Court has repeatedly stated that "a federal habeas court need not 'formal[ly]' apply both *Brecht* and 'AEDPA/*Chapman*.'" *Davis* v. *Ayala*, 576 U.S. 257, 268 (2015); *see also Fry* v. *Pliler*, 551 U.S. 112, 120 (2007). Most recently, in *Ayala*, this Court explained that AEDPA "sets forth a precondition to the grant of habeas relief," but that applying *Brecht* "subsumes" AEDPA's requirements because a habeas petitioner who shows "actual prejudice" under *Brecht*'s stringent test necessarily demonstrates that no fairminded jurist could find the state court's harmlessness determination reasonable. 576 U.S. at 268, 270.

Although this Court has not previously explained how a federal habeas court may assure compliance with Section 2254(d)(1)'s limitations without formally applying AEDPA/*Chapman*, its precedent points the way. After finding that a constitutional violation resulted in actual prejudice under *Brecht*, a federal habeas court may grant relief without further inquiry if its *Brecht*

[1] Section 2254(d)(2) additionally allows relief where the state-court decision "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)(2). That provision is not at issue here.

analysis relied only on the legal and factual materials allowed under Section 2254(d)(1). In that situation, the federal court's finding of actual prejudice under *Brecht* necessarily means that a state court's finding of harmlessness beyond a reasonable doubt was an objectively unreasonable application of *Chapman* and complies with the limitations set by Section 2254(d)(1). On the other hand, if a federal court's *Brecht* analysis deviates from Section 2254(d)(1)'s limitations on legal and factual materials—*e.g.*, if the court relies on evidence presented at a Section 2254(e)(2) hearing—the federal habeas court should then conduct a separate and formal AEDPA/*Chapman* analysis before awarding habeas relief.

This approach takes account of the two ways that Section 2254(d)(1) limits habeas relief. *First*, Section 2254(d)(1) limits relief by requiring the federal court to ask a particular question in conducting the AEDPA/*Chapman* inquiry. A federal habeas court does not engage in a direct *Chapman* analysis, asking whether the prosecution proved harmlessness beyond a reasonable doubt, because mere disagreement on that question does not warrant habeas relief. Instead, the federal habeas court asks whether the state court "applie[d] a rule that contradicts the governing law set forth" by this Court or if the state court "unreasonably applie[d] [the correct rule] to the facts of the particular state prisoner's case." *Williams* v. *Taylor*, 529 U.S. 362, 405-407 (2000). Section 2254(d)(1) limits habeas relief to instances in which the state court applied a harmless-error rule that contradicts *Chapman* or applied *Chapman* in an unobjectively unreasonable manner.

Second, Section 2254(d)(1) limits the legal and factual materials the federal court may consider in making this determination. For example, the "clearly

established" federal law that guides the Section 2254(d)(1) inquiry is set by this Court's holdings—not dicta or lower-court holdings—that had been issued at the time of the state-court decision. *See Lockyer* v. *Andrade*, 538 U.S. 63, 71-72 (2003). Similarly, a Section 2254(d)(1) inquiry "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). Section 2254(d)(1) also requires the federal court to consider the "'particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims,'" if the state court supplied a rationale. *Wilson* v. *Sellers*, 138 S. Ct. 1188, 1191-1192 (2018).

In the harmless-error context, as discussed further below, it will not always be necessary for the federal habeas court to conduct a separate, formal AEDPA/*Chapman* analysis to assure compliance with both categories of protections. A finding of actual prejudice under *Brecht* necessarily means that the state court's harmlessness determination was unreasonable, satisfying AEDPA's first limitation. Therefore, as long as the *Brecht* determination did not transgress AEDPA's second limitation by considering legal or factual materials outside the bounds of a Section 2254(d)(1) inquiry, it would make no sense as a matter of judicial efficiency to require federal courts to formally perform that additional inquiry.

B. A Finding Of Actual Prejudice Under *Brecht* Means That A State Court's Determination That An Error Was Harmless Beyond A Reasonable Doubt Is Objectively Unreasonable Under AEDPA

It is more difficult for a habeas petitioner to obtain relief under *Brecht*'s actual prejudice standard than

AEDPA/*Chapman*'s unreasonable-application clause—so much so that a state-court determination of harmlessness beyond a reasonable doubt is necessarily objectively unreasonable if the constitutional error resulted in actual prejudice under *Brecht*. For this reason, a federal habeas court need not formally apply AEDPA/*Chapman* after finding actual prejudice under *Brecht* (assuming that the *Brecht* determination complied with Section 2254(d)(1)'s limitations on factual and legal materials). The State's and its amici's efforts to challenge the relationship between *Brecht* and AEDPA/*Chapman* contradict the plain meaning of what is required by the two tests, this Court's precedent, and the State's own prior position before this Court.

1. *Brecht*'s actual prejudice test imposes a higher barrier to habeas relief than that imposed by the unreasonable-application clause of Section 2254(d)(1)

In *Brecht*, this Court considered the proper standard for determining the harmlessness of a constitutional violation at trial on habeas review. The Court had previously established, in *Chapman*, that constitutional violations at trial require reversal on direct review unless the prosecution can prove harmlessness beyond a reasonable doubt. 386 U.S. at 24. The *Chapman* standard is defendant-friendly, allowing for a reviewing court to uphold a conviction in the face of constitutional error only if there is no "'reasonable possibility' that trial error contributed to the verdict." *Brecht*, 507 U.S. at 637 (quoting *Chapman*, 386 U.S. at 24). This means that if, after "conduct[ing] a thorough examination of the record," a reviewing "court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error … it should not find the error

harmless." *Neder* v. *United States*, 527 U.S. 1, 19 (1999). This requires a court "[to] ask[] whether the record contains evidence that could rationally lead to a contrary finding" and to find the error harmless only if "the answer to that question is 'no.'" *Id.*; *see also Satterwhite* v. *Texas*, 486 U.S. 249, 258-259 (1988) ("The question, however, is not whether the legally admitted evidence was sufficient to support the [verdict]."); *Yates* v. *Evatt*, 500 U.S. 391, 404 (1991) ("To satisfy *Chapman*'s reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the [error].").

Although the Court had previously suggested that *Chapman* might apply on both direct and collateral review, the Court in *Brecht* clarified that principles of finality, comity, and federalism called for a more stringent standard on collateral review. *Brecht*, 507 U.S. at 635 ("The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. We have also spoken of comity and federalism." (citations and quotation marks omitted)).

The Court in *Brecht* explained that applying *Chapman*'s defendant-friendly inquiry on habeas review would undermine the presumptive correctness and finality of state-court decisions:

> Overturning final and presumptively correct convictions on collateral review because the state cannot prove that an error is harmless under *Chapman* undermines the state's interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a "reasonable

> possibility" that trial error contributed to the verdict is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has "grievously wronged."

507 U.S. at 637 (citations omitted). Thus, to preserve state-court decisions from unnecessary collateral attack, this Court adopted a more stringent standard.

The *Brecht* standard limits habeas relief to situations in which an error resulted in "actual prejudice." *Brecht*, 507 U.S. at 637; *see also Ayala*, 576 U.S. at 267. This means that "relief is proper only if the federal court has 'grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict.'" *Ayala*, 576 U.S. at 267-268 (quoting *O'Neal* v. *McAninch*, 513 U.S. 432, 436 (1995) (quotation marks omitted)). Significantly, the grave doubt required under *Brecht* is not doubt as to whether an error is harmless beyond a reasonable doubt, it is doubt as to whether the error actually prejudiced the defendant. As explained by this Court, this means that there must be "more than a 'reasonable possibility' that the error was harmful." *Ayala*, 576 U.S. at 268 (quoting *Brecht*, 507 U.S. at 637).

The unreasonable-application clause of Section 2254(d)(1), on the other hand, requires a federal court to find that the state court's decision "involved an unreasonable application of … clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. 2254(d)(1); *see also Ayala*, 576 U.S. at 268-269. Thus, where the state court determined that a trial error was harmless under *Chapman*, a habeas court may not grant relief under this clause unless it determines that no fair-minded jurist could agree with the state court's conclusion that the prosecution proved that the error was

harmless beyond a reasonable doubt. *Ayala*, 576 U.S. at 269-270 (citing *Harrington* v. *Richter*, 562 U.S. 86, 101, 103 (2011)).

Examining what is required by *Brecht* and AEDPA/*Chapman* reveals a clear relationship. By definition, if there is more than a "'reasonable possibility'" that the error was in fact harmful (as *Brecht* requires, 507 U.S. at 637), then no fairminded jurist could agree with the state court's finding that the prosecution proved that the error was harmless beyond a reasonable doubt. As discussed above, *Chapman* requires a court to grant relief on direct review if the record evidence could rationally lead to a finding that the error affected the verdict. *See, e.g.*, *Neder*, 527 U.S. at 19; *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993) ("The [*Chapman*] inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."). A finding of actual prejudice under *Brecht* (*i.e.*, more than a reasonable possibility that the error affected the verdict), precludes the reasonableness of any determination by the state court that the prosecution proved beyond a reasonable doubt that the error did not affect the verdict.

This understanding of the relationship between *Brecht* and AEDPA/*Chapman* reflects this Court's own statements in *Fry* and *Davis*. In *Fry*, the Court considered whether AEDPA supplanted the *Brecht* standard. The Court held that it did not, confirming the vitality of both tests but recognizing that there is "no sense to require formal application of *both* tests." *Fry*, 551 U.S. at 119-120. The Court based this conclusion on the fact that *Brecht* imposes a higher bar to habeas relief than AEDPA/*Chapman*:

> Given our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief, it is implausible that, without saying so, AEDPA replaced the *Brecht* standard of "actual prejudice," with the more liberal AEDPA/*Chapman* standard which requires only that the state court's harmless-beyond-a-reasonable-doubt determination be unreasonable. 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.

Id.

Notably, in *Fry*, the State of Michigan, along with 20 other States (many of which also appear as amici in this case), submitted an amicus brief in which it recognized that satisfying *Brecht*'s actual-prejudice test necessarily means that the unreasonable-application clause of Section 2254(d)(1) is satisfied as well:

> To be sure, *Brecht* analysis and reasonableness review of a state court's *Chapman* analysis can overlap. For instance, when a federal habeas court finds that a constitutional error had a substantial and injurious effect, it follows that (to the federal court) the state court unreasonably applied *Chapman* (if the state court did harmless error analysis).

No. 06-5247 Missouri et al. Amicus Br. 12-13, 2007 WL 621857, at *12-13 (filed Feb. 22, 2007). The States were presumably content to acknowledge this point at the time—in contrast to their position now—because the obsolescence of *Brecht* would have lowered the bar for habeas relief for state prisoners.

Subsequently, in *Ayala*, this Court explained that "[a habeas petitioner] must show that he was actually prejudiced by [the error], a standard that he necessarily cannot satisfy if fairminded jurists could agree with the [state-court] decision that [the error] met the *Chapman* standard of harmlessness." 576 U.S. at 270. In other words, if fairminded jurists could agree with the state court's application of *Chapman* (*i.e.*, AEDPA/*Chapman* is not satisfied), then the error did not result in actual prejudice (*i.e.*, *Brecht* is not satisfied). This also means that if the error did result in actual prejudice (*i.e.*, *Brecht* is satisfied), then no fairminded jurist could agree with the state court's application of *Chapman* (*i.e.*, AEDPA/*Chapman* is satisfied).[2]

Notably, while the Court in *Ayala* was divided over whether habeas relief was warranted under *Brecht* and AEDPA/*Chapman*, the logical relationship between *Brecht* and AEDPA/*Chapman* was a point of unanimous agreement. As noted by Justice Sotomayor in dissent:

> My disagreement with the Court does not stem from its discussion of the applicable standard of

[2] The Court's statement in *Ayala* that a habeas petitioner "necessarily cannot satisfy" *Brecht* if "fairminded jurists could agree with the [state-court] decision that [the error] met the *Chapman* standard of harmlessness," 576 U.S. at 270—*i.e.*, if AEDPA/*Chapman* is not satisfied, then *Brecht* is not satisfied—can be expressed in symbolic-logic notation as: if ~A, then ~B. The logical equivalent of this statement, under the rule of transposition in the discipline of formal logic is: If *Brecht* is satisfied, then AEDPA/*Chapman* is necessarily satisfied (or, if B, then A). *See* Copi et al., *Introduction to Logic* 357 (15th ed. 2019) ("We know that if any conditional statement is true, then if its consequent is false its antecedent must also be false. Therefore, any conditional statement is logically equivalent to the conditional statement asserting that the negation of its consequent implies the negation of its antecedent.").

> review, which simply restates the holding of *Fry*. … Nothing in the Court's opinion today calls into question this aspect of *Fry*'s holding. If a trial error is prejudicial under *Brecht*'s standard, a state court's determination that the error was harmless beyond a reasonable doubt is necessarily unreasonable.

576 U.S. at 291-292 (Sotomayor, J., dissenting) (citation omitted).[3]

Finally, the State and its amici continue to identify no cases in which a habeas court has found *Brecht* to be satisfied but then denied relief under AEDPA/*Chapman*, in contrast to the numerous cases in which courts applying both standards have found them both to be satisfied. This practical experience under the two

---

[3] Further underscoring the Court's agreement on this point, the majority opinions in both *Fry* and *Ayala* state that *Brecht* "subsumes" AEDPA's limitations. *Ayala*, 576 U.S. at 270; *Fry*, 551 U.S. at 120. The Court has frequently used that term to describe a situation in which a more stringent standard or inquiry may be relied upon to satisfy a more lenient standard without formally applying both. *See Johnson* v. *Williams*, 568 U.S. 289, 301-302 (2013) ("To be sure, if the state-law rule subsumes the federal standard—that is, if it is at least as protective as the federal standard—then the federal claim may be regarded as having been adjudicated on the merits."); *In re Primus*, 436 U.S. 412, 426-427 n.18 (1978) ("In the discussion that follows, we do not treat separately the two Disciplinary Rules upon which appellant's violation was based. Since DR 2-103(D)(5) was held by the court below to proscribe in a narrower fashion the same conduct as DR 2-104(A)(5), a determination of unconstitutionality as to the former would subsume the latter." (citation omitted)); *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2153 (2016) (Alito, J., concurring) ("Most notably, once the Patent Office issues its final written decision, the probabilistic question whether a challenge is 'reasonabl[y] likel[y]' to prevail on the merits will be subsumed by the ultimate question whether the challenger should in fact prevail." (brackets in original) (citation omitted)).

standards confirms what common sense dictates: that a finding of actual prejudice under *Brecht* (assuming it complies with AEDPA's limits on the legal and factual materials to be considered) necessarily establishes that a state court's finding of harmlessness under *Chapman* is objectively unreasonable.

2. The State and its amici misunderstand the relationship between *Brecht* and AEDPA/*Chapman*

The State attempts to muddy the relationship between these two standards by characterizing AEDPA/*Chapman* as deferential and *Brecht* as de novo review. This assertion, however, reflects a fundamental misunderstanding of the deference owed to state courts. Deference is not achieved through the blind placement of a thumb on the scale in favor of upholding state-court judgments—this is perhaps why Section 2254(d) does not actually mention the word "deference." Rather, the deference owed to state-court decisions—under both *Brecht* and AEDPA/*Chapman*—is baked into the questions that a federal court must ask and answer under each standard. What makes both *Brecht* and AEDPA/*Chapman* deferential is that neither allows a federal habeas court to engage in a de novo *Chapman* analysis by simply deciding for itself the same harmlessness question that the state court already decided or should have decided on direct review.

Instead, AEDPA/*Chapman* asks whether the state court either applied a rule contrary to *Chapman* or applied *Chapman* but did so in an objectively unreasonable manner. The standard is deferential because it does not allow the federal court to discard the state court's application of *Chapman* merely because it disagrees with it. Likewise, *Brecht* does not charge a federal habeas court

with second guessing a state court's *Chapman* finding of harmlessness beyond a reasonable doubt, but instead tasks it with asking whether the error resulted in actual prejudice.

The deference baked into these questions protects state-court decisions from being overturned on habeas review merely because a federal court disagrees with a state court's *Chapman* decision. And while the AEDPA/*Chapman* inquiry lends state courts significant leeway in applying *Chapman*, the question in *Brecht* is, as discussed above, in actuality even more deferential.

In a related vein, the State Amici draw on a comparison between AEDPA/*Chapman* and the sufficiency-of-the-evidence standard to argue that a finding of actual prejudice under *Brecht* does not necessarily mean that a state-court determination of harmlessness beyond a reasonable doubt is objectively unreasonable. States Amicus Br. 17-20. This reliance is misplaced. Sufficiency review is not "analytically, almost identical to AEDPA review of a *Chapman* determination." *Id.* at 17. Any superficial similarity between the two standards ends, and the logic of the State Amici's argument breaks down, when considering the burdens and presumptions underlying the two inquiries.

Sufficiency review under *Jackson* v. *Virginia*, 443 U.S. 307 (1979), requires a reviewing court to uphold a conviction if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. This standard is doubly deferential—both viewing the evidence in the light most favorable to the prosecution and asking whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt. And this makes

sense: the nature of a sufficiency challenge is that the evidence presented at trial was not enough to support a conviction as a matter of law. A verdict should not be overturned as long as any rational trier of fact viewing the evidence in the light most favorable to the prosecution could have found the defendant guilty, without regard to any error at trial.

AEDPA/*Chapman* is fundamentally different. Unlike sufficiency review, AEDPA/*Chapman* does not allow a habeas court to consider the facts in the light most favorable to the prosecution, because *Chapman* itself does not allow the state court to do so on direct review. And unlike sufficiency review, the relevant question under *Chapman* (and by extension, AEDPA/*Chapman*) is not "whether the legally admitted evidence was sufficient to support" the verdict, but rather "whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Satterwhite*, 486 U.S. at 258-259 (citing *Chapman*, 386 U.S. at 24)); *see also Sullivan*, 508 U.S. at 279.

Chapman (and therefore AEDPA/*Chapman*) thus focuses, just as *Brecht* does, on the effect of the constitutional violation on the verdict that was actually rendered—not, as in sufficiency review, on whether a hypothetical reasonable jury could have reached the same verdict in the absence of the error. "The [*Chapman*] inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan*, 508 at 279. That is why a finding that there is more than a reasonable possibility that the error contributed to the verdict (as required under *Brecht*) necessarily means it would be objectively unreasonable to find that there was no possibility beyond a

reasonable doubt that the error contributed to the verdict (assuming the *Brecht* finding does not rely on legal or factual materials prohibited under AEDPA).[4]

C. Separate, Formal Application Of AEDPA/*Chapman* Is Necessary Only Where The *Brecht* Analysis Does Not Comply With AEDPA's Limitations On Factual And Legal Materials

Section 2254(d)(1) limits the legal and factual materials that a federal habeas court may consider in assessing whether a state-court decision was contrary to or involved an unreasonable application of clearly established federal law. Accordingly, if a federal habeas court's finding of actual prejudice under *Brecht* relied on materials that are not permitted under Section 2254(d)(1), the court should separately conduct a formal AEDPA/*Chapman* inquiry to ensure adherence to Section 2254(d)(1)'s limitations. But where the *Brecht* analysis did not transgress those limits, there is no need for a superfluous formal application of AEDPA/*Chapman*.

For example, if a federal habeas court found actual prejudice under *Brecht* by relying on dicta in this Court's precedent, lower court precedents, or other authorities in a way that would be impermissible under Section

---

[4] The State Amici also err in relying on AEDPA cases in which the underlying standard applied by the state court was itself highly deferential to the prosecution—a situation significantly different from that presented by AEDPA/*Chapman*. For example, the State Amici mischaracterize *Cavazos* v. *Smith*, 565 U.S. 1 (2011) (per curiam), as an example of sufficiency review on direct appeal when in fact it was a habeas case governed by Section 2254(d). *See* States Amicus Br. 18-20; *Cavazos*, 565 U.S. at 7-8; *see also Renico* v. *Lett*, 559 U.S. 766, 778 (2010) ("The Court of Appeal's ruling in Lett's favor failed to grant the Michigan courts the dual layers of deference required by AEDPA and our double jeopardy precedents.").

2254(d)(1), the federal court should then conduct a separate, formal application of AEDPA/*Chapman*. Similarly, a separate, formal AEDPA/*Chapman* analysis would be warranted if the *Brecht* analysis failed to give due consideration to the state court's rationale for finding the error harmless or relied on arguments or evidence not previously presented to the state court, including evidence gathered in a Section 2254(e)(2) evidentiary hearing. In these situations, the federal habeas court could not rely on its determination that a constitutional violation at trial resulted in actual prejudice to assure itself that the state court's determination of harmlessness beyond a reasonable doubt was objectively unreasonable within the limitations set out by Section 2254(d)(1).

On the other hand, if the federal habeas court's *Brecht* analysis complied with Section 2254(d)(1)'s rules for consideration of legal and factual materials then there is no need for the federal court to embark on a separate formal AEDPA/*Chapman* analysis. Rather, it can rest assured that its finding of actual prejudice under *Brecht* necessarily means that the state-court determination of harmlessness beyond a reasonable doubt was an objectively unreasonable application of *Chapman* under Section 2254(d)(1) and that it adhered to all relevant limitations in reaching this conclusion.

In most cases, this will be the end of the inquiry and there will be no need to apply a separate, formal AEDPA/*Chapman* analysis. This approach will free federal habeas courts from having to expend judicial resources to engage in superfluous legal analysis that advances no offsetting interests in comity or finality. Moreover, this approach would relieve federal courts of the need to confront complex legal questions under AEDPA that would not affect the outcome of the case—

including, for example, determining whether a state-court order denying leave to appeal that substitutes its own reasoned decision in place of the lower court's constitutes the relevant merits adjudication for AEDPA purposes, or whether AEDPA deference is owed to an intermediate court's decision when its rationale is explicitly rejected by the state supreme court in an opinion denying leave to appeal.

II. THE COURT OF APPEALS' ANALYSIS COMPLIED WITH SECTION 2254(d)(1)'S LIMITATIONS

The court of appeals' determination that the unconstitutional shackling of Mr. Davenport at trial resulted in actual prejudice did not rely on materials outside the scope of those permitted by Section 2254(d)(1), and there is therefore no need to formally apply a separate AEDPA/*Chapman* analysis.

A. The Court Of Appeals Did Not Impermissibly Rely On Circuit Precedent, Social-Science Research, Or Dicta

The legal principles governing Mr. Davenport's habeas claim—and the court of appeals' decision—are clearly established by this Court's own holdings. In *Deck*, this Court held that "shackling is 'inherently prejudicial,'" that it "will often have negative effects" that "'cannot be shown from a trial transcript,'" and that "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, … [t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" 544 U.S. at 635 (second brackets in original). Thus, the clearly established law relevant to a Section 2254(d)(1) analysis in this case is that a shackling error invalidates a conviction unless

the State on direct review proves harmlessness beyond a reasonable doubt under *Chapman*.

Chapman, in turn, clearly establishes that the harmlessness of an error must be determined based on a review of the trial record considered by the jury. *See, e.g.*, *Neder* v. *United States*, 527 U.S. 1, 19 (1999) ("Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record."); *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983) ("we hold that *Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless"). The court of appeals applied these clearly established holdings to conclude that Mr. Davenport's due process rights were violated and that he suffered actual prejudice as a result.

The State faults the court of appeals for citing circuit precedent in determining whether Mr. Davenport established actual prejudice under *Brecht*, suggesting that it would have been improper to do so in an AEDPA/*Chapman* analysis. Pet. Br. 43-44. But the court of appeals relied on the governing legal principles from *Deck* as the clearly established precedent in this case. *See* Pet. App. 20a-27a; Pet. App. 109a ("as the majority opinion explicitly noted, the Supreme Court's shackling jurisprudence was the exclusive basis for its reasoning").

The mere citation of circuit precedent does not doom a decision under Section 2254(d)(1). The court of appeals did not rely on circuit precedents to extend Supreme Court precedent or turn "a general principle of Supreme Court jurisprudence into a specific legal rule," *Marshall* v. *Rodgers* 569 U.S. 58, 64 (2013). Rather, the court of appeals "look[ed] to circuit precedent to ascertain whether it ha[d] already held that the particular point in

issue is clearly established by Supreme Court precedent[.]" *Id.*; *see* Pet. App. 108a.

There is likewise nothing impermissible about a federal habeas court reviewing lower-court decisions to see how it or its sister courts have previously determined whether a state court's application of a Supreme Court holding is unreasonable. Doing so does not alter the framework of clearly established federal law that governs a habeas claim, but simply ensures consistency in the application of that clearly established law. "[T]he Supreme Court's shackling jurisprudence was the exclusive basis for [the court of appeals'] reasoning[.]" Pet. App. 109a.

The State also suggests that the court of appeals impermissibly relied on social-science studies to "discredit" the jurors' testimony (at 46-47)—disregarding that the state supreme court itself also held that excessive reliance on juror testimony was improper. But the court of appeals relied on this Court's own determination in *Holbrook*, 475 U.S. at 570, that "jurors will not necessarily be fully conscious of the effect" that inherently prejudicial, visible shackling "will have on their attitude toward the accused." Pet. App. 34a (quoting *Holbrook*, 475 U.S. at 570); *see also* Pet. App. 35a ("But it was the Supreme Court in *Holbrook* that stated the danger of relying on after-the-fact juror conclusions regarding 'inherently prejudicial' actions such as shackling because jurors may not be fully aware of how such effects 'their attitude toward the accused.'"). The social-science data simply confirmed *Holbrook*'s conclusion. Pet. App. 35a ("This scientific evidence merely provides further support for the Supreme Court's determination.").

B. The Court Of Appeals Did Not Ignore The State Court's Rationale

The State contends that the court of appeals ignored the state court's decision or failed to give it proper "leeway." Pet. Br. 30. But the court considered at length the only two justifications for a finding of harmlessness arguably offered by the state courts (and highlighted by the State in its brief opposing habeas relief): the juror testimony and the strength of the evidence of first-degree murder. Pet. App. 34a-38a (addressing testimony given by the jurors three years after trial that they still remember that Mr. Davenport was shackled during trial, leaving them with the impression that he was dangerous); Pet. App. 27a-33a (discussing the "evidence of guilt" and noting that "the only evidence of premeditation and deliberation the prosecution pointed to in its closing was the time that strangulation would have taken" and recognizing that "evidence of manual strangulation alone is not enough to prove premeditation").

Moreover, the State's insistence that the court of appeals should have deferred to the state intermediate court's rationale—that the juror testimony should be near-conclusive evidence that the shackling error was harmless—distorts the very concept of deference. That rationale was expressly rejected by the state supreme court. *See* Pet. App. 93a-94a (admonishing the state intermediate appellate court for failing to recognize that "the question must be not whether jurors actually articulated a consciousness of some prejudicial effect"). Had the court of appeals below attached great weight to the juror testimony, as the State urges, it would have contravened the state supreme court's decision—the very opposite of deference.

This is not a case in which the court of appeals found actual prejudice under *Brecht* by ignoring or giving short shrift to the rationale underlying the state-court harmlessness determination. Rather, the court of appeals considered the state court's reasoning—and all arguments raised by the State—at length.

C. The Court Of Appeals Did Not Rely On Evidence Outside The State-Court Record Or Arguments Not Previously Presented To The State Court

The court of appeals did not rely on evidence or arguments outside of the state-court record. Indeed, the State makes no argument otherwise. The State Amici try but fail to show that the court of appeals relied on new evidence and arguments.

First, the State Amici claim that Mr. Davenport argued self-defense to the state courts and did not argue until he sought habeas relief in federal court that "by 'implying …that court authorities consider[ed] him a danger,' shackling [Mr.] Davenport could have led the jury to conclude [Mr.] Davenport committed *premeditated* violent murder rather than an impulsive one." States Amicus Br. 14-15. This argument was not "new." From the start, including on direct review in state court, Mr. Davenport argued that the shackling was prejudicial and influenced the jury's consideration of his mens rea. *E.g.*, Davenport Br. 22, *Michigan* v. *Davenport*, No. 306868 (Mich. Ct. App. filed Mar. 2, 2012), Dkt. No. 12. Indeed, that was the only argument available to Mr. Davenport: the nature of the harmlessness inquiry requires the State to "prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the *verdict obtained*,'" *Deck*, 544 U.S. at 635 (citing *Chapman*, 386 U.S. at 24) (emphasis added), and the verdict

here was first-degree murder. Thus, Mr. Davenport necessarily focused on "the only disputed fact at trial," Pet. App. 32a—his state of mind at the time of the offense—and whether the prosecution could prove the shackling error was harmless beyond a reasonable doubt given the trial evidence on that issue.

Second, the State Amici fault the court of appeals for referencing the length of the jury deliberations. States Amicus Br. 8-9. The court cited the jury's six-hour deliberation in "further" demonstration of the closeness of the case. Pet. App. 32a. Contrary to the State Amici's suggestion, this Court has previously considered the length of jury deliberations in assessing prejudice and granting post-conviction relief, and such consideration therefore does not violate AEDPA. *See Parker* v. *Gladden*, 385 U.S. 363, 365 (1966). In any event, the court of appeals did not rely on the length of deliberations for its conclusions but used it only as "further demonstrat[ion]" of "[t]he closeness of the case." Pet. App. 32a.

Finally, the State Amici accuse the court of appeals of applying a presumption of prejudice. States Amicus Br. 12-13. As Judge Straunch rightly observed, "the majority opinion did not apply a 'presumption of prejudice,' … That language is not in the majority opinion." Pet. App. 107a. The court merely recognized, in accordance with this Court's precedents, that shackling is an "inherently prejudicial practice," *Holbrook*, 475 U.S. at 568, which is why shackling a defendant without adequate justification violates due process. Pet. App. 21a. The court then found that Mr. Davenport "is not entitled to habeas relief simply because he was unconstitutionally shackled," *id.*, and went on to assure itself that the requirements of AEDPA and *Brecht* were satisfied.

III. SEPARATE, FORMAL APPLICATION OF AEDPA CONFIRMS THE COURT OF APPEALS' DETERMINATION

Even if this Court were to determine that a separate, formal application of AEDPA/*Chapman* is warranted in this case, habeas relief is proper under Section 2254(d)(1) because the state-court harmlessness determination was both contrary to and an unreasonable application of clearly established federal law, as determined by this Court.[5]

A. The Michigan Supreme Court Decision Was Contrary To Clearly Established Federal Law As Determined By This Court

1. The Michigan Supreme Court decision was contrary to *Deck* and *Chapman*

The Michigan Supreme Court, which issued the last reasoned state-court decision in this case, did not apply *Chapman* in evaluating whether Mr. Davenport's unconstitutional shackling was harmless. The court held:

> While the Court of Appeals erroneously failed to consider defendant's claim in light of the United

---

[5] The State's conclusory suggestions (at 5, 47 n.4) that *Brecht* might not have been satisfied do not fairly raise this issue, which is outside the scope of the question presented. *See* S. Ct. R. 24.1(a).

Moreover, if this Court were to hold that a separate, formal application of AEDPA is required, a remand to the lower court may be warranted. Formal application of AEDPA/*Chapman* raises a number of legal issues not previously considered or resolved by the courts below, including whether the Michigan Supreme Court's order denying review constitutes an adjudication on the merits for purposes of Section 2254(d)(1) and, if not, whether a federal habeas court owes deference to an intermediate state-court decision when that court's rationale was explicitly rejected by the state supreme court in a discretionary denial of review.

> States Supreme Court decision in *Holbrook v Flynn*, 475 US 560, 570; 106 S Ct 1340; 89 L Ed 2d 525 (1986) ("the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play'"), the error was harmless under the facts of this case. Given the substantial evidence of guilt presented at trial, we cannot conclude that there was an acceptable risk of impermissible factors coming into play.

Pet. App. 93a-94a (citing reference omitted). Accordingly, instead of holding the State to its burden of proving harmlessness beyond a reasonable doubt under *Chapman*, the Michigan Supreme Court concluded, applying *Holbrook*, that Mr. Davenport's visible shackling was harmless because the court "c[ould not] conclude that there was an unacceptable risk of impermissible factors coming into play." Pet. App. 94a.

By imposing a burden on Mr. Davenport to establish "an unacceptable risk of impermissible factors coming into play" instead of holding the State to its burden to prove that the unconstitutional shackling was harmless beyond a reasonable doubt under *Chapman*, the Michigan Supreme Court "applie[d] a rule that contradicts the governing law" that was clearly established by this Court in *Chapman* and *Deck*. *See Williams*, 529 U.S. at 405. As the State concedes (at 37), *Holbrook* was not a harmless-error case at all. It articulated the "unacceptable risk" test not to identify when shackling may be excused as harmless on direct review, but to evaluate whether courtroom security measures are so inherently prejudicial as to constitute a constitutional violation in the first place, which would then be subject to harmless-

error review. *Holbrook*, 475 U.S. at 568. Courtroom practices that present "an unacceptable risk … of impermissible factors coming into play," such as shackling, are "so inherently prejudicial" as to deprive the defendant of his due process rights. *Id.* at 570.

Holbrook's test thus bore no relevance to Mr. Davenport's entitlement to relief on direct appeal because it was undisputed by the parties and clearly established under *Deck* that Mr. Davenport's visible shackling was a violation of his due process rights subject to harmless-error review. Yet the Michigan Supreme Court relied on *Holbrook*'s test to hold that Mr. Davenport's shackling was harmless. Pet. App. 94a.

Accordingly, even if this Court were to agree with the State that a federal habeas court cannot grant relief without formally applying both AEDPA/*Chapman* and *Brecht*, Mr. Davenport would still be entitled to habeas relief because the last reasoned decision of the state court contravened clearly established federal law by failing to apply *Chapman*'s harmlessness analysis. *See*, *e.g.*, *Williams*, 529 U.S. at 397.

The State suggests two contradictory theories to defend the Michigan Supreme Court's decision. *First*, the State argues that the court was "free to utilize" the *Holbrook* test because doing so did not contravene *Chapman*'s general standard. Pet. Br. 40. But, as discussed, *Holbrook* is not a variation on *Chapman*'s test for harmless error. Indeed, as the State concedes, "the Court [in *Holbrook*] did not employ a harmless-error analysis," but "limited its discussion to whether there was an underlying constitutional violation" at all. Pet. Br. 37. Even if state courts have leeway under Section 2254(d)(1) in applying general standards established by this Court, this leeway does not give a state court license

to substitute a completely different standard. Doing so would allow the "unreasonable application" clause to effectively eliminate the "contrary to" clause, in contravention of AEDPA's plain text.

Second, the State asks this Court to assume that the Michigan Supreme Court did, implicitly, apply *Chapman* because, in remanding Mr. Davenport's case back to the trial court for an evidentiary hearing, the Michigan Supreme Court articulated the correct *Chapman* standard. Pet. Br. 39-40. The state cites no authority (and Mr. Davenport is aware of none) to support its position that a court's articulation of a standard more than two years earlier can satisfy the state court's obligation to actually apply that standard in a later appeal.

In any event, an assumption that the state court applied *Chapman* would be appropriate only if the Michigan Supreme Court's decision were "'unaccompanied by an explanation.'" *Harrington*, 562 U.S. at 98. Where the state court does supply an explanation, the federal habeas court "reviews the specific reasons given by the state court." *Wilson*, 138 S. Ct. at 1192. And here, the Michigan Supreme Court explicitly found that Mr. Davenport's shackling was harmless under *Holbrook*'s standard—a standard that contradicts clearly established law as determined by this Court in *Deck* and *Chapman*.[6]

---

[6] Even if this Court were to accept the State's view that the Michigan Supreme Court somehow applied *Chapman* through the *Holbrook* standard for determining whether there was a constitutional trial violation, its application was unreasonable for the same reasons discussed below, *infra* pp. 45-46, relating to the Michigan Appeals Court opinion.

2. The Michigan Supreme Court issued the last reasoned decision

The State asks this Court to ignore the Michigan Supreme Court order altogether and adjudge the Michigan intermediate court the last reasoned decision. Pet. Br. 35. The sole basis for this argument is that the Michigan Supreme Court's order denied discretionary review rather than granting review and rejecting Mr. Davenport's claim on the merits. Pet. Br. 35; *see Shinn* v. *Kayer*, 141 S. Ct. 517, 524 n.1 (2020) (per curiam).

The State took the opposite position below and explained precisely why the Michigan Supreme Court should be considered the last reasoned decision:

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

Response to Habeas Pet. 35-37, No. 14-1012 (W.D. Mich. May 27, 2015), Dkt. 7.

The State's district court position was correct. A denial of an application for leave to appeal may be an adjudication on the merits for purposes of habeas review. *See Shinn*, 141 S. Ct. at 524 n.1 (considering state-court denial of review and noting that "[u]nreasoned dispositions by appellate courts sometimes qualify as adjudications on the merits"); *Werth* v. *Bell*, 692 F.3d 486, 493-494 (6th Cir. 2012) (holding that "AEDPA deference applies to Michigan orders like the orders in this case" where "the Michigan appellate courts specified that they denied [defendant's] application for reasons involving the substance of his claims").

The caselaw cited by the State (at 35), is not to the contrary. In *Greene* v. *Fisher*, 565 U.S. 34 (2011), and *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991), state appellate courts summarily denied review without reasoned explanation. Here, unlike in *Greene* or *Ylst*, the Michigan Supreme Court did not deny review on boilerplate grounds or without explanation, but explicitly considered and rejected the lower court's analysis and reached its own independent conclusion on the issue of harmlessness. Pet. App. 93a-94a.

In that respect, the Michigan Supreme Court's order in this case stands out among that court's orders denying leave to appeal—the vast majority of which are disposed of by summary order. For example, in 2013—the year of the decision in this case—the Michigan Supreme Court denied leave to appeal in 1,217 cases because "it was not persuaded that the question(s) presented should be reviewed by this Court." A review of each of these 1,217 decisions reveals that in all but eight, the Michigan Supreme Court denied leave to appeal in a single-line, boilerplate summary order. As one of only eight orders that year that provided further analysis, the Michigan Supreme Court's denial of review here, with explanation,

was not a run-of-the-mill denial of review but reflected the deliberate reasoning and consideration that is indicative of an adjudication on the merits. *See Wilson*, 138 S. Ct. at 1192.

B. The Michigan Court Of Appeals Decision Was Contrary To And Involved An Unreasonable Application Of Federal Law As Established By This Court

Even if the opinion of the Michigan Court of Appeals were considered the last reasoned state-court decision, it was also "contrary to, or involved an unreasonable application of, clearly established federal law," as determined by this Court. 28 U.S.C. § 2254(d)(1).

The Michigan Court of Appeals impermissibly based its decision on the jurors' self-assessments that they were not negatively influenced by seeing Mr. Davenport in shackles. Pet. App. 97a-100a. That reliance on the jurors' subjective testimony was contrary to federal law clearly established in *Holbrook* and *Deck*. In *Holbrook*, this Court specifically admonished that "little stock need be placed in jurors' claims" that they were not prejudiced. 475 U.S. at 570. In doing so, the Court acknowledged the danger of implicit and undetectable bias engendered by errors like unconstitutional shackling, noting that even the jurors themselves may not realize the effect of such errors on their own deliberation. *See id.* ("Even 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."). And, in *Deck*, the Court confirmed that shackling in view of the jury is a violation of due process rights for the very reason that it "undermines the presumption of innocence," "almost inevitably affects adversely the jury's perception of the character of the defendant," and

"inevitably undermines the jury's ability to weigh accurately all relevant considerations." 544 U.S. at 630, 633. In other words, baked into the very reason that shackling is unconstitutional in the first place is the recognition that it affects jurors in an unconscious manner that evades detection—even by the jurors themselves.

Indeed, as the State concedes, both the Michigan Supreme Court and the Sixth Circuit recognized the Michigan Court of Appeals' reliance on juror testimony to be improper under *Holbrook*. Pet. App. 93a-94a; *see* Pet. Br. 9. The State's continued insistence to the contrary ignores *Holbrook* and disregards the state supreme court's own decision, undermining the very interests of comity and federalism that are central to both AEDPA/*Chapman* and *Brecht*.

The State similarly argues (again in contradiction to the Michigan Supreme Court's own analysis), that *Holbrook* "did not foreclose the approach taken here by the" Michigan Court of Appeals because the juror testimony in *Holbrook* occurred before trial rather than after trial, and because the Court's admonition regarding jurors' testimony in *Holbrook* does not apply to determining whether the practice was harmless error. Pet. Br. 36-38. Those arguments contradict *Holbrook*, which found generally that "[i]f a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process"—which visible shackling indisputably does—then "little stock need be placed in jurors' claims to the contrary" because "jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." 475 U.S. at 568, 570. This observation had nothing to do with the timing of the juror testimony relative to trial but was a general statement about "inherently prejudicial" practices. Moreover, if a practice is so

inherently prejudicial that a juror will not be fully conscious of its effects, and therefore cannot be expected to articulate those effects for purposes of determining whether a trial practice is unconstitutional, it follows that such juror also could not be expected to articulate those effects for purposes of determining whether a constitutional violation was harmless.

Nor was this Court's statement about juror testimony mere dicta that can be ignored, as the State suggests. Pet. Br. 38. It is part and parcel of *Holbrook*'s holding that a trial judge should, on a case-by-case basis, evaluate whether a courtroom practice increases the risk of prejudice by asking whether "an unacceptable risk is presented of impermissible factors coming into play," not whether the jurors actually perceive a prejudicial effect. 475 U.S. at 570.

The Michigan Court of Appeals decision also involved an unreasonable application of federal law clearly established in *Deck* and *Chapman*. Reliance on juror testimony was an unreasonable application of *Deck* and *Chapman* for the same reasons just discussed. Moreover, the Michigan Court of Appeal failed to consider the constitutional violation in light of all the evidence presented at trial, as *Chapman* requires. *See, e.g.*, *Hasting*, 461 U.S. at 509 n.7. The court addressed the trial evidence only in a cursory two-sentence footnote that did not even consider whether the evidence supported a finding of harmlessness beyond a reasonable doubt. Pet. App. 99a. And it unreasonably focused on a false choice between first-degree murder and self-defense, ignoring that the jury could have found that Mr. Davenport lacked the premeditation and deliberation necessary for a first-degree murder conviction, even while rejecting his claim of self-defense. Even if the evidence at trial "belied" Mr. Davenport's self-defense theory, Pet. App.

99a n.2, this does not necessarily mean that there was overwhelming evidence of premeditation and deliberation. As the court of appeals below concluded, "[i]n this case, the amount of time the strangling must have taken is the *only* evidence of premeditation and deliberation the prosecution pointed to in its closing argument[, which] is not definitive proof of premeditation or deliberation." Pet. App. 30a (citations omitted) (emphasis added). Considering Mr. Davenport's visible and unjustified shackling in light of all the trial evidence and the State's heavy burden under *Chapman*, it was unreasonable to conclude that the State proved the due process violation harmless beyond a reasonable doubt.

CONCLUSION

The court of appeals' decision should be affirmed.

Respectfully submitted.

CATHERINE M.A. CARROLL
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

TASHA J. BAHAL
Counsel of Record
REUVEN DASHEVSKY
GARY B. HOWELL-WALTON
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
tasha.bahal@wilmerhale.com

AUGUST 2021