No. _____

In the Supreme Court of the United States

Armando B. Cortinas, Jr.,

Petitioner,

v.

Jo Gentry, et al.,

Respondents.

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

Petition for a writ of certiorari

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QUESTION PRESENTED

Mr. Cortinas is a state prisoner litigating a federal habeas petition under 28 U.S.C. §2254. At his murder trial, the State presented a premeditation and deliberation theory, along with a felony murder theory. The felony murder theory was legally erroneous and produced federal constitutional error, as everyone agrees here.

The only issue in these proceedings is whether the error was harmless. The state supreme court concluded on direct appeal the error was harmless because the evidence of premeditation and deliberation was supposedly overwhelming. That holding was unreasonable under 28 U.S.C. §2254(d)(1) & (2). After the crime, Mr. Cortinas gave a full confession to the police with many damaging details, but he insisted the murder wasn't planned; he merely lashed out. Any fairminded jurist would agree the confession provided sufficient evidence for a rational juror to find reasonable doubt about premeditation and deliberation. See *Neder* v. *United States*, 527 U.S. 1, 19 (1999). Mr. Cortinas also argued the constitutional error was harmful under federal collateral review standards. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993). The Ninth Circuit below erroneously rejected these arguments.

This term, the Court is considering *Brown* v. *Davenport*, No. 20-826, which involves how Section 2254(d) and *Brecht* apply when a state court, as here, finds a federal constitutional error to be harmless. The question presented is:

Should the Court hold this petition pending disposition of *Brown* v. *Davenport*, No. 20-826, which will likely address how 28 U.S.C. §2254(d) and *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), apply when a state court finds a federal constitutional error to be harmless?

List of Parties

Armando B. Cortinas, Jr., is the petitioner. Jo Gentry (the former warden of Southern Desert Correctional Center) and the Attorney General of the State of Nevada are the respondents. No party is a corporate entity.

LIST OF PRIOR PROCEEDINGS

This is a federal habeas case challenging a state court judgment of conviction. The underlying trial took place in *State* v. *Cortinas*, Case No. C192895 (Nev. Eighth Jud. Dist. Ct.) (judgment of conviction issued July 27, 2006). The direct appeal took place in *Cortinas* v. *Nevada*, Case No. 47905 (Nev. Sup. Ct.) (opinion issued Oct. 30, 2008).

Initial state collateral review proceedings took place in *Cortinas* v. *Nevada*, Case No. C192895 (Nev. Eighth Jud. Dist. Ct.) (order issued July 14, 2010).

These federal habeas proceedings began in *Cortinas* v. *Gentry*, Case No. 3:10-cv-00439-LRH-WGC (D. Nev.). The district court consolidated this case with another duplicative federal habeas proceeding, *Cortinas* v. *Nevens*, Case No. 2:14-cv-01549-RFB-CWH (D. Nev.). There are no other related federal proceedings besides these consolidated proceedings in the district court and the appellate proceedings in the Ninth Circuit below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Armando B. Cortinas, Jr., respectfully requests the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit issued an unpublished memorandum decision affirming the denial of Mr. Cortinas's petition for a writ of habeas corpus. Pet. App. 28-32. The federal district court's order is likewise unpublished. Pet. App. 33-63.

JURISDICTION

Mr. Cortinas sought habeas relief under 28 U.S.C. §2254 to challenge his state court judgment of conviction (Pet. App. 64-65). The Ninth Circuit affirmed the petition's denial on June 22, 2021. Pet. App. 28-32. It denied a timely rehearing petition on August 2, 2021. Pet. App. 1. This Court has jurisdiction under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254(d) provides as follows: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

INTRODUCTION

This petition raises a legal issue this Court will address this term in *Brown* v. *Davenport*, No. 20-826: if a state court issues a merits decision finding federal constitutional error but holding the error to be harmless, how should a federal court review that decision under 28 U.S.C. §2254(d) and the federal common law standard from *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993)?

In this case, Mr. Cortinas impulsively strangled a prostitute to death and took some of her belongings afterward. Before the police even determined the victim's identity, Mr. Cortinas gave the authorities a full and detailed confession. Among other things, he estimated the murder took almost an hour and proceeded in fits and starts. He also admitted to stealing some of the victim's belongings after her death. But he repeatedly insisted the murder was an unplanned act; he just lashed out.

The State prosecuted Mr. Cortinas for first-degree murder. It alleged two theories of liability: premeditation and deliberation, along with felony murder. Under the felony murder theory, the State accused Mr. Cortinas of committing robbery by stealing the victim's belongings after her death; the State sought to use the alleged robbery as a predicate felony for felony murder. The defense argued this felony murder theory was legally invalid. Even in the State's view, Mr. Cortinas's intent to rob postdated the murder; according to the defense, a predicate felony qualifies for the felony murder rule only if the felonious intent predated the murder. The trial court rejected this argument and allowed the State to present the felony murder theory.

The jury convicted Mr. Cortinas and returned a general verdict that doesn't disclose which theory the jury relied upon. The jury didn't even have to be unanimous about which theory it believed applied.

On appeal, the Nevada Supreme Court agreed the felony murder theory was legally invalid and indicated the erroneous theory amounted to federal constitutional error. Nonetheless, it concluded the error was harmless under *Chapman* v. *California*, 386 U.S. 18 (1967), because the evidence of premeditation and deliberation was supposedly overwhelming.

Mr. Cortinas pursued federal habeas relief on this claim. He argued the error was harmful under federal collateral review standards. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993). He also argued the state appellate court's decision unreasonably applied *Chapman* under 28 U.S.C. §2254(d). The Ninth Circuit disagreed.

This Court should grant certiorari. The Court is currently considering *Brown* v. *Davenport*, No. 20-826. *Davenport* raises a similar issue regarding how federal courts should apply Section 2254(d) and *Brecht* when a state appellate court finds constitutional error but concludes the error was harmless. The Court's decision in *Davenport* will likely provide direction to lower courts about how to perform this analysis. Here, the Ninth Circuit's decision erroneously applied Section 2254(d) and *Brecht*, and it would likely benefit from this Court's guidance in *Davenport*. The Court should hold this case pending resolution of *Davenport* and then grant the petition, vacate the Ninth Circuit's decision, and remand for further consideration.

STATEMENT

1. The State prosecuted Mr. Cortinas for strangling and killing a prostitute. The primary evidence at trial was Mr. Cortinas's confession. One night shortly after the murder, Mr. Cortinas became suicidal. Worried about his safety, his family called the police, who responded with a plan to involuntarily commit him. When they arrived, Mr. Cortinas gave them a full and unprompted confession. His statement featured many harmful details the State eventually used against him at trial, including (1) his claim that the murder took almost an hour and proceeded in fits and starts, and (2) his admission that he stole some of the victim's belongings after her death. The prosecution believes Mr. Cortinas's confession was truthful and accurate in nearly every material respect. However, Mr. Cortinas repeatedly told the police the killing was a rash impulse, for example stating the murder "was not planned," "was not, you know, premediated," "I don't think it through," "I lash out," and "I do things that, I don't think about it."

2. The State sought a first-degree murder conviction and alleged a premeditation and deliberation theory, along with a felony murder theory. Under the premeditation and deliberation theory, the State insisted the killing wasn't a rash impulse but instead the product of a cool, dispassionate weighing process, in which Mr. Cortinas thoughtfully considered the pros and cons of committing murder and the consequences of his actions. See *Byford* v. *State*, 116 Nev. 215, 233-37, 994 P.2d 700, 712-15 (2000). Under the felony murder theory, the State argued Mr. Cortinas

committed robbery by stealing the victim's belongings after her death, and it claimed the robbery was an appropriate predicate felony for the felony murder rule.

Before and during trial, the defense challenged the felony murder theory as legally incorrect. It observed the State was alleging a so-called afterthought robbery—a robbery where the intent to steal postdates the use of force—because Mr. Cortinas decided to steal the victim's belongings after the murder. The defense maintained an afterthought robbery cannot support a felony murder conviction because felony murder applies only when the intent to commit the relevant felony predates the killing. The trial court disagreed and allowed the State to present a felony murder theory based on an afterthought robbery.

At trial, the defense conceded Mr. Cortinas was guilty of second-degree murder. It argued his acts didn't qualify for first-degree murder because he didn't premediate or deliberate over the killing. As the defense noted, Mr. Cortinas gave the police a full, detailed confession, but he earnestly insisted he'd just lashed out without thinking about it. According to the defense, those statements were likely true (Mr. Cortinas had no reason to lie and was truthful about essentially everything else), and they supported an inference that the killing was a mere rash impulse. The prosecution disagreed. It argued primarily that Mr. Cortinas described a lengthy, protracted killing process. According to the prosecution, if the killing was a lengthy process, that would support an inference of premeditation and deliberation. (It also described acts Mr. Cortinas said he performed while disposing of the body hours after the victim's death, but those acts had little relevance to his state of mind during the killing.)

The prosecution also argued Mr. Cortinas was guilty of first-degree murder under a felony murder theory because he committed robbery by killing the victim and then stealing her belongings after the fact. The defense conceded Mr. Cortinas killed the victim and didn't dispute he stole items from her afterward, so the defense had no colorable way to contest the factual basis for the felony murder theory.

The jury convicted Mr. Cortinas of first-degree murder. The general verdict form doesn't disclose whether the jury relied on the premeditation and deliberation theory, or the felony murder theory. The jurors didn't have to unanimously agree on which theory applied; they could convict Mr. Cortinas of first-degree murder so long as they all agreed at least one theory applied, even if they disagreed about which theory applied.

3. Mr. Cortinas appealed and alleged the felony murder theory was legally invalid, producing federal constitutional error. See *Yates* v. *United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds by Burks* v. *United States*, 437 U.S. 1 (1978); see also, e.g., *Skilling* v. *United States*, 561 U.S. 358, 414 (2010) (summarizing *Yates* in a parenthetical in the following manner: "constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory"); *Hedgpeth* v. *Pulido*, 555 U.S. 57, 60 (2008) (per curiam); *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931).

The Nevada Supreme Court agreed on appeal. See *Cortinas* v. *State*, 124 Nev. 1013, 1020-21 195 P.3d 315, 320 (2008). Nonetheless, the court held the error was harmless beyond a reasonable doubt. In the court's view, there was overwhelming

evidence of premeditation and deliberation because Mr. Cortinas indisputably killed the victim, and his incriminating statements about the way the killing proceeded (and his postmortem acts) provided "legitimate circumstances from which to infer" premeditation and deliberation. 124 Nev. at 1029, 195 P.3d at 326.

4. Mr. Cortinas pursued federal habeas relief and raised this same constitutional error. He argued the error was harmful under federal collateral review standards, and the state appellate court's decision unreasonably concluded the error was harmless beyond a reasonable doubt. As he explained, while the felony murder theory was legally invalid, the defense didn't contest any of the facts relevant to that theory. Thus, any reasonable juror would've had to convict Mr. Cortinas of first-degree murder under the felony murder theory. On the other hand, the defense presented reasonable arguments about premeditation and deliberation that a reasonable juror could've credited—namely that while Mr. Cortinas provided a full, unvarnished confession to the killing, he nevertheless insisted the murder wasn't planned but rather was the product of him merely lashing out without thinking about it. It was therefore almost certain the jury relied on the factually uncontested felony murder theory, not the reasonably disputed premeditation and deliberation theory.

The district court denied this claim but issued a certificate of appealability. As it recognized, the legally incorrect felony murder theory was "irrefutable" as a factual matter: Mr. Cortinas "admitted to killing the victim and to taking her property after the murder," which were in essence the only two facts the prosecution needed to prove

to establish this invalid theory. Pet. App. 62. On the other hand, the defense had at least "contested" the premeditation and deliberation theory. *Ibid.*

Mr. Cortinas appealed, and the Ninth Circuit affirmed. It rejected his argument that the error was harmful under federal collateral review standards. Pet. App. 30-31. It also concluded the Nevada Supreme Court's decision was reasonable within the meaning of Section 2254(d) because "[t]he evidence for premeditated murder was overwhelming." Pet. App. 32.

Mr. Cortinas sought rehearing and in part asked the court to defer final resolution of the appeal until after this Court resolved *Davenport*. Pet. App. 25-26. The court denied rehearing.

REASONS FOR GRANTING THE PETITION

This petition raises the question whether the lower court properly applied the federal collateral review harmful error standard from *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), and Section 2254(d) in this case, where it was undisputed the invalid felony murder theory created federal constitutional error. The Court is currently considering *Brown* v. *Davenport*, No. 20-826, which involves the interplay between *Brecht* and Section 2254(d). Its decision will likely provide further guidance to lower courts on how to perform these analyses. The Court should therefore hold the instant petition pending its disposition of *Davenport* and then grant the petition, vacate the lower court's judgment, and remand for further consideration.

I. The Court is currently considering a related issue in *Davenport*.

This term, the Court has received briefing and argument in *Brown* v. *Davenport*, No. 20-826. The question presented is as follows: "May a federal habeas court grant relief based *solely* on its conclusion that the *Brecht* standard is satisfied, as the Sixth Circuit held below, or must it also find that the state court's *Chapman* application was unreasonable under §2254(d)(1)?" The Court's resolution of this case will likely provide further guidance to lower courts about how to analyze claims, like Mr. Cortinas's, where a state court found federal constitutional error but concluded the error was harmless.

Different harmless error standards apply at different stages of the criminal justice process. If a court on direct appeal concludes a constitutional trial error occurred, the error generally requires reversal unless the prosecution proves the error was "harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). This is a relatively defendant-friendly test. On federal collateral review, however, courts apply a heightened standard: a constitutional trial error doesn't require relief unless it had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993) (cleaned up). This is a much more difficult standard than *Chapman* for petitioners to meet.

Separately, in federal habeas proceedings involving state inmates, if the state court has already resolved a claim for relief adversely to a petitioner, then the petitioner must demonstrate the state court unreasonably applied the relevant Supreme Court precedent (or unreasonably determined the facts). See 28 U.S.C. §2254(d).

The Court has periodically considered how Section 2254(d) interacts with the heightened *Brecht* harmless error inquiry, most recently in *Davis* v. *Ayala*, 576 U.S. 257 (2015). There, the Court explained that as a formal matter, if the state court concluded an error was harmless under *Chapman*, a federal habeas petitioner must demonstrate the state court decision isn't entitled to deference under Section 2254(d). *Id.* at 268. But as a matter of function, "a federal habeas court need not formally apply both *Brecht* and AEDPA/*Chapman*," because proving harmful error under *Brecht* necessarily proves the state court unreasonably applied *Chapman*. *Ibid.* (cleaned up). After all, the *Brecht* harmless error standard is substantially more difficult for petitioners to meet than the *Chapman* harmless error standard. Even though Section 2254(d) enacts a formidable obstacle to relief, the combination of Section 2254(d) applied to the defendant-friendly *Chapman* standard nonetheless results in an easier bar for petitioners to clear than the daunting *Brecht* standard.

The Court is currently revisiting this issue in *Davenport* and will likely give additional guidance to lower courts about how to analyze and resolve federal habeas claims when the state court previously found harmless error. In the *Davenport* proceedings in the Sixth Circuit, multiple judges invited the Court to provide further clarity. Then-Judge (now Chief Judge) Sutton suggested "there is room for clarification by the Supreme Court" and remarked, "I suspect every federal judge in the country would welcome guidance in the area." *Davenport* v. *MacLaren*, 975 F.3d 537, 543 (6th Cir. 2020) (Sutton, J., concurring in the denial of rehearing en banc). Similarly, Judge Thapar lamented "the deep confusion within and among the circuits." *Id.* at

553 (Thapar, J., dissenting from the denial of rehearing en banc). And Judge Readler in his panel dissent expressed his "hope that some court, either our en banc court or beyond, will clarify the standard we apply in this frequent setting." *Davenport* v. *MacLaren*, 964 F.3d 448, 477 (6th Cir. 2020) (Readler, J., dissenting). If the Court takes up these calls, then its opinion in *Davenport* may ultimately assist lower courts in applying *Brecht* and Section 2254(d) to cases where a petitioner raises a constitutional error that the state court found harmless on direct appeal.

II. The Court should hold this petition pending *Davenport*.

The Ninth Circuit's decision in this case wrongly applied both *Brecht* and Section 2254(d). Because the *Davenport* decision may provide additional instructions to lower courts about how to perform these analyses, the Court should hold this petition until it resolves *Davenport*, then grant, vacate, and remand.

A. The lower court's decision was wrong.

In its erroneous decision below, the Ninth Circuit improperly applied both *Brecht* and Section 2254(d).

The *Brecht* standard instructs courts to consider whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). This analysis focuses on "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos*, 328 U.S. at 764. Its "function" isn't "to determine guilt or innocence." *Id.* at 763. "Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out."

Ibid. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.* at 765. Put simply, it's not a sufficiency test: courts shouldn't merely ask whether the prosecution could've secured a conviction absent the error. Rather, the question is "whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Ibid.* If the record is in equipoise on the question, the court should rule for the petitioner. See *O'Neal* v. *McAninch*, 513 U.S. 432, 435 (1995).

In cases where the prosecution pursued a legally invalid theory of liability at trial along with a valid theory, this Court's precedent therefore instructs courts *not* to consider whether there was sufficient evidence to convict on the valid theory, and *not* to merely "speculate upon probable reconviction" if the prosecution proceeded only on the valid theory. *Kotteakos*, 328 U.S. at 763. Rather, the issue is whether "the error itself had substantial influence" at the petitioner's actual trial. *Id.* at 765. Said differently, "the relevant question is not simply whether we can be reasonably certain that the jury *could* have convicted [the petitioner] based on the valid theory . . . but whether we can be reasonably certain that the jury *did* convict him based on the valid . . . theory." *Riley* v. *McDaniel*, 786 F.3d 719, 726 (9th Cir. 2015) (cleaned up).

In this case, Mr. Cortinas demonstrated harmful error under *Brecht*. As he explained, the parties strenuously contested the facts underlying the premeditation and deliberation theory. According to the State, Mr. Cortinas's description in his confession of the time it took to kill the victim and the way the killing occurred both supported an inference of premeditation and deliberation. According to the defense,

Mr. Cortinas made statements in the very same confession that, if taken to be true, would disprove premeditation and deliberation. The defense argued the jury should credit those statements because the State believed Mr. Cortinas's confession to be complete and accurate in nearly every other material respect. Both the prosecution and the defense's arguments were reasonable, and a rational juror could've agreed with either party's position. But the felony murder theory, while legally erroneous, was factually uncontested: the defense expressly conceded Mr. Cortinas killed the victim, and there was no dispute he stole items from her afterwards, which were the two fundamental facts the prosecution had to prove under this theory. Faced with these two theories, one reasonably disputed, the other undisputed, a rational juror would've taken the path of least resistance and voted to convict based on the undisputed felony murder theory. Thus, this invalid theory of liability produced harmful constitutional error under *Brecht* because the error likely had substantial influence on the jury's deliberations.

The lower court's decision in this case is unpersuasive. Its analysis regarding *Brecht* rests on only one sentence, where it stated the "ultimate inquiry" is whether "the jury would have convicted if properly instructed." Pet. App. 31. But this Court forbids lower courts from merely "speculat[ing] upon probable reconviction" (*Kotteakos*, 328 U.S. at 763), which is exactly what the lower court did here. Instead, the court should've asked whether the error had substantial influence *in this case*. It did, because it's almost certain the jury in this case voted to convict based on the legally

erroneous but factually undisputed felony murder theory, not the reasonably disputed premeditation and deliberation theory.

Mr. Cortinas also demonstrated the state appellate court's decision wasn't entitled to deference under Section 2254(d). Because Mr. Cortinas proved harmful error under *Brecht*, he necessarily established the state appellate court unreasonably applied *Chapman* on direct appeal. *Davis*, 576 U.S. at 268. That in and of itself should end the Section 2254(d) inquiry.

Even applying a more searching analysis, the state appellate court's decision is sufficiently flawed to allow federal habeas relief. Among other things, the state court unreasonably applied both *Chapman* and this Court's subsequent decision in *Neder* v. *United States*, 527 U.S. 1 (1999). In *Neder*, the Court discussed *Chapman* in a case where the trial court failed to instruct the jury to resolve a specific element. If "the defendant contested the omitted element and raised evidence sufficient to support a . . . finding" in the defendant's favor, a court "should not find the [instructional] error harmless." 527 U.S. at 19.

There's only one "fairminded" way to apply *Chapman* and *Neder* in this case. *Harrington* v. *Richter*, 562 U.S. 86, 102 (2011). Mr. Cortinas "contested" the premeditation and deliberation theory "and raised evidence sufficient" to allow a rational juror to reject that theory. *Neder*, 527 U.S. at 19. The primary evidence in this case was Mr. Cortinas's confession; some of his statements supported an inference of premeditation and deliberation, as the State argued; some of his statements supported an inference that he acted out of a rash, unconsidered impulse, as the defense argued;

both positions were reasonable; the confession therefore provided "evidence sufficient" for the jury to find reasonable doubt about premeditation and deliberation; so the state appellate court "should not" have found the invalid felony murder theory to be "harmless." *Ibid.* The state appellate court nonetheless ignored this law, so its decision fails to qualify for deference.

In its opinion, the Nevada Supreme Court asserted there was overwhelming evidence of guilt, but almost all the evidence it surveyed showed only that Mr. Cortinas killed the victim (a fact not in dispute)—not that he premeditated and deliberated over the murder. See *Cortinas* v. *State*, 124 Nev. 1013, 1029, 195 P.3d 315, 326 (2008). When it came to premeditation and deliberation, the court focused on Mr. Cortinas's confession and his admissions about how the killing took place. *Ibid.* But the court never wrestled with the core of Mr. Cortinas's argument—that his confession included evidence that reasonably supported *both* the prosecution and the defense's positions. The court's decision is therefore an unreasonable application of *Chapman* and *Neder*.

The lower court's decision in this case suffers from the same error. Like the state court, the lower court asserted "[t]he evidence for premediated murder was overwhelming." Pet. App. 32. Like the state court, the lower court focused on incriminating details from Mr. Cortinas's confession. Like the state court, the lower court failed to mention the crux of Mr. Cortinas's position—his confession included statements both helpful *and* hurtful to the defense, so the confession gave both the prosecution *and* the defense reasonable arguments about premeditation and deliberation.

Because the lower court incorrectly applied both *Brecht* and Section 2254(d), its decision was erroneous.

B. The Court's decision in *Davenport* will likely provide additional guidance.

The Court should hold this case and remand it to the lower court after its decision in *Davenport* because the *Davenport* opinion will likely give lower courts further instruction about how to apply *Brecht* and Section 2254(d) when a state court found a constitutional error harmless on direct appeal. Multiple judges in the Sixth Circuit in *Davenport* asked the Court to provide additional guidance on this precise topic. If the Court accepts the invitation, then its opinion will presumably explain the standards lower courts should follow when they conduct this analysis. Here, the lower court erred when it applied both *Brecht* and Section 2254(d), and the Court's decision in *Davenport* may further illustrate the lower court's error. The Court should therefore give the Ninth Circuit an opportunity to reconsider this case once it resolves *Davenport*. See, e.g., *Lawrence* v. *Chater*, 516 U.S. 163, 166-68 (1996) (endorsing the grant, vacate, and remand procedure).

CONCLUSION

The Court should hold this petition pending its decision in *Davenport*, then grant the petition, vacate the lower court's decision, and remand for further consideration in light of *Davenport*.

Dated October 28, 2021.

Respectfully submitted,

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/s/ Jeremy C. Baron
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