NO. ____________

IN THE SUPREME COURT OF THE UNITED STATES

MANUEL SHEARD,

Petitioner,

v.

PAUL KLEE,

Respondent.

On Petition for Writ of Certiorari to the
Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Melissa M. Salinas
Counsel of Record
University of Michigan Law School
Federal Appellate Litigation Clinic
363 Legal Research Building
801 Monroe Street
Ann Arbor, MI 48109-1215
(734) 763-4319

Pro Bono Counsel for Petitioner

QUESTIONS PRESENTED

In this § 2254 habeas case, the state appellate court found pervasive prosecutorial misconduct and that Petitioner's defense counsel was deficient. But the state court nonetheless found these errors did not affect the verdict, without applying *Chapman v. California*'s "harmless beyond a reasonable doubt" standard.

The Questions Presented are:

i. What is the appropriate harmless error analysis the federal court sitting in habeas should apply?

ii. Does the analysis require additional deference to the state court under *Harrington v. Richter*, even when the state court failed to apply *Chapman*?

iii. Whether, under *Brecht v. Abrahamson*, a court must assess whether a constitutional error, "combined with a pattern of prosecutorial misconduct, . . . so infect[ed] the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict."

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Appendix iii

Table of Authorities iv

References to Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 3

Reasons for Granting the Writ 7

I. The federal circuits are irreconcilably split as to how AEDPA applies when a state court finds constitutional errors in a criminal trial, but nonetheless concludes the errors are harmless 7

A. The federal circuits have adopted three conflicting approaches as to whether a federal court must review whether a state court reasonably applied *Chapman* 8

B. The Sixth Circuit's position that a state court's harmless error determination should receive deference under *Harrington*, even if the state court failed to apply *Chapman*, is logically untenable and diverges from other circuits 12

C. This case falls squarely within *Brecht*'s prosecutorial misconduct safety valve 17

II. This case presents an excellent vehicle to resolve the harmless error issue 20

Conclusion 21

APPENDIX

Sheard v. Klee, 692 F. App'x 780
(6th Cir. 2017) .... App. 1

Sheard v. Klee, No. 13–11681, 2015 WL 3634104
(E.D. Mich. June 9, 2015) .... App. 19

People v. Sheard, No. 299084, 2011 WL 4952329
(Mich. Ct. App. Oct. 18, 2011) .... App. 34

People v. Sheard, No. 144228, 491 Mich. 909, 810 N.W.2d 576 (Mem)
(Mich. 2012) .... App. 42

Order Denying Rehearing *en banc*, No. 15–1813,
Sheard v. Klee, (6th Cir. Sept. 20, 2017) .... App. 43

Order Granting Motion for *in forma pauperis* and
Appointment of Appellate Counsel, No. 15–1813,
Sheard v. Klee, (6th Cir. Jan. 25, 2016) .... App. 45

Letter Appointing Appellate Counsel
Under the Criminal Justice Act, 18 U.S.C. § 3006A, No. 15–1813,
Sheard v. Klee, (6th Cir. July 20, 2016) .... App. 49

TABLE OF AUTHORITIES

Cases

Bauberger v. Haynes,
632 F.3d 100 (4th Cir. 2011) 9

Bond v. Beard,
539 F.3d 256 (3d Cir. 2008) 9

Brecht v. Abrahamson,
507 U.S. 619 (1993) .... *passim*

Burgess v. Dretke,
350 F.3d 461 (5th Cir. 2003) 18

Chapman v. California,
386 U.S. 18 (1967) 7

Connolly v. Roden,
752 F.3d 505 (1st Cir. 2014) 11

Dansberry v. Pfister,
801 F.3d 863 (7th Cir. 2015) 10

Davis v. Ayala,
135 S. Ct. 2187 (2015) 8

Deck v. Jenkins,
814 F.3d 954 (9th Cir. 2014) 9, 13, 15, 17

Fry v. Pliler,
551 U.S. 112 (2007) 8, 12, 13

Gongora v. Thaler,
710 F.3d 267 (5th Cir. 2013) (per curiam) 10-11, 13, 17

Greer v. Miller,
483 U.S. 756 (1987) 17

Harrington v. Richter,
562 U.S. 86 (2011) .... *passim*

Harris v. Stovall,
212 F.3d 940 (6th Cir. 2000) 19

Hassine v. Zimmerman,
160 F.3d 941 (3d Cir. 1998) 18

Holland v. Florida,
775 F.3d 1294 (11th Cir. 2014)...9

Jackson v. Norris,
573 F.3d 856 (8th Cir. 2009)...9

Johnson v. Acevedo,
572 F.3d 398 (7th Cir. 2009)..10, 13

Jones v. Basinger,
635 F.3d 1030 (7th Cir. 2011)..*passim*

Kotteakos v. United States,
328 U.S. 750 (1946)..15

Maurino v. Johnson,
210 F.3d 638 (6th. Cir. 2000)..19

Mitchell v. Esparza,
540 U.S. 12 (2003) (per curiam) 8

O'Neal v. McAninch,
513 U.S. 432 (1995)...17-18

Petrocelli v. Baker,
869 F.3d 710 (9th Cir. 2017)..18-19

Roberts v. Moore,
No. 97-12, 1998 WL 41683 (4th Cir. Feb. 4, 1998) 18

Robinson v. Arvonio,
27 F.3d 877 (3d Cir. 1994) 18

Rosencrantz v. Lafler,
568 F.3d 577 (6th Cir. 2009)...18

Ruelas v. Wolfenbarger,

580 F.3d 403 (6th Cir. 2009)....9, 11

Torres v. Mullin,
317 F.3d 1145 (10th Cir. 2003)....18

United States v. Bowen,
799 F.3d 336 (5th Cir. 2015)....18-19

United States v. Clay,
720 F.3d 1021 (8th Cir. 2013)....18

United States v. Harbin,
250 F.3d. 532 (7th Cir. 2001)....18-20

Vines v. United States,
28 F.3d 1123 (11th Cir. 1994)....18

Welch v. Workman,
639 F.3d 980 (10th Cir. 2011)....9

Wood v. Ercole,
644 F.3d 83 (2d Cir. 2011) 9, 15

Statutes

28 U.S.C § 2254 ....2, 5, 7, 21

28 U.S.C. § 1254(1)....1

M.C.L. § 750.520b....3

Constitutional Provisions

U.S. Const. amend. VI....1, 5

U.S. Const. amend. XIV 1, 5

REFERENCES TO OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is unpublished, but it is reported at 692 F. App'x 780. App. 1. The district court's opinion is unpublished, but it is available at No. 13–11681, 2015 WL 3634104. App. 19. And the Michigan Court of Appeals opinion is unpublished, but it is available at No. 299084, 2011 WL 4952329. App 34.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals originally entered judgment on June 15, 2017, and it subsequently amended its opinion on June 19, 2017. App. 1–2. On September 20, 2017, the court entered an order denying rehearing en banc. App. 43. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI.

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a federal court may not grant a writ of habeas corpus on a claim that has been adjudicated on the merits by a state court unless the state court's adjudication of that claim "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." 28 U.S.C. § 2254(d)(1).

STATEMENT OF THE CASE

Petitioner Manuel Sheard was sentenced to l00–200 years in prison after a trial where the prosecutor perpetrated a pervasive course of misconduct and Sheard was deprived of effective counsel. All lower courts agreed the prosecutor's misconduct was egregious and that Sheard's counsel was grossly deficient. App. 10–11, 24–25, 36. Despite this, all the lower courts also agreed these errors were harmless.

In 2010, Sheard was tried in Saginaw, Michigan for four counts of criminal sexual conduct in violation of M.C.L. § 750.520b. *See* App. 19. He was ostensibly convicted for committing this crime. But the prosecutor's misconduct, combined with the defense counsel's legal ignorance, App. 16, instead raise the specter of a conviction for being a "bad man."

At every opportunity, the prosecutor introduced Sheard's extramarital affair as improper character evidence and indicated to the jury they could not trust his testimony. *See* App. 4–7. The prosecutor improperly introduced this evidence in his opening statement. App. 4 (telling the jury that, while Sheard was married, he "takes up with [another woman] and has a child to [sic] her."). The prosecutor improperly introduced this evidence during his questioning of Sheard's daughter, wife, and sister, and Sheard himself. App. 4–6. The prosecutor improperly introduced this evidence in his closing statement and explicitly invited the jury to use Sheard's extramarital affair as improper character evidence:

> He takes an oath before he testifies. Swears to tell the truth, the whole truth and nothing but the truth. And then tells you, why, if I had repeatedly put my penis in her mouth, members of the jury, I would tell you that. Do you believe that? Members of the jury, if I repeatedly put my penis in her vagina, I would tell you that. Do you believe that? Members of the jury, if I repeatedly rode her from the back and put my penis in her anus, I would tell you that. Do you believe that?
>
> . . .
>
> Whether he had an affair and lied to Sarah about his intentions is important as to whether he can be believed. Whether he lied to Monique while he's married to her is important to you in the context of whether he can be believed. If he's lying with the women he sleeps with, if he's lying with the women he has babies with, if he confesses to things that have no costs, is there a cost in this case? There sure is. Four counts of criminal sexual conduct first degree.

App. 6.

At no point did defense counsel object to any of these references to the extramarital affair. App. 16. At the end of the trial, the jury convicted Sheard on all four counts. App. 4.

The prosecutor again introduced the affair at Sheard's sentencing hearing, stating, "[t]his defendant was married when this happened. This defendant had a girlfriend when this happened . . . Apparently, his sexual appetites were such that when neither of the adult females were around, his daughter . . . became the focus of his sexual appetites." App. 6–7. Again, Sheard's attorney failed to object. App. 16. Sheard was sentenced to four 25–50 year consecutive sentences, for a total sentence of 100–200 years. App. 7.

Sheard appealed to the Michigan Court of Appeals and presented prosecutorial misconduct and ineffective assistance of counsel claims. App. 34.

On direct appeal, the court found the prosecutor's misconduct to be "repeated and egregious," App. 36, however, the court affirmed the conviction. App. 41. Though on direct review, the court conducted plain error review, not *Chapman*'s harmless error analysis. The court found that because of the "weight of the testimony and physical evidence" against Sheard, "the prosecutor's misconduct . . . did not prejudice defendant. And, for that reason, it did not amount to plain error warranting a new trial." App. 36.

Sheard appealed this decision to the Michigan Supreme Court, which denied his application for leave to appeal. App. 42.

Sheard then filed a petition for writ of habeas corpus pursuant to 28 U.S.C § 2254 in the Eastern District of Michigan. App. 19. Sheard claimed the prosecutor's misconduct resulted in a denial of his Fourteenth Amendment due process rights and that he was denied effective assistance of counsel in violation of the Sixth Amendment. App. 20; U.S. Const. amends. VI, XIV. The district court agreed that the prosecutor's conduct was improper, App. 28, but held that this error and the deficient counsel were harmless. App. 27–28.

The district court thus denied the petition, but it granted a certificate of appealability for the prosecutorial misconduct and ineffective assistance of counsel claims. App. 32–33.

Sheard appealed to the Sixth Circuit Court of Appeals. App. 1. The Sixth Circuit agreed there was pervasive prosecutorial misconduct and that defense counsel's performance was constitutionally deficient. App. 14–16. Indeed, the

Sixth Circuit concluded defense counsel's silence amid this obvious prosecutorial misconduct "evidenced an ignorance of the law." App. 16. The court of appeals, however, held these errors harmless. App. 15, 17.

In its harmless error analysis, the Sixth Circuit reasoned, "Sheard must show that he was 'actually prejudiced' by the prosecutor's comments, 'a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the [Michigan Court of Appeals'] decision that this [conduct] met the *Chapman* standard of harmlessness.'" App. 11–12. This harmless error analysis assumed, without any meaningful review of the Michigan Court of Appeals decision, that the state court applied *Chapman*. Applying *Brecht*'s "substantial and injurious effect" standard with an additional layer of deference to the state court, the Sixth Circuit concluded the Michigan Court of Appeals' purported harmless error decision was reasonable. App. 11–12, 15.

Judge Merritt wrote a short dissent:

> I agree with our Court's opinion that there was gross ineffective assistance of counsel here. The state courts and the district court below recognized the failure of counsel to represent his client, a failure that seems to have led directly to what turns out to be a life sentence. I disagree, however, that we should overlook the error. I would issue the writ and let the state retry the defendant in a trial in which he has decent counsel and the opportunity to receive a more humane sentence. Our criminal justice system should not allow a man to be condemned to life imprisonment when he has been so egregiously deprived of counsel.

App. 18.

The Sixth Circuit denied Sheard's request for rehearing en banc. App. 43. This timely petition follows.

REASONS FOR GRANTING THE WRIT

I. The federal circuits are irreconcilably split as to how AEDPA applies when a state court finds constitutional errors in a criminal trial, but nonetheless concludes the errors are harmless.

The panel's opinion and harmless error analysis deepened a persistent split among the federal circuits. Due to differing interpretations of this Court's harmless error decisions, the circuit courts of appeals are irreconcilably split on how AEDPA applies when a state court finds pervasive constitutional violations but nonetheless concludes the errors are harmless. This case presents three issues relating to harmless error review in § 2254 habeas proceedings.

First, when a state court purportedly conducts a harmless error analysis on direct review, should the federal habeas court review that analysis to determine whether it was contrary to, or an unreasonable application of, *Chapman v. California*, 386 U.S. 18 (1967)? As explained below, the circuit courts of appeals have adopted three different approaches.

Second, do federal habeas courts owe deference to a state court's harmless error determination, even when the state court fails to apply *Chapman*? If a state court, as here, fails to apply *Chapman* harmless error review, "there is no possibility that a fairminded jurist could disagree that the state court's [harmless error] decision conflicts with [*Chapman*]"—because *Chapman* was not even applied. *See Harrington v. Richter*, 562 U.S. 86, 102

(2011). In applying a double deference standard, the Sixth Circuit diverged from at least four of its sister circuits.

Third, regardless of whether the errors in this case substantially influenced the jury's verdict, this case presents the scenario contemplated in *Brecht* footnote nine. An independent *Brecht* analysis asks a court to consider whether the case is one in which "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993).

A. The federal circuits have adopted three conflicting approaches as to whether a federal court must review whether a state court reasonably applied *Chapman*.

A federal court sitting in habeas must assess the prejudicial impact of constitutional error in a state criminal trial under the *Brecht* "substantial and injurious effect" standard, whether or not the state court reasonably applied *Chapman*'s "harmless beyond a reasonable doubt" standard. *Fry v. Pliler*, 551 U.S. 112, 121–22 (2007). But when a state court's *Chapman* decision is reviewed, "a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015); *see also Mitchell v. Esparza*, 540 U.S. 12, 17–18 (2003) (per curiam). The circuit courts of appeals are irreconcilably split as to their interpretations of this line of cases.

Here, the Sixth Circuit adopted the view that, "*Brecht* is always the test, and there is no reason to ask both whether the state court 'unreasonably' applied *Chapman* under the AEDPA and, further, whether the constitutional error had a 'substantial and injurious' effect on the jury's verdict." App. 11 (citing *Ruelas v. Wolfenbarger*, 580 F.3d 403, 412 (6th Cir. 2009)).

In so holding, the Sixth Circuit joined at least seven sister circuits in the "*Brecht*-only" approach. *See Wood v. Ercole*, 644 F.3d 83, 94 (2d Cir. 2011) ("[W]e conclude that the 'unreasonable application of *Chapman*' standard does not survive *Fry*."); *Bond v. Beard*, 539 F.3d 256, 275–76 (3d Cir. 2008) ("*Fry* instructs us to perform our own harmless error analysis under *Brecht v. Abrahamson* . . . rather than review the state court's harmless error analysis under the AEDPA standard.") (internal citations omitted).[1]

[1] *See also Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2014) ("A federal habeas court therefore need not formally apply both the *Brecht* test and the AEDPA[/*Chapman*] standard; it is sufficient to apply *Brecht* alone."); *Holland v. Florida*, 775 F.3d 1294, 1314 (11th Cir. 2014) (rejecting the habeas petitioner's argument that the court needed to consider whether the Florida Supreme Court unreasonably applied *Chapman*); *Bauberger v. Haynes*, 632 F.3d 100, 104 (4th Cir. 2011) ("Federal habeas courts must always review constitutional errors in state trials under *Brecht*, but they need not debate whether a state court's harmless error determination also unreasonably applied *Chapman* . . . ."); *Welch v. Workman*, 639 F.3d 980, 992 (10th Cir. 2011) ("The [*Brecht*] standard applies 'whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman*.'"); *Jackson v. Norris*, 573 F.3d 856, 858 (8th Cir. 2009) ("The sole question before us is whether the state expert's . . . testimony had a substantial and injurious effect on the jury's verdict.").

By contrast, the Seventh Circuit has rejected this approach and adopted a "two-step" analysis. The Seventh Circuit first reviews whether the state court's harmless error determination was a reasonable application of *Chapman*:

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

Johnson v. Acevedo, 572 F.3d 398, 404 (7th Cir. 2009) (emphasis added); *see also Dansberry v. Pfister*, 801 F.3d 863, 868–69 (7th Cir. 2015).

The Fifth Circuit has joined the Seventh Circuit. *See Gongora v. Thaler*, 710 F.3d 267, 274–75 (5th Cir. 2013) (per curiam). In *Gongora*, the Fifth Circuit first found the state court "did not apply *Chapman*," and then proceeded to apply its own independent analysis under *Brecht*. *Id.*

The Fifth Circuit's acknowledgement that the state court did not apply the *Chapman* harmless error test had the important (and correct) consequence of *not* extending deference under *Harrington v. Richter* to the state court's harmless error determination. *See infra* Section I.B. The Seventh Circuit has applied the same analytical approach. *See Jones v. Basinger*, 635 F.3d 1030, 1052 n.8 (7th Cir. 2011). In both circuits, without the additional layer of

Harrington deference, the courts granted habeas relief in cases that involved similarly pervasive errors as this case. *Gongora*, 710 F.3d at 278–83; *Basinger*, 635 F.3d at 1052 n.8, 1052–56. This analysis is correct because, if the state court did not apply *Chapman* on direct review, then "there is no possibility fairminded jurists could disagree that the state court's [harmless error] decision conflicts with [*Chapman*]." *See Harrington*, 562 U.S. at 102; *infra* Section I.B.

Finally, the First Circuit has charted yet another course and adopted a "flexible" approach. *See Connolly v. Roden*, 752 F.3d 505, 511 (1st Cir. 2014) (holding that when a state court decides an error is harmless under *Chapman*, "a federal court on habeas review may choose between two equally valid options. The court may apply *Esparza* and then move on to the *Brecht* test only if the state court's decision was an unreasonable application of *Chapman*. Alternatively, the court may begin with the *Brecht* test directly.").

Here, the district court joined the First Circuit in its flexible approach. App. 26 ("[A] federal court on habeas review of a state court decision remains free to determine whether the state court's *Chapman* harmless error analysis was reasonable. . . . However, a federal court is also free to proceed directly to use the *Brecht* test to determine whether the error was harmless.") (citing *Ruelas*, 580 F.3d at 413).

There is thus a persistent split among the circuit courts of appeals that justifies the exercise of this Court's jurisdiction. To be sure, a habeas petitioner must satisfy *Brecht* to secure relief under any approach. But importantly, under the two-step approach, deference is not given to a state court harmless error decision that was either never made or that unreasonably applied *Chapman*. In such a case, *Brecht* applies detached from any deference to the state court's harmless error analysis. As Section I.B further explains, this dissolution of deference is vital as to whether a petitioner secures habeas relief—particularly in cases involving pervasive errors.

B. The Sixth Circuit's position that a state court's harmless error determination should receive deference under *Harrington*, even if the state court failed to apply *Chapman*, is logically untenable and diverges from other circuits.

Though setting a high bar for relief, AEDPA "preserves authority to issue the writ [of habeas corpus] in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Harrington*, 562 U.S. at 102. If a state court fails to apply the *Chapman* test for harmless error on direct review, as happened here, there is no possibility a fairminded jurist could disagree that the state court's reasoning conflicts with *Chapman*—because *Chapman* was not even applied. Consequently, this failure to apply the correct harmless error analysis on direct review should dissolve any *Harrington* deference given to the state court's harmless error determination.

This consequence is not inconsistent with *Fry*'s statement that "a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." 551 U.S. at 119. If a habeas petitioner satisfies the *Brecht* standard, the state court's harmlessness determination would necessarily be "unreasonable" because the *Brecht* test is stricter than *Chapman*. *See id.* at 119–120; *see also, e.g.*, *Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2014) ("A determination that the error resulted in 'actual prejudice' necessarily means that the state court's harmlessness determination was . . . objectively unreasonable.") (internal citations omitted).

This dissolution of deference results in a meaningfully different harmless error analysis. If the Seventh and Fifth Circuit two-step approach is applied, and the petitioner survives step one (i.e., the state court's *Chapman* analysis was unreasonable), then *Brecht* should be applied *independently* by the federal court, detached from any *Harrington* deference. *See, e.g.*, *Acevedo*, 572 F.3d at 404 (explaining, at step two, "the federal court must make an independent decision, just as if the state court had never addressed the subject at all.").

The Fifth and Seventh Circuits have employed this approach and granted habeas relief in cases that involve pervasive improper comments by a prosecutor. *Gongora*, 710 F.3d at 278–83; *Basinger*, 635 F.3d at 1052 n.8, 1052–56. In *Gongora*, the court concluded, "the Fifth Amendment violation in this case was not 'an isolated comment in a sea of evidence.' The violation consisted of repeated comments that began after the court issued its cautionary instruction and continued following each of the court's brief curative instructions." 710 F.3d at 282–83 (internal citations omitted). Likewise, in

Basinger, the court found the Sixth Amendment Confrontation Clause violation "was deliberately elicited [by the prosecutor], was extensive, and [it] graphically portrayed [the defendant] as a despicable character." 635 F.3d at 1053; *see also id.* at 1052 ("At its core, that testimony was nothing but a thinly-veiled introduction of additional, but inadmissible, evidence of [defendant's] guilt.").

Here too, both defense counsel and the judge allowed the prosecutor to assail Sheard's credibility and character. *See, e.g.*, App. 4–7, 16. The prosecutor referenced Sheard's extramarital affair at every stage of the proceedings. *See, e.g.*, App. 7 ("This defendant was married when this happened. This defendant had a girlfriend when this happened . . . Apparently, his sexual appetites were such that when neither of the adult females were around, his daughter . . . became the focus of his sexual appetites."); *see also* App. 4–7.

Amid this assault, Sheard's constitutional rights crumbled. Pervasive prosecutorial misconduct and deficient counsel infected his trial. The infection was lethal to Sheard's credibility, the verdict, and the sentence.

Moreover, the state appellate court's prejudice analysis did not consider how this attack on Sheard's credibility tainted the remaining evidence. App. 36. The state court simply viewed the remaining, supposedly error-free evidence, standing alone, as sufficient to sustain guilt. App. 36. While the Sixth Circuit deferred to this analysis, the Seventh Circuit rejected this approach in *Basinger*. 635 F.3d at 1053 ("That analysis ignores the significant prejudicial effect the error can have on a jury's ability to evaluate fairly the remaining evidence. That analysis also offers prosecutors no real incentive to comply with the Constitution so long as any evidence not admitted in error is legally sufficient to sustain a conviction.").

The Sixth Circuit's flawed approach on review led to a flawed decision. Instead, when a federal court applies *Brecht* independently, "the harmless-error 'inquiry cannot be merely whether there was enough [evidence] to support the result . . . It is rather, even so, whether the error had substantial influence' in light of the entire record." *Basinger*, 635 F.3d at 1053 (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *Brecht*, 507 U.S. at 638). The Sixth Circuit and Michigan Court of Appeals erroneously engaged in the inquiry of whether there was enough evidence to support the result. *See* App. 14 (the Sixth Circuit reasoned, "[t]he weight of the evidence against Sheard, even if not overwhelming, was certainly compelling."); App. 36.

But even if a court proceeds directly to *Brecht*, without any analysis of whether *Chapman* was reasonably applied, the court should still apply *Brecht* independently, detached from any *Harrington* deference. The Second and Ninth Circuits have adopted such an approach and granted habeas relief. *Deck*, 814 F.3d at 985–86 (finding that "[t]he record establishes that the [prosecutor's improper] comments were not inadvertent or isolated, and it cannot be questioned they went to the heart of [defendant's] defense," and granting habeas relief); *see also Wood*, 644 F.3d at 94–99. Both of these decisions came after *Harrington* and both, correctly, do not apply *Harrington*'s analysis in their harmless error review.

By contrast, in this case the Sixth Circuit continued to give *Harrington* deference to the state court's purported harmless error determination, App. 11–12, 15, even though the Michigan Court of Appeals failed to apply *Chapman*. *See* App. 34–41. The panel below found Sheard could not succeed on his prosecutorial misconduct and ineffective assistance claims "if a fairminded jurist could agree with the [Michigan Court of Appeals'] decision that this [conduct] met the *Chapman* standard of harmlessness." App. 11–12. The panel then quoted the state appellate court's *plain error* decision and, without any analysis, assumed it was a *Chapman* harmless error decision that "[was] not entirely unreasonable." App. 12; *see also* App. 15 (citing *Harrington*, 562 U.S. at 101).

Without the Sixth Circuit's flawed double deference standard, this case falls squarely within the framework of cases like *Gongora*, *Basinger*, and *Deck*. The Sixth Circuit should have credited its own findings that the prosecutor's misconduct was "pervasive," App. 14, and that defense counsel's performance "evidenced an ignorance of the law." App. 16; *see also* App. 18 (Merritt, J., dissenting) ("Our criminal justice system should not allow a man to be condemned to life imprisonment when he has been so egregiously deprived of counsel."). And without double deference providing a heavy thumb on the scale, the panel below, like its sister circuits, must have had grave doubt as to the harmlessness of proceedings where pervasive prosecutorial misconduct is laced with legally ignorant counsel. *See Deck*, 814 F.3d at 985–86 (citing *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)) (prosecutor engaged in pervasively improper conduct); *Gongora*, 710 F.3d at 282–83 (same); *Basinger*, 635 F.3d at 1052–53 (same).

There is, therefore, a meaningful difference in harmless error analysis between the circuits. In the most egregious cases with pervasive errors, habeas relief is appropriately granted. In such cases, if the state court fails to apply *Chapman*, then *Harrington* deference is not applied to the state court harmless error decision. The Sixth Circuit departed from this approach.

C. This case falls squarely within *Brecht*'s prosecutorial misconduct safety valve.

An independent *Brecht* analysis also asks a court to consider whether a constitutional error "that is combined with a pattern of prosecutorial misconduct, . . . so infect[s] the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 638 n.9 (citing *Greer v. Miller*, 483 U.S. 756, 769 (1987) (Stevens, J., concurring)). The *Brecht* Court laid out this prosecutorial misconduct safety valve for egregious cases like Sheard's trial:

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

Id. at 638 n. 9 (citation omitted).

Lower courts have understood this footnote to define a "hybrid" error that looks like a trial error but is so pervasive throughout the proceedings that it poisons the entire trial. *See, e.g.*, *Burgess v. Dretke*, 350 F.3d 461, 471 (5th Cir. 2003) (interpreting *Brecht*). There is, therefore, no way to isolate the error and its effect on the other evidence. *See id.* at 471. Judges have acknowledged such errors are "pervasive, flout[ ] Supreme Court authority, and undermine[ ] the integrity of the criminal justice process." *Petrocelli v. Baker*, 869 F.3d 710, 731 (9th Cir. 2017) (Christen, J., concurring). These errors can be a single egregious error, or a combination of errors that work together to destroy the integrity of the trial.

This case falls into the latter category. Clear and consistent prosecutorial misconduct occurred throughout trial, and counsel's failure to object also significantly exacerbated the harm of the misconduct.

Almost all lower courts have acknowledged *Brecht* footnote nine.[2] In recent years, one circuit has reversed a conviction for a sentence based on the footnote and three others have shown a willingness to do so. *See Petrocelli*, 869 F.3d 710; *United States v. Bowen,* 799 F.3d 336 (5th Cir. 2015); *United States*

[2] *See, e.g.*, *United States v. Clay*, 720 F.3d 1021 (8th Cir. 2013); *Rosencrantz v. Lafler,* 568 F.3d 577 (6th Cir. 2009); *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003); *Roberts v. Moore*, No. 97-12, 1998 WL 41683 (4th Cir. Feb. 4, 1998); *Hassine v. Zimmerman*, 160 F.3d 941 (3d Cir. 1998); *Robinson v. Arvonio*, 27 F.3d 877 (3d Cir. 1994) (vacated and remanded in light of *O'Neal v. McAninch,* 513 U.S. 432 (1995)); *Vines v. United States*, 28 F.3d 1123 (11th Cir. 1994).

v. Harbin, 250 F.3d 532 (7th Cir. 2001); *Maurino v. Johnson*, 210 F.3d 638 (6th. Cir. 2000), *abrogated on other grounds by Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000). This year, a Ninth Circuit concurring opinion applied the footnote nine exception. *Petrocelli*, 869 F.3d at 731—37 (Christen, J., concurring). The Fifth Circuit also applied footnote nine in a case where prosecutorial misconduct existed in conjunction with additional misconduct by the government, ultimately granting a new trial to the defendants. *Bowen,* 799 F.3d at 355. In *Harbin*, the Seventh Circuit showed a willingness to grant relief under footnote nine, but ultimately determined the error was so egregious that it was most fairly categorized as a structural error. 250 F.3d. at 545, 547–48. Finally, a dissenting judge on the Sixth Circuit has indicated footnote nine relief was appropriate due to egregious prosecutorial misconduct, even when the majority declined to grant relief. *Maurino*, 210 F.3d at 648–52 (Holschuh, J., dissenting).

Sheard's case is just the type of case that demands application of *Brecht* footnote nine. Every court has found prosecutorial misconduct infected Sheard's trial, App. 10–11, 24–25, 36, from the opening statement, to the questioning of every key witness, to closing argument and sentencing. App. 4–7. Because the prosecutor's suggestions of Sheard's untrustworthiness were so frequent and so inflammatory, there is no way to isolate these errors. Rather, the statements laced the whole trial with prejudice, the full effect of which cannot be understood through the "substantial and injurious" standard.

This misconduct was combined with defective counsel who failed to object to any instance of improper character evidence during the trial. The jury never heard a dissenting voice. This combination of errors falls squarely into the prosecutorial misconduct safety valve identified by this Court as being egregious enough to warrant reversal, "even if it did not substantially influence the jury's verdict." *Brecht*, 507 U.S. at 638 n.9. Like the structural error in *Harbin*, the result of these errors was to "effect a shift in the total balance of advantages in favor of the prosecution." 250 F.3d at 549.

If someone in Sheard's position is unable to rely on this safety valve, it is hard to envision a case in which prosecutorial misconduct would combine with another constitutional error and give rise to the "egregious" level envisioned by the *Brecht* Court.

II. This case presents an excellent vehicle to resolve the harmless error issue.

This case squarely presents the questions presented in this petition. The panel below unambiguously applied the *Brecht*-only approach, App. 11, and departed from at least three of its sister circuits. Moreover, the panel granted *Harrington* deference to the state court's purported *Chapman* harmless error determination, App. 15, even though *Chapman* was never applied. App. 34–41. The panel did so despite the fact that all lower courts, and indeed the panel itself, agreed the prosecutor's misconduct was pervasive, App. 10–11, and Sheard's trial counsel was grossly deficient. App. 16. Sheard presented his prosecutorial misconduct and ineffective assistance of counsel claims to each court that reviewed his case, and the reviewing courts adjudicated his claims on the merits. There are no confounding variables. The only issue remaining in this case is the harmlessness of these pervasive errors.

The circuit courts of appeals have sufficiently ventilated the issues this case presents since this Court decided *Brecht* nearly twenty-five years ago, and since *Esparza* and *Fry* a decade ago. This Court now has the opportunity to clarify a three-way circuit split and reverse a logically untenable approach to harmless error review. Doing so will further § 2254(d)'s purpose of "guard[ing] against extreme malfunctions in the state criminal justice systems." *Harrington*, 562 U.S. at 102.

CONCLUSION

Petitioner Manuel Sheard respectfully requests this Court grant his petition for writ of certiorari.

Respectfully submitted,

Melissa M. Salinas
Melissa M. Salinas
Counsel of Record
University of Michigan Law School
Federal Appellate Litigation Clinic[3]
363 Legal Research Building,
801 Monroe Street
Ann Arbor, MI 48109-1215
(734) 763-4319

Pro Bono Counsel for Petitioner

Dated: December 18, 2017

[3] Law students on petition: Rachel June-Graber and Adam Kleven.