No. 20-826

In the Supreme Court of the United States

MIKE BROWN, ACTING-WARDEN, PETITIONER

v.

ERVINE DAVENPORT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

The dispute here is whether the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies when a federal court reviews a state court's harmlessness determination. This Court has already said that the statute forms a "precondition" to relief.

Davenport does not dispute this, but he insists that the harmlessness test from *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), is more difficult, so there is no need to discuss AEDPA's limitations. But he fails to explain why this Court nevertheless employed AEDPA deference throughout its analysis in *Davis* v. *Ayala*, 576 U.S. 257 (2015), or how the *Brecht* test could incorporate the unique requirements of AEDPA that did not even exist when the test was announced.

Davenport then doubts the circuit split by arguing that none of the cited cases resulted in the particular *outcome* the State advocates here. But given the law announced in those cases—AEDPA's limitations must be overcome before habeas relief may be granted—relief would have been denied had this case arisen in those circuits. Thus, there is a circuit split.

Davenport finally challenges whether the question is presented here and whether this case presents a good vehicle to consider the issue. It is and it does. The last reasoned state court decision was entitled to AEDPA deference, yet the Sixth Circuit did not apply that deference. Had it done so, the result would have been different. Accordingly, this case presents an "ideal vehicle" to resolve a problem that plagues habeas courts throughout the country.

ARGUMENT

I. The Sixth Circuit's *Brecht*-only approach ignores *Ayala*'s reaffirmation that AEDPA forms a "precondition" to relief.

Davenport first argues that the petition should not be granted because the Sixth Circuit "faithfully applied *Ayala*." Br. in Opp. at 2, 12. But it is hard to reconcile the decision below with *Ayala*, when the latter employed AEDPA's deferential standard throughout its lengthy analysis while the former expressly disavowed the need to utilize AEDPA at all.[1]

And despite Davenport's characterization, the State's argument does not contradict *Ayala*'s statement that *Brecht* and AEDPA need not both be *formally* applied. Rather, the crux of the question presented in this petition is whether the Sixth Circuit contravened *Ayala* by finding that it need not consider the State court decision *at all*.

The contradiction here is clear. *Ayala* said that "a federal habeas court need not formally apply both *Brecht* and AEDPA/*Chapman*, [but] AEDPA nevertheless sets forth a precondition to the grant of habeas relief." 576 U.S. at 268 (internal quotations omitted). It does not then follow that a habeas court has "no reason to ask" whether AEDPA deference was overcome,

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[1] Davenport faults the State for labeling the Sixth Circuit's approach "*Brecht*-only," accusing the State of "misleading" this Court. Br. in Opp. at 17 n.6. But it was the Sixth Circuit itself that attached that label to its analysis (and to what it perceived to be like-analyses from its sister circuits), using the phrase no less than nine times in its opinion. (App. at 14a, 15a, 16a, 22a, 23a, 25a n.10, 26a ("*Brecht*-only")).

App. at 10a, that it may "leapfrog AEDPA and jump directly to *Brecht*," App. at 12a, or that *Brecht* "handles the work of both tests," App. at 11a. The Sixth Circuit's unfounded catchphrases demonstrate an erroneous understanding of *Ayala*'s in-depth AEDPA analysis, not a faithful application of it.

And if it is somehow not clear that the Sixth Circuit contradicted *Ayala*, it is unmistakable that it contradicted AEDPA, which demands deference to a state court's merits adjudication. 28 U.S.C. § 2254(d). See App. at 133a ("If AEDPA applies, the panel decision is plainly erroneous since it extends Supreme Court precedent, relies on circuit precedent, creates a new standard for harmless-error review in the shackling context, and introduces evidence not presented in the state court proceedings."); see also State's Pet. at 21–29.

Davenport does not counter that point. Instead, he simply highlights the same arguments that the court made below. But those arguments relied on an incorrect interpretation of *Ayala*, not an analysis of AEDPA's requirements. They do not grapple with how the *Brecht* test could incorporate the unique requirements of AEDPA—"no looking at non-Supreme Court cases, no extending existing Supreme Court precedent, and no relying on evidence not presented in state court," App. at 133a (Thapar, J., dissenting from en banc denial, joined by five other judges)—statutory requirements that did not even exist when *Brecht* was decided.

The Sixth Circuit's *Brecht*-only approach conflicts with *Ayala* and with AEDPA.

II. Five federal courts of appeals would have decided this case differently; there is a circuit split.

Davenport next argues that this Court should not grant the petition because there is no circuit split. In doing so, he notes only that none of the cases cited in the petition reached the particular *outcome* that the State advocates here. See Br. in Opp. at 17 (not a "single case" where a petitioner "prevailed under *Brecht* [who] was nonetheless denied relief under AEDPA/*Chapman*.") But that none of those cases resulted in that outcome does not annul the law laid out in those opinions.

In the Second Circuit, Davenport argues that in *Orlando* v. *Nassau County District Attorney's Office*, 915 F.3d 113 (2d Cir. 2019), the habeas court had no reason to apply AEDPA deference because the state court did not make a harmlessness determination. That is true, but the *Orlando* court pointed out that for that very reason—and only for that reason—it did not owe any deference under AEDPA. *Id*. at 127. The court then performed a *Brecht* analysis. *Id*. at 127–30. If the Second Circuit recognized that *Brecht* "handles the work of both tests," App. at 11a, as the Sixth Circuit does, then the *Orlando* court's paragraph pointing out that AEDPA deference does not apply to the case at hand was unnecessary and irrelevant.

In the Third Circuit, Davenport suggests that the analysis in *Johnson* v. *Lamas* is consistent with the Sixth Circuit's analysis here because that court found that the petitioner failed the AEDPA/*Chapman* test and "[t]herefore . . . 'necessarily cannot satisfy' *Brecht*." 850 F.3d 119, 137 (3d Cir. 2017), quoting

Ayala, 576 U.S. at 270. But that is not what the Sixth Circuit said. The Sixth Circuit took that language correlating the two standards and determined that a *different* corollary was also true—that when the petitioner *passes* the *Brecht* test, it necessarily satisfies the AEDPA/*Chapman* standard. App. at 17a. Davenport treats these two corollaries as one in the same without any further explanation. And in doing so, he wholly ignores the Third Circuit's interpretation of *Ayala*'s effect on its review—that it "clarified that [a federal habeas court] must defer to [a state court's harmlessness] determination under AEDPA unless the state court unreasonably applied *Chapman*." *Johnson* v. *Lamas*, 850 F.3d at 133.

Next, Davenport points to *Jensen* v. *Clements*, 800 F.3d 892, 908 (7th Cir. 2015), to show that the Seventh Circuit conducts a *Brecht*-only analysis. But despite the conclusory statement at the very end of its opinion, the *Jensen* court explicitly found that the state court's harmlessness determination was unreasonable, meticulously discussing the reasoning employed by the state court, before granting habeas relief. *Id*. at 903–08. Davenport also closes his eyes to the persuasive language in *Johnson* v. *Acevedo* indicating that a "federal court must decide whether [a state court's harmless-error] analysis was a reasonable application of the *Chapman* standard." 572 F.3d 398, 404 (7th Cir. 2009). He ignores the express statement in *Welch* v. *Hepp* holding that such a determination "is subject to deference." 793 F.3d 734, 738 (7th Cir. 2015). And he disregards the protracted discussion in *Richardson* v. *Griffin* detailing how AEDPA's limitations were overcome before conducting a *Brecht* analysis. 866 F.3d 836, 843–45 (7th Cir. 2017).

Moving on to the Ninth Circuit, Davenport claims that *Ford* v. *Peery*, 976 F.3d 1032, 1044 (9th Cir. 2020), is not applicable because it "did not discuss the relationship between *Brecht* and AEDPA/*Chapman*" nor did it depart from prior holdings from the circuit seemingly aligned with the Sixth Circuit's *Brecht*-only approach. Br. in Opp. at 20. But Davenport does not explain why the court found it necessary to conduct an AEDPA/*Chapman* analysis after already finding actual prejudice under *Brecht*. *Ford*, 976 F.3d at 1044–45. And that other decisions, earlier in time, went the *Brecht*-only approach only shows—at most—that there is an intra-circuit split along with an inter-circuit split. See App. at 134a–135a (Thapar, J., dissenting from en banc denial) ("[M]y review of the caselaw reveals subtle (and not so subtle) tension within many circuits.")

As for the Tenth Circuit, Davenport ignores the analysis in *Malone* v. *Carpenter*, 911 F.3d 1022 (10th Cir. 2018). That court dove headfirst into an AEDPA/*Chapman* analysis and expressed that a *Brecht*-only approach was warranted only if the state-court did not employ a *Chapman* analysis. *Id*. at 1031–37.

The Sixth Circuit's *Brecht*-only review—even when a state court has made a harmlessness determination under *Chapman*—directly conflicts with the approaches taken in the Second, Third, Seventh, Ninth, and Tenth Circuits. Thus, there is a circuit split.

III. Because the outcome would have been different had AEDPA deference been applied, this case is an "ideal vehicle" for review.

Last, Davenport argues that this case is a poor vehicle for review because the question presented is not even applicable in this case and the Sixth Circuit did not err in the manner the State described. Neither argument is correct.

A. The state court decisions are entitled to AEDPA deference.

Davenport first asserts that the question presented in this petition cannot be resolved by this case. According to him, the last reasoned decision adjudicated on the merits in a Michigan court proceeding was the Michigan Supreme Court. Because that court did not conduct a harmless-error analysis under *Chapman*, Davenport argues, AEDPA's deferential standard does not apply, meaning the *Brecht* test was the only harmlessness standard applicable here. Br. in Opp. at 22. Notably, despite raising this argument in the Sixth Circuit, not one of the 15 judges who reviewed this case mentioned this easy way to avoid the dispute.

In any event, Davenport's argument is unpersuasive for two reasons.

First, if the Michigan Supreme Court's order was the last reasoned decision, it is entitled to AEDPA deference. Davenport argues that the court's citation to and use of the standard from *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), is evidence that the state supreme

court failed to apply the *Chapman* harmless-beyond-a-reasonable-doubt standard. But despite its pronouncement in *Deck* v. *Missouri*, 544 U.S. 622, 635 (2005), that shackling errors are subject to harmless-error review under the *Chapman* standard, this Court has not discussed a more-specific framework for analyzing a shackling error under that standard.

The Michigan Supreme Court did not substitute a *Flynn* analysis for a *Chapman* analysis. It used the reasoning in *Flynn* to help determine whether the *Chapman* analysis was met. Because general legal rules—such as *Chapman*'s harmless-beyond-a-reasonable-doubt standard—give a state court "more leeway. . . in reaching outcomes in case-by-case determinations," *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004), the Michigan Supreme Court's order must be reviewed with AEDPA deference.[2]

That the Michigan Supreme Court did not expressly cite *Chapman* is irrelevant. "[A]s this Court has observed, a state court need not cite or even be aware of our cases under § 2254(d)." *Harrington* v. *Richter*, 562 U.S. 86, 98 (2011). Contrary to Davenport's argument, that rule is not limited to unreasoned

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[2] Davenport contradicts himself later in his own brief, when he asserts that the State's argument against *the Sixth Circuit's* use of *Flynn* effectively "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*." Br. in Opp. at 27. Davenport was attempting to make the point that the Sixth Circuit did not err in relying on *Flynn*. But it would make little sense to prohibit courts from using *Flynn*'s reasoning to reject juror testimony on direct review while permitting that use on collateral review, which is "secondary and limited." *Brecht*, 507 U.S. at 633.

adjudications. See *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (stating that satisfying AEDPA's standard "does not require citation of [the Supreme Court's] cases. . . so long as neither the reasoning nor the result of the state-court decision contradicts them"). Keep in mind, the Michigan Supreme Court initially cited *Deck* and remanded the case to determine "whether the prosecution can demonstrate beyond a reasonable doubt that the shackling error did not contribute to the verdict against the defendant." *People* v. *Davenport*, 794 N.W.2d 616 (Mich. 2011). And, on remand, the trial court and the intermediate appellate court both expressly found that the error was harmless beyond a reasonable doubt. App. at 100a (Mich. Ct. App. Dec. 13, 2012 Opinion.) To argue that the Michigan Supreme Court's order did not conduct a *Chapman* analysis would be to argue that the court disavowed the entire purpose of the remand without explicitly stating so.

Second, the Michigan Supreme Court was arguably not the last reasoned decision in any event. That court, in an order, stated that Davenport's application for leave to appeal was denied. (App. at 93a.) (Mich. July 3, 2013 order.) The decision to deny an application for leave to appeal was not an adjudication of the claim; rather, it was a decision *not to adjudicate* the claim. The court's order was "a decision by the state supreme court not to hear the appeal—that is, not to decide at all." *Greene* v. *Fisher*, 565 U.S. 34, 40 (2011). "[T]he discretionary denial of review on direct appeal" by the Michigan Supreme Court "is not even a 'judgment.' " *Ylst* v. *Nunnemaker*, 501 U.S. 797, 805–06 (1991). Thus, it could not serve as the last reasoned decision that adjudicated the claim on the merits.

Responding to this argument, Davenport cites *Shinn* v. *Kayer*, 141 S. Ct. 517, 524 n.1 (2020). In *Kayer*, this Court pointed to a state supreme court's order denying leave and said that "[u]nreasoned dispositions by appellate courts sometimes qualify as adjudications on the merits." *Id*. But this statement was contained in a footnote and was dicta—the Court resolved the case without deciding whether the order denying leave was the last reasoned merits adjudication. *Id*. Moreover, *Kayer* appeared to rely on *Wilson* v. *Sellers*, but *Wilson* only referred to an unexplained *decision*, it said nothing about an order denying leave to appeal. 138 S. Ct. 1188, 1192 (2018). Thus, the footnoted dicta in *Kayer* should not be read to disregard *Ylst*'s ruling that "the discretionary denial of review . . . is not even a 'judgment.' " *Ylst* at 501 U.S. at 805–06. And that leaves the state appellate court's decision here as the last word, which expressly held the error harmless beyond a reasonable doubt. (App. at 100a.)

Whether the relevant decision for habeas review is the Michigan Supreme Court's order denying leave or the Michigan Court of Appeals' opinion denying the claim on the merits, AEDPA deference applies.

B. The *Brecht*-only approach changed the outcome here, making this case an "ideal vehicle" for review.

Finally, Davenport argues that this case is a poor vehicle for review because the Sixth Circuit did not run afoul of AEDPA's statutory prohibitions as the State argues. But other than general denials, he does not expand on his arguments and instead reiterates ones that are unavailing.

For instance, Davenport attempts to downplay the Sixth Circuit's reliance on circuit precedent by claiming that the Sixth Circuit relied on the general law from *Deck*. But the court also relied on *Ruimveld* v. *Birkett*, 404 F.3d 1006, 1017–18 (6th Cir. 2005), and *Rhoden* v. *Rowland*, 172 F.3d 633, 637 (9th Cir. 1999), for the proposition that a shackling error is harmless in a close case and where the crucial issue is the defendant's "violent nature." See App. at 38a. Those indicia of harmlessness were not established by *Deck* nor any other Supreme Court precedent.

Davenport also has no answer to the State's argument that the Sixth Circuit violated AEDPA's limitations by extending *Flynn* and relying on extra-judicial social-science research. He does not explain why the prohibition of *pre*-trial juror testimony regarding the prejudicial nature of a courtroom-security practice clearly establishes that *post*-trial testimony evaluating the harmlessness of that practice cannot be considered. Nor does he explain how a study highlighting a defendant's race and size merely "confirm[s]" *Flynn*'s analysis. Br. in Opp. at 27; see App. at 34a–35a n.13.

Davenport also glosses over the State's argument that the Sixth Circuit did not afford the state court the leeway required when applying the general *Chapman* standard. Put simply, while a state court *could have* found that the shackling error here was not harmless, it was not unreasonable to conclude otherwise, particularly where the evidence undoubtedly showed that Davenport choked a woman half his size and refused to relent even after she lost consciousness, see App.

at 4a, and where the jurors disclaimed any effect the shackling had on their verdict, App. at 96a.

The Sixth Circuit here circumvented AEDPA's limitations. Had the court performed the appropriate analysis, habeas relief would have been denied. Thus, this case is an "ideal vehicle" to resolve the question presented. App. at 133a (Thapar, J., dissenting from en banc denial).[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] Davenport points out that, "as this case comes to the Court," there is no dispute that the shackling resulted in actual prejudice under *Brecht*. (Br. in Opp. at 30.) While the question presented here certainly applies to cases where the *Brecht* test is undisputedly met, the State does not concede that the *Brecht* analysis below was correct, consistent with the dissent from Judge Thapar from the en banc decision. See App. 135a–137a ("[G]iven the grave consequences, it is error that should not go unchecked.")