No. 20-826

In the Supreme Court of the United States

MIKE BROWN, ACTING WARDEN, PETITIONER

v.

ERVINE DAVENPORT

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

REPLY BRIEF

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INTRODUCTION

When a state court adjudicates a constitutional claim, AEDPA, 28 U.S.C. § 2254(d), demands that a federal court afford high deference to the state court's adjudication of that claim. But what if the state court found error yet determined it was harmless? Does AEDPA deference vanish simply because the collateral harmlessness test in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), is difficult to meet?

Davenport answers that it does—sometimes. He even concedes that *Brecht* may "transgress" AEDPA's limits. But he maintains—in tension with that point—that sometimes *Brecht* is an all-encompassing test, eliminating the need to also apply AEDPA. Davenport attempts to square this circle by arguing that when a federal court determines that the *Brecht* test is met by relying on "legal and factual materials" that AEDPA prohibits, the court must conduct a separate inquiry giving deference to the state court's application of the harmless-error test in *Chapman* v. *California*, 386 U.S. 18 (1967).

This new approach is found nowhere in existing precedent and fails to appreciate the dichotomy between the two harmlessness standards. While *Brecht* asks a court to make an independent harmlessness review, AEDPA/*Chapman* demands a review of *another* court's harmlessness assessment—and allows relief only if no fairminded jurist could agree. However difficult *Brecht* may be to meet, it cannot encompass AEDPA's deferential qualities.

Even if it could, Davenport cannot reconcile the standards: AEDPA requires a habeas petitioner to prove entitlement to relief while *Brecht* imposes no such burden. The two standards are *different*, even where a *Brecht* analysis adheres to some of AEDPA's limitations.

Regardless, the Sixth Circuit did not adhere to those limitations here, thwarting Davenport's novel approach. The court below *did* rely on "legal and factual materials" prohibited by AEDPA; it considered circuit precedent, extra-judicial studies, and arguments never advanced in the state court. Even under Davenport's proposed approach, the Sixth Circuit should have separately applied AEDPA/*Chapman*.

Had it done so, it would have denied relief. Whichever state court issued the last reasoned decision, fairminded jurists could agree that the overwhelming evidence of Davenport's guilt rendered the shackling error harmless. Davenport strangled Annette White, squeezing her neck for at least four minutes, including after she had already lost consciousness. He then dumped her body, stole from her home, and later admitted he "off[ed]" her. Just days before killing White, he strangled another woman, and he told one witness that he would strangle again. During the subsequent investigation, Davenport repeatedly lied to police. His explanation at trial: "[I]t's not gonna help me any to tell the truth." Because it was reasonable to find the shackling error harmless in light of the overwhelming evidence of guilt, Davenport failed to meet his burden under AEDPA.

ARGUMENT

I. *Brecht* and AEDPA/*Chapman* are distinct standards, and both must be applied before habeas relief is granted.

The standards under *Brecht* and AEDPA/*Chapman* are *different*. One cannot always subsume the other. Davenport agrees. He acknowledges that AEDPA "limits the legal and factual materials the federal court may consider," a limitation the *Brecht* test does not always capture. Resp. Br. at 17. Nevertheless, he posits that a finding of actual prejudice under *Brecht* necessarily means that the AEDPA/*Chapman* standard is met, so long as the *Brecht* analysis relies only on legal and factual materials permitted by AEDPA. But this novel and unsupported approach does not capture the myriad of ways the two standards differ. That is why *both* tests must be met before habeas relief may be granted.

A. *Brecht* cannot always subsume AEDPA/*Chapman*, as even Davenport concedes.

In refusing to apply AEDPA/*Chapman*, the Sixth Circuit said that the proper harmless-error test "contains a choice of prompts," one of which is "to leapfrog AEDPA and jump directly to *Brecht*." Pet. App. 12a (quotation marks and citations omitted). The court pointed to *Fry* v. *Pliler*, 551 U.S. 112 (2007), and *Davis* v. *Ayala*, 576 U.S. 257 (2015), in support. But this one-size-fits-all approach does not comport with this Court's precedents.

In *Fry*, this Court first indicated that it "makes no sense to require formal application of *both* tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former." 551 U.S. at 120. It is important to note, though, that there was no underlying state-court harmlessness determination in *Fry*. *Id.* The question was whether *Brecht* or *Chapman*-sans-AEDPA should apply. *Id*. The pertinent rule from *Fry*, then, is that *Brecht* subsumes a *Chapman* analysis when AEDPA deference is not at play.

Complicating the matter, *Ayala* (a case where there *was* a state-court harmlessness determination) incorporated *Fry*'s language. It stated that "the *Brecht* test subsumes the limitations imposed by AEDPA" and that "a federal habeas court need not 'formal[ly]' apply both *Brecht* and 'AEDPA/*Chapman*.' " 576 U.S. at 268–70 (quoting *Fry*, 551 U.S. at 119–20). *Ayala* also noted that the petitioner "must show that he was actually prejudiced by [the presumed error], a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the [state court]'s decision that [the presumed error] met the *Chapman* standard of harmlessness." *Id.* at 270. But these passages do not indicate that AEDPA/*Chapman* need not be applied.

Ayala confirmed—in word and in deed—that when a state court has made a harmlessness determination, "AEDPA's highly deferential standards kick in." 576 U.S. at 269. While analyzing the harmfulness of a claim that the trial court had violated *Batson* v. *Kentucky*, 476 U.S. 79 (1986), by receiving the prosecution's responses to the *Batson* challenges without the defense present, *Ayala* discussed the juror's *voir dire* responses. The Court determined that, not only

was *Brecht* not satisfied, but also the state court's determinations were not unreasonable applications of *Chapman*. 576 U.S. at 286 ("There is no basis for finding that Ayala suffered actual prejudice, *and* the decision of the California Supreme Court represented an entirely reasonable application of controlling precedent.") (emphasis added). See also *id*. at 274, 281, 284. The Court applied both tests, an unnecessary task if AEDPA/*Chapman* were necessarily met when the *Brecht* test was already met.

Indeed, Davenport recognizes that AEDPA/*Chapman* applies in certain circumstances. He concedes AEDPA/*Chapman* must be applied if a federal habeas court's *Brecht* analysis relied on dicta or lower-court precedents. Resp. Br. at 29–30. He also concedes that "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." *Id*. at 30. The same would be true if the federal habeas court's *Brecht* analysis extended a prior precedent to a new circumstance where the "specific question" was not presented by this Court's prior ruling. Cf. *Woods* v. *Donald*, 575 U.S. 312, 317 (2015). Suffice to say there are multiple ways in which *Brecht* and AEDPA/*Chapman* are different such that both must be applied. Inherent in Davenport's novel two-step approach is his recognition that *Brecht* does not always subsume AEDPA/*Chapman*.

What, then, did *Ayala* mean when it stated that *Brecht* "subsumes" AEDPA's limitations? This Court has not clearly indicated, but a look at an earlier passage from *Ayala* suggests the answer: "AEDPA nevertheless 'sets forth a precondition to *the grant* of habeas

relief.' " *Id*. at 268 (quoting *Fry*, 551 U.S. at 119–20) (emphasis added). Put differently, *Brecht* can subsume AEDPA's limitations when an error does *not* substantially influence the verdict, obviating the need to formally apply two standards. But when a federal court finds that an error substantially influenced the verdict under *Brecht*, AEDPA/*Chapman* still must be formally applied before a federal court may *grant* habeas relief.

Without clear precedent supporting his contrary approach, Davenport conjures a distraction. He points to *Fry* and contends that the State took a different position over a decade ago when it said that an actual-prejudice finding under *Brecht* necessarily means that a state court unreasonably applied *Chapman*. Resp. Br. at 23 (citing Br. of Missouri et al. as Amici Curiae Supporting Respondent, *Fry* v. *Pliler*, 551 U.S. 112 (2007) (No. 06-5247), 2007 WL 621857, at *12–13). The State was not a party in *Fry*; this position was contained in an amicus brief. And Davenport misunderstands the amici's position by cherry-picking two sentences within the 18-page brief while overlooking the fact that the entire purpose of the brief was to advocate that *both* standards should apply. See *Fry* State Amicus at *4–5 ("This Court should confirm that when a state court has done harmless-error analysis, federal habeas petitioners seeking relief must show that the state court's decision was contrary to or involved an unreasonable application of *Chapman* and then also satisfy the *Brecht* standard."). That is the exact position the State takes now. Whatever point Davenport was trying to make by digging up a 14-year-old amicus brief, it should play no role in this Court's analysis.

In sum, *Ayala* does not support the Sixth Circuit's *Brecht*-only approach. Nor does it support Davenport's new approach, which undermines his own claim that the AEDPA/*Chapman* standard is necessarily met when *Brecht* is met. This Court should therefore reject both. The proper reading of *Ayala* is that *Brecht* subsumes AEDPA/*Chapman* except when the federal court finds that the error substantially influenced the verdict under *Brecht*. In that circumstance, AEDPA "kick[s] in," *Ayala*, 576 U.S. at 269, and both tests must be met.

B. Review under *Brecht* is independent and does not involve any level of deference.

Davenport's approach has another fatal problem: the limitations on legal and factual materials are not the only differences between the two tests.

In its opening merits brief, the State explained in detail the independent nature of harmless-error review under *Brecht*. State Br. at 17–21. The standard could not consider AEDPA's limitations because *Brecht* was decided before AEDPA was enacted, when federal habeas review did not require any deference to state courts. See *Wright* v. *West*, 505 U.S. 277, 305 (1992) (opinion of O'Connor, J.) (noting the "independent obligation" of federal habeas courts). Indeed, this Court has clarified that *Brecht* is met merely when a federal judge is unsure—in his or her own mind—that the error affected the jury's verdict. *O'Neal* v. *McAninch*, 513 U.S. 432, 435 (1995).

Conversely, AEDPA's underlying premise is that a federal court must give significant deference to a

state court that has already adjudicated the claim. Davenport questions that premise, irrelevantly noting that the word "deference" does not appear within the statute. Resp. Br. at 26. And he argues that whatever deference is due under AEDPA, the same is due under *Brecht*. *Id.* at 26–27. That argument ignores the pointed language this Court has used—repeatedly—when applying AEDPA.

For instance, this Court has said that when a state court has adjudicated a claim on the merits, the standard for reviewing that adjudication under AEDPA is "highly deferential." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (quotation marks and citation omitted). The statute "demands that state-court decisions be given the benefit of the doubt." *Id.* The question, then, is whether the state court's adjudication was "objectively unreasonable." *Williams* v. *Taylor*, 529 U.S. 362, 409 (2000). That phrase means that the adjudication must have been "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). If " 'fairminded jurists could disagree,' " habeas relief is prohibited. *Id.* at 101 (quoting *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004)).

Nothing comparable to this language is found in *Brecht* or its progeny. How, then, can *Brecht* afford the same deference to the state-court decision under review? Davenport says it is "baked into the question[ ]" under *Brecht*. Resp. Br. at 26. And he asserts that because *Brecht* does not ask the same question *Chapman* asks, it "protects state-court decisions from being overturned on habeas review merely because a federal

court disagrees with a state court's *Chapman* analysis." *Id.* at 27. But Davenport's premise confirms the State's point—the questions are different. That a federal judge might believe an error was substantial and injurious does not resolve whether a fairminded jurist could agree with the state court ruling on the harmless-beyond-a-reasonable-doubt question.

Ignoring the differences between the standards, Davenport asserts that *Brecht* is so difficult to meet that it necessarily encompasses an AEDPA/*Chapman* determination. But the strong phrases that this Court has used in describing AEDPA deference are not mere lip service. Indeed, a federal habeas court "*must* determine what arguments or theories supported . . . the state court's decision; and then it *must* ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 562 U.S. at 102 (emphases added).

In other words, AEDPA deference is not just a standard that can be measured in terms of its difficulty level and then compared to other standards on a one-dimensional scale. It imposes an affirmative duty on a federal court to cast aside its own views of a case and evaluate whether a reasonable jurist could come to a certain conclusion. The *Brecht* test—however difficult to meet—does not impose such a duty.

C. Unlike AEDPA, *Brecht* does not require a habeas petitioner to prove anything.

Another difference between the two standards is the burden each imposes.

Brecht does not impose a burden per se. Instead, it involves "a legal standard" that a judge must apply to the facts of the case. *O'Neal*, 513 U.S. at 436. The judge must ask, " 'Do I, the judge, think that the error substantially influenced the jury's decision?' " *Id.* If the judge has "grave doubt"—*i.e.*, is in "virtual equipoise" as to the error's harmlessness—the error is not harmless. *Id.* at 435. Said differently, if the judge cannot say for certain that the error did not have substantial and injurious effect or influence on the verdict, "the [habeas] petitioner must win." *Id.* at 436.

Under that standard, the habeas petitioner does not have to prove anything. In fact, the parties may have equally compelling cases as to harmlessness; yet, in such a circumstance, a court must grant relief. So although the "burden of proof" may not be on either party, the State must, essentially, convince a federal judge that the error was harmless. Indeed, even after *O'Neal* rejected any notion of a "burden," a prominent view of *Brecht* is that it "imposes a significant burden of persuasion on the State." *Fry*, 551 U.S. at 122 (Stevens, J., concurring).[1]

AEDPA requires a much different examination. "[I]t is the habeas applicant's burden" to demonstrate that the state court's adjudication was objectively

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[1] *Ayala* properly reaffirmed this standard when it stated, "Under [*Brecht*], relief is proper only if the federal court has 'grave doubt' " as to the error's harmlessness. 576 U.S. at 267–68 (quoting *O'Neal*, 513 U.S. at 436). But it created confusion when it later stated that "Ayala must show that he was actually prejudiced" by the error. 576 U.S. at 270. The apparent conflict between these two passages (and any impact on *O'Neal*) was unexplained.

unreasonable. *Visciotti*, 537 U.S. at 25. "The petitioner carries the burden of proof." *Cullen* v. *Pinholster*, 563 U.S. 170, 181 (2011).

A chief problem with the Sixth Circuit's opinion below was that it expressly declined to impose the burden on Davenport to disprove harmlessness. The court went further, expressly placing the burden on the State. Pet. App. 2a ("[T]he State has not met its burden to show the restraints did not have a substantial and injurious effect or influence in determining the jury's verdict."), 38a ("[T]he State has 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.") (both quotes cleaned up). While this approach is questionable even under *Brecht*, the failure to require Davenport to meet *his* burden is wholly inconsistent with AEDPA.[2]

All of this refutes Davenport's claim that AEDPA/*Chapman* is necessarily met if *Brecht* is met. The two are simply different tests with different requirements.

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[2] By placing the burden on the State, instead of asking the question *O'Neal* articulated, the Sixth Circuit erred even in its *Brecht*-only approach. Davenport's assertion that the State does not contest the Sixth Circuit's *Brecht* determination is inaccurate. Resp. Br. at 1, 12. While not essential to the question presented, the State has consistently maintained that the court below erred in finding actual prejudice under *Brecht*. State Reply Br. at 12 n.3 ("[T]he State does not concede that the *Brecht* analysis below was correct . . . ."); State Br. at 47 n.4 ("[T]he court also erred in its application of the *Brecht* standard.").

II. Even under Davenport's approach, the Sixth Circuit should have applied AEDPA/*Chapman*.

According to Davenport, "if a federal court's *Brecht* analysis deviates from [AEDPA]'s limitations on legal and factual materials[,] . . . the federal habeas court should then conduct a separate and formal AEDPA/*Chapman* analysis before awarding habeas relief." Resp. Br. at 17. The Sixth Circuit deviated from those limitations here, so, even if this Court adopts Davenport's proposed approach, the court should have applied AEDPA.

Under AEDPA, a court cannot rely on circuit precedent. *Kernan* v. *Cuero*, 138 S. Ct. 4, 9 (2017). But the Sixth Circuit did just that. Davenport attempts to refute this point, asserting that the court only " '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[.]' " Resp. Br. at 33 (quoting *Marshall* v. *Rodgers*, 569 U.S. 58, 64 (2013)). Had that been what the Sixth Circuit did, it would have been permissible under AEDPA. But that is not what it did.

The Sixth Circuit relied on its own precedent, *Ruimveld* v. *Birkett*, 404 F.3d 1006, 1016 (6th Cir. 2005), to support its proposition that a close case with lengthy jury deliberations should weigh in favor of finding a shackling error prejudicial. Pet. App. 32a. The court did not claim that *Ruimveld* held that the length of jury deliberations was already clearly established by this Court as a factor to be considered when evaluating the prejudicial effect of a shackling error. Indeed, it could not have made such a claim, as

Ruimveld cited no authority when it addressed that factor. 404 F.3d at 1016. The Sixth Circuit additionally relied on the Ninth Circuit's decision in *Rhoden* v. *Rowland*, 172 F.3d 633, 637 (9th Cir. 1999), for its assertion that a defendant's alleged propensity for violence makes a shackling error more likely to be prejudicial. Pet. App. 37a–38a. But *Rhoden* was a pre-AEDPA case, so the court did not determine whether any point in issue was clearly established. Neither of these lower-court decisions had any proper role to play within an AEDPA/*Chapman* analysis.

Davenport also defends the Sixth Circuit's use of social-science studies, arguing that the studies "simply confirmed" this Court's assertion in *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), that relying on jurors' own reflections on the impact of the shackling is improper. Resp. Br. at 33. But studies from the 2010s involving the race of defendants cannot "simply confirm" a 1986 judicial opinion that had nothing to do with race. Those studies did much more than "confirm" *Flynn*'s holding—they provided the Sixth Circuit with additional bases for determining that Davenport was prejudiced. Those studies might be important to consider on direct review, when a prior state-court adjudication is not involved and the federal court is free to break new constitutional ground, but they are prohibited by AEDPA/*Chapman*.

AEDPA also prohibits a federal court from relying on arguments that were not raised in state court. *Sexton* v. *Beaudreaux*, 138 S. Ct. 2555, 2560 (2018). Davenport never argued in the Michigan Court of Appeals that the shackling contributed to the jury finding that the murder *was premeditated*. See Br. of Arkansas et

al. as Amicus Curiae Supporting Petitioner at 14–15. Contrary to Davenport's suggestion, this Court cannot simply presume he raised the argument because it was "the only argument available." Resp. Br. at 35. Also available was an argument that the shackling caused the jury to reject Davenport's self-defense claim in general, which was exactly what he raised. See 3/2/12 Davenport's Appellant's Br. in the Michigan Court of Appeals at 23, ECF No. 8-27, Page ID #2679 (arguing that the shackling error "may have been enough to convince just one wavering juror to change that juror's vote from not guilty to guilty"), *id.* at 24, Page ID #2680 ("The trial judge made absolutely no attempt to evaluate how Mr. Davenport's claim of self-defense was impacted by the shackling.").[3]

Davenport never argued that the shackling error may have caused the jury to find that the murder was premeditated instead of impulsive, yet the Sixth Circuit used that argument to find actual prejudice under *Brecht*. Pet. App. 31a ("The jury easily could have

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[3] In his reply brief in the Michigan Court of Appeals, Davenport briefly and vaguely suggested that the jury may have found him guilty of a lesser offense. (5/25/12 Davenport's Reply Br. at 7, ECF No. 8-27, Page ID #2777.) But raising the issue for the first time in a reply brief was not sufficient to present the issue to the court. See *Blazer Foods, Inc.* v. *Restaurant Properties, Inc.*, 673 N.W.2d 805, 802–13 (Mich. Ct. App. 2003). He repeated this suggestion in his application for leave to appeal in the Michigan Supreme Court, 2/7/13 Appl. for Leave to Appeal at 27–28, ECF No. 8-23, Page ID #2384–85, but the crux of his argument in that court, too, was that the shackling caused the jury to disbelieve his self-defense claim and find him guilty in general. See *id.* at 29, Page ID #2386.

found that this was second-degree murder, not first-degree murder . . . .").

Because the "federal habeas court's finding of actual prejudice under *Brecht* relied on materials that are not permitted under [AEDPA], the court should [have] separately conduct[ed] a formal AEDPA/*Chapman* inquiry to ensure adherence to [AEDPA]'s limitations." Resp. Br. at 29. Thus, even under Davenport's test, the Sixth Circuit violated AEDPA.

III. Davenport has not shown that the state court's harmlessness determination was an unreasonable application of *Chapman*.

No matter which state court issued the last reasoned decision, it does not affect the outcome. Either way, AEDPA's limitations apply, and Davenport has not overcome them.

A. The Michigan Court of Appeals' opinion was the last reasoned decision.

The State is not "ask[ing] this Court to ignore the Michigan Supreme Court order altogether." Resp. Br. at 41. Rather, it asks this Court to read the order and determine that it was not a reasoned decision on the claim because it was a decision not to decide the case at all. See Pet. App. 93a; accord *Greene* v. *Fisher*, 565 U.S. 34, 40 (2011) (describing a state court's order as "a decision by the state supreme court not to hear the appeal—that is, not to decide at all"); *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991) (finding that "the discretionary denial of review on direct appeal by the California Supreme Court is not even a 'judgment' ").

Davenport resists this by pointing out that *Greene* and *Ylst* involved unreasoned state-court orders. But that matters not. This Court's reasoning rested on the state courts' decisions to expressly decline to hear the appeals, not on the unreasoned nature of those orders. Davenport also cites *Shinn* v. *Kayer*, 141 S. Ct. 517, 524 n.1 (2020), for the proposition that a denial of an application for leave to appeal may be considered a merits adjudication for habeas purposes. But the relevant language from *Kayer* was dicta—this 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* referred only to an unexplained *decision*, not an order denying leave to appeal. 138 S. Ct. 1188, 1192 (2018). Thus, the dicta in *Kayer* should not be read to abrogate this Court's rulings in *Greene* and *Ylst*.[4]

B. The Michigan Court of Appeals' decision was not objectively unreasonable.

Because the Michigan Court of Appeals' opinion was the last reasoned decision in this case, AEDPA

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[4] Davenport faults the State for taking "the opposite position below" when it argued that the Michigan Supreme Court's order was " 'probably' " the last reasoned decision in its district court filing. Resp. Br. at 41. This is a distraction. The State pressed the same argument in the Sixth Circuit as here, and it has not shifted positions to gain an advantage, but on principled reconsideration of the question. And the larger points have never changed: *whichever* state-court decision was the last reasoned one deserves deference; the Sixth Circuit did not give deference to *any* state-court decision; and *neither* state-court decision was objectively unreasonable.

precludes relief unless that decision was "objectively unreasonable." *Williams*, 529 U.S. at 409.

As discussed, to make such a finding, a federal habeas court "*must* determine what arguments or theories supported . . . the state court's decision; and then it *must* ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 562 U.S. at 102 (emphases added). Davenport contends that the Sixth Circuit did this, or, at least, it "considered at length the only two justifications for a finding of harmlessness arguably offered by the state courts." Resp. Br. at 34. But independently analyzing the same factors that the state court considered is not the same as evaluating the state court's contrary analysis. Put differently, that one court finds juror testimony deficient, or the evidence not overwhelming, does not mean that it was objectively unreasonable for another court to come to the opposite conclusion.

Moreover, it strains credulity to argue that the Sixth Circuit gave proper deference to the state court when its opinion did not even identify which state court produced the last reasoned decision under review. The court instead determined that there was "no reason to ask . . . whether the state court 'unreasonably' applied *Chapman*," Pet. App. 10a, and conducted a *de novo* factual and legal review of the record.

So while the Sixth Circuit may have evaluated the same factors the state court did, it did not ask "the only question that matters under [AEDPA]—whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal

law." *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003). Had it asked that question, the answer would have been clear: whether right or wrong, the Michigan Court of Appeals' decision was reasonable.

Most of the Michigan Court of Appeals' analysis focused on the jurors' post-trial testimony. The court evaluated that testimony as a whole, even expressly noting that some jurors provided some statements that were not favorable to a harmlessness finding. Pet. App. 97a–98a. But it provided sound reasoning explaining why those statements did not weigh against its decision: the five jurors who testified that they saw the shackles also testified that the shackling did not influence their verdicts, and the three jurors who testified that they believed that Davenport might be dangerous also testified that their belief stemmed from the first-degree murder charge itself, not the shackling.[5] *Id.* Evaluating the testimony as a whole, the court found that it supported a finding that the shackling error was harmless beyond a reasonable doubt. That reasoning was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

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[5] The Sixth Circuit highlighted the jurors' ability to remember the shackles (or a comment about the shackles) three years after the trial as a factor in favor of finding the error was not harmless. But this fact is much more innocuous than the court made it out to be—not one juror mentioned the shackles when responding to the prosecution's open-ended question regarding Davenport's appearance at trial; their memory was triggered only after a reference to the restraints. J.A. 702–03, 729–30, 743–44, 757–59, 783–84, 804, 851–52.

Davenport argues that the Michigan Court of Appeals' reliance on juror testimony was contrary to this Court's decision in *Flynn*. The State has previously detailed why *Flynn* did not foreclose the state court's approach: *Flynn* involved *pre*-trial testimony, it was not a harmless-error case, and its discussion about juror testimony was not a holding at all. State Br. at 36–38. Thus, the court's use of juror testimony could not be contrary to *Flynn*. See *White* v. *Woodall*, 572 U.S. 415, 419 (2014). Davenport's conclusory responses, Resp. Br. at 44–45, do not undermine these arguments.

The Michigan Court of Appeals also cited the trial evidence, which "overwhelmingly established defendant's guilt and belied his contention that he killed the 103 pound victim in self-defense, a theory that was explicitly disputed by expert medical testimony." Pet. App. 99a n.2. Davenport suggests this analysis was unreasonable because it was contained within "a cursory two-sentence footnote." Resp. Br. at 45. But nothing in AEDPA requires a certain level of detail within a state court's analysis, so long as its decision is not contrary to or an unreasonable application of this Court's precedents. See *Johnson* v. *Williams*, 568 U.S. 289, 300 (2013) ("[F]ederal courts have no authority to impose mandatory opinion-writing standards on state courts . . . ."). And nowhere in this Court's seminal shackling case, *Deck* v. *Missouri*, 544 U.S. 622 (2005), did the Court indicate that the evidence of guilt at trial cannot be considered when determining the harmlessness of a shackling error. Davenport even appears to concede that overwhelming evidence can render a shackling error harmless. See Resp. Br. at 45–46.

Davenport makes two other points.

First, he contends that the Michigan Court of Appeals "unreasonably focused on a false choice between first-degree murder and self-defense." *Id.* But, as discussed, he never argued to that court that the shackling affected the jury's choice between first- and second-degree murder. See *supra*, at 13–14. It was not objectively unreasonable for the court not to expressly address a dispute it was never asked to resolve.

Second, Davenport argues that the Michigan Court of Appeals' decision was unreasonable because " 'the *only* evidence of premeditation and deliberation the prosecution pointed to in its closing argument' " was the time it took for Davenport to strangle the victim. Resp. Br. at 46 (quoting Pet. App. 30a). Other than the obvious point that the state court was not limited to considering the prosecution's closing argument (because it was not evidence, as the trial court instructed the jury (7/17/08 Trial Tr., ECF No. 8-19, Page ID #1990)), this statement is wrong because there was substantial other evidence of premeditation. One witness testified that Davenport had a plan to choke people he had a problem with. J.A. 175–78. Two other witnesses testified that just days before the murder, Davenport strangled another woman until she lost consciousness. J.A. 218, 231–33. The jury also heard that, after the murder, Davenport disposed of White's body, stole from her home, admitted he had "off[ed] her," and repeatedly lied to police.[6] J.A. 172–

[6] In Michigan, "the defendant's actions before *and after* the crime" "may be considered to establish premeditation." *People* v. *Bass*, 893 N.W.2d 140, 157 (Mich. Ct. App. 2016) (emphasis added).

73, 290–97, 303–05, 525–27, 590–94. These facts all supported the prosecution's theory that Davenport committed premeditated murder when he strangled White for at least four minutes and continued to do so after she lost consciousness. J.A. 26–27. Fairminded jurists could agree with the court's characterization of this evidence as "overwhelming[ ]."

All told, considering the jurors' testimony disclaiming any reliance on the shackling when deciding the case and the overwhelming evidence of guilt, the Michigan Court of Appeals' conclusion that the shackling error was harmless beyond a reasonable doubt was not contrary to or an unreasonable application of *Chapman*.

C. The Michigan Supreme Court's decision was not objectively unreasonable.

Even if the Michigan Supreme Court's order was the last reasoned state-court decision, it was not contrary to or an unreasonable application of *Chapman*. That decision cited "the substantial evidence of guilt presented at trial" and concluded that the shackling error was harmless. Pet. App. 93a–94a. Just like the Michigan Court of Appeals' analysis, the Michigan Supreme Court's analysis was reasonable.

Davenport makes three counterpoints, none of which are persuasive.

First, he argues that the court's citation to *Flynn* was unreasonable because *Flynn* "is not a variation" of the *Chapman* standard. Resp. Br. at 39. True, *Flynn* cannot be used instead of *Chapman* when determining whether a shackling error was harmless.

But the Michigan Supreme Court never said it was throwing out the harmless-beyond-a-reasonable-doubt standard (the very standard that it initially asked the lower courts to apply, J.A. 687–88). Rather, the court used *Flynn* to support its determination that the Michigan Court of Appeals should not have considered the juror's self-assessment of prejudice. Limiting the factors the prosecution can use in meeting its burden to prove harmlessness beyond a reasonable doubt does not somehow negate the *Chapman* standard altogether.

Second, Davenport argues that the Michigan Supreme Court's first order, which cited *Deck* and remanded to determine whether the shackling error was harmless beyond a reasonable doubt, cannot be used to show that its final order applied *Chapman*. But the final order need not be read in a vacuum, apart from the posture of the entire appeal. The stated goal of the first Michigan Supreme Court order, the trial court's decision, and the Michigan Court of Appeals' opinion was to determine whether the error was harmless beyond a reasonable doubt. To say that the Michigan Supreme Court in its final order reviewed the case and repudiated the entire purpose of the appeal without expressly saying so makes no sense. It also does not give the state court's decision "the benefit of the doubt," as AEDPA demands. *Visciotti*, 537 U.S. at 24.

Third, Davenport argues that the Michigan Supreme Court's failure to cite *Chapman* was unreasonable. He contends that a lack of a citation to the relevant authority is appropriate under AEDPA only if the decision was unreasoned. That is not the case. Else this Court in *Early* v. *Packer* would not have said

that AEDPA "does not even require *awareness* of our cases, so long as neither *the reasoning* nor the result of the state-court decision contradicts them." 537 U.S. 3, 8 (2002) (second emphasis added). Neither the Michigan Supreme Court's reasoning nor its result was contrary to or an unreasonable application of *Chapman* or *Deck*.

* * *

Davenport's arguments ignore AEDPA's purpose. Even if the Sixth Circuit's independent decision about the prejudicial nature of the shackling error was correct under *Brecht*, that does not mean the state court's assessment of harmlessness under *Chapman* was objectively unreasonable. Because the last reasoned state-court decision reasonably determined that the error was harmless beyond a reasonable doubt, this Court should reverse the Sixth Circuit's decision granting habeas relief.

CONCLUSION

This Court should reverse the Sixth Circuit's judgment.

Respectfully submitted,

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