No. 20-826

In the Supreme Court of the United States

MIKE BROWN, ACTING-WARDEN, PETITIONER

v.

ERVINE DAVENPORT

REPLY IN SUPPORT OF APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PENDING DECISION ON THE STATE OF MICHIGAN'S PETITION FOR A WRIT OF CERTIORARI

To the Honorable Brett M. Kavanaugh,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Sixth Circuit

RESPONSE REQUESTED BY FEBRUARY 3

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INTRODUCTION

The State's petition for a writ of certiorari presents an important legal question that has plagued federal habeas review and has divided courts and jurists across the country. While this Court considers whether to grant the petition, the State is placed in an impossible position: it must be ready to afford a retrial, fair to both Davenport and the prosecution, with barely a month's notice, while an unprecedented global pandemic wreaks havoc on the criminal justice system. Naturally, the State has requested that this Court stay the mandate ordering retrial by May 4, 2021.

Davenport pleads that a stay is unnecessary, but his position rests on an overly creative (and wrong) procedural argument, a rehash of the flawed analysis used by the court below, and an obliviousness to the inner-workings of a local prosecutor's office and the burdens that the COVID-19 crisis has placed on it. As discussed in full below: (1) the State requested the exact relief sought here in the Sixth Circuit Court of Appeals (that it alternatively requested a lesser form of relief did not negate its primary argument); (2) despite the unpersuasive attempts to rationalize the incompatibility between the legal holding below and that of this Court, the governing statute, and five other courts of appeals, there is a reasonable probability that four Justices will grant certiorari and a fair prospect that the judgment below will be reversed; and (3) the State's ability to conduct a fair retrial will be irreparably harmed if it is required to try a 14-year-old murder case with short notice.

For these reasons, this Court should grant the application to stay the mandate.

ARGUMENT

I. The State requests that this Court stay the mandate—the exact relief that it requested in, and was denied by, the Sixth Circuit Court of Appeals.

Davenport's first argument is a procedural one: he asserts that the State never asked the court below for the relief it now seeks. He is mistaken.

In its November 13, 2020 motion in the Sixth Circuit, the State requested that the court stay the mandate until this Court rules on the petition for certiorari—indeed, the State expressly requested that relief *four times* throughout the motion. (Respondent's Appx. D, 19 ("This Court should stay the 180-period within which Davenport must be released or retried, ruling that the 180-day time period will begin to run from the final disposition of the State's petition for certiorari in that court."), 28 ("[T]his Court should recall the mandate and stay its issuance . . ., ordering that the 180-day time period will instead begin to run from the final disposition of the State's petition for certiorari . . .."), 30 ("The State therefore respectfully requests that this Court recall the mandate and stay its issuance while the State files a timely petition for a writ of certiorari in the Supreme Court, ordering that the 180 days begin to run from the final disposition of the State's petition for certiorari."), 31 ("[T]he State respectfully requests that this Court . . . order that the 180 days in which the State may retry or release Ervine Davenport begins to run from the date the State's petition reaches final disposition . . .."),) It was undeniably clear that the State's motion sought a stay until this Court rules on the petition.

Davenport's contrary argument focuses on the State's alternative request that the Sixth Circuit clarify that the 180-day period within which to release or retry him began to run the date the mandate issued (as opposed to the date the panel opinion issued, which was 128 days earlier).[1] Davenport stated that he " 'ha[d] no objection' " to this alternative request, and the Sixth Circuit Court of Appeals adopted that clarification. (Application Appx. F, 1, 2.) But the State's alternative request did not somehow negate its primary request. See *Greene* v. *United States*, 376 U.S. 149, 159 n.13 (1964) (finding the government's alternative argument that assumed the rejection of its primary argument was not a concession); *United States* v. *Ayeni*, 374 F.3d 1313, 1319 (D.C. Cir. 2004) (Tatel, J., concurring) ("A party making such alternative arguments does not, of course, forfeit either one."). The Sixth Circuit understood this, which is why, despite agreeing to clarify the date that the 180-day period began to run, it ultimately *denied* the motion. (Application Appx. F, 2.)

Davenport's argument rests on the premise that the State's motion sought equally each of its alternative requests for relief. But a fair reading of the motion indicates otherwise. As demonstrated by the multiple parenthetical citations above, the State made clear throughout the pleading that it desired, first, that the mandate be stayed until this Court ruled on the petition.

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[1] The original panel majority opinion stated that Davenport was to be released "unless the State of Michigan commences a new trial against him within 180 days *from the date of this opinion*." (Application Appx. A at 25–26 (emphasis added).) Both the State and the district court interpreted this language to mean that the time allotted began running on June 30, 2020, the date the panel opinion was issued. (See Application Appx. E, District Court's Nov. 18, 2020 order ("[I]f the State of Michigan fails to commence a new trial against [Davenport] by December 30, 2020, a writ of habeas corpus shall issue.").)

Indeed, the motion expressly stated that only "if" the Sixth Circuit did not grant that relief should it then clarify the starting date of the 180-day period. (Respondent's Appx. D, 28, ¶ 14) ("Alternatively, *if* this Court does not grant this relief [of ordering that the 180-day time period will begin to run from the final disposition of the State's petition for certiorari] while the State files a timely petition, this Court should clarify that the 180-day period runs from the date of the mandate, which issued on November 5, 2020, not the date of the opinion.") (emphasis added).

Given that the State preserved its request that the mandate be stayed until this Court rules, Davenport tries to save his argument by suggesting that the State's *reasoning* was not properly raised below. Because the State reasoned only that it could not comply with the writ and simultaneously preserve its ability to appeal to this Court by December 29, 2020, the argument goes, the State never raised its current argument that it cannot comply by May 4, 2021. But Supreme Court Rule 23.3 does not require the specific reasoning be presented to the Court of Appeals; rather, it requires only the "relief requested" be first sought below. In any event, the State specifically requested that the stay extend until this Court rules on its petition, irrespective of the date the lower courts set to comply. It would have made little sense to argue specifically that it could not comply by May 4 when the deadline as originally stated in the opinion of the Sixth Circuit was four months earlier. And, as discussed above, that the State *alternatively* sought that the comply-by date be extended to May 4 does not negate its primary argument that the mandate be stayed until after this Court rules.

Despite Davenport's strained reading of the State's motion below, this Court's "job is not. . . to see how creatively [it] can read pleadings in order to avoid deciding an issue." *Ayeni*, 374 F.3d at 1319 (Tatel, J., concurring). At bottom, the State requested that the Sixth Circuit stay its mandate until this Court rules on the petition. It requests the same relief here. No contrived procedural infirmity bars that relief.

II. There is a reasonable probability that four Justices will grant certiorari and a fair prospect that the judgment below will be reversed.

The State's petition has considerable merit. Seven Sixth Circuit judges thought the issue was worthy of rehearing en banc. Even two Sixth Circuit judges who voted to deny rehearing suggested that this Court should review this important question. (Application Appx. B, 10 (Sutton, J., concurring) ("The[ ] . . . debate over *Chapman*/*Brecht* seem[s] to be [a] recurring one[ ] in our circuit and outside it, suggesting that there is room for clarification by the Supreme Court when it comes to federal court review of state court harmless-error decision under AEDPA . . ..").) Because there is a strong case that this Court will review and reverse the decision below, a stay should be granted.

A. The State court's harmlessness decision is entitled to AEDPA's highly deferential standard of review.

Davenport attempts to avoid the substance of the State's petition by asserting that the question, however important it may be, is simply not presented in 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* v. *California*, 386 U.S. 18 (1967), Davenport argues, AEDPA's deferential standard of review does not apply, meaning the *Brecht* test was the only harmlessness standard applicable here. Notably, not one of the 15 judges who reviewed this case in the court below agreed with this position, else the opinions (particularly those ruling in Davenport's favor) would have mentioned this easy way to avoid the issue.

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

First, the Michigan Supreme Court did not issue the last reasoned State court decision to adjudicate the claim. That court, in an order, stated that Davenport's application for leave to appeal was denied. (Respondent's Appx. B, 4a.) 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. Despite its additional two-sentence analysis, the Michigan Supreme 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. See *Langley* v. *Prince*, 926 F.3d 145, 180 n.13 (5th Cir. 2019) (en banc) (Higginson, J., dissenting) (noting that because the highest state court's "decision was a discretionary denial of review," the State intermediate appellate court's

decision "was the last decision on the merits in the state system"); see also *Plumaj* v. *Booker*, 629 Fed. App'x. 662, 665 (6th Cir. 2015) ("[T]he Supreme Court has held that 'the discretionary denial of review . . . is not even a "judgment" ' for purposes of identifying a state court judgment on the merits of a habeas claim.") (quoting *Ylst*).

Second, even if the Michigan Supreme Court's order was the last reasoned State court decision, it is surely entitled to AEDPA deference. Davenport argues that the court's citation to and use of the standard outlined in *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), is evidence that it failed to apply the *Chapman* harmless-beyond-a-reasonable-doubt standard. But, as pointed out in the State's petition, *Chapman* is a general standard entitled to substantial leeway by state courts. (State's Pet., 26–29.) 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. Thus, a state court is free to utilize the analysis employed by this Court in a related context (*Flynn* considered whether a courtroom security practice was a constitution violation in the first instance; it had no reason to conduct a harmlessness analysis) when determining whether the error was harmless. While the Michigan Supreme Court concluded that the Michigan Court of Appeals erred in failing to consider *Flynn* in its review of the jurors' testimony, the State Supreme Court nevertheless found that "the error was harmless under the facts of this case." (Respondent's Appx. B, 4a.) That the 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). Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.

Harrington v. *Richter*, 562 U.S. 86, 98 (2011) (citation omitted).

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 State trial court and the intermediate appellate court both expressly found that the error was harmless beyond a reasonable doubt. (Respondent's Appx. A, 1–3.) To argue that the Michigan Supreme Court's last decision did not conduct a *Chapman* analysis would be to argue that the court disavowed the entire purpose of the remand without explicitly stating so.

All told, whether the relevant decision for habeas review is the Michigan Supreme Court's order denying leave to appeal or the Michigan Court of Appeals' opinion denying the claim on the merits, AEDPA deference applies. And because the Sixth Circuit expressly ignored that deference and employed a *Brecht*-only approach, the question posed by the petition—"[M]ust the court also find that the state court's *Chapman* application was unreasonable . . .?"—is squarely presented in this action.

B. The decision below conflicts with *Ayala*, conflicts with AEDPA, and creates a circuit split.

Davenport also argues that this Court is unlikely to grant the State's petition because the Sixth Circuit's decision "is fully consistent with *Davis* v. *Ayala*, 576 US.

257 (2015), and AEDPA." (Opposition to Application, 14.) 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.

In support of his position, Davenport mainly rehashes arguments put forth by the Sixth Circuit's panel majority opinion and the lead opinion concurring with the order denying rehearing en banc. The State's petition fully explains why those arguments are based on a misreading of *Ayala* and a misunderstanding of habeas law. (State's Pet., 19–21.)

One point to briefly reiterate: although it is true that *Ayala* states that AEDPA's limitations need not be *formally* applied, the Sixth Circuit below expressly acknowledged that it did not consider the State court decisions *at all*. But contrary to the court's reasoning, *Brecht* does not "handle[ ] the work of both tests." (Application Appx. A, 8 (internal quotation omitted).) As Judge Thapar stated in his opinion dissenting from the order denying rehearing en banc: "[W]hile *Brecht* might impose a stricter substantive standard for relief than *Chapman* standing alone, *Brecht* and AEDPA ask different questions and are governed by different procedural rules." (Application Appx. B, 21.) A federal habeas court performing an analysis under *Brecht* may (as the Sixth Circuit did here) rely on circuit precedent and extra-judicial sources, extend this Court's precedents, and need not give a state court leeway when analyzing a general legal rule—all practices prohibited by AEDPA. (See State's Pet., 21–29.) Simply put, the tests are different, and it matters not that *Brecht* imposes a

demanding standard. (See Application Appx. A, 36 (Readler, J., dissenting) ("While *Brecht* . . . may 'subsume' the AEDPA analysis, nowhere has the Supreme Court declared that *Brecht consumes* AEDPA, rendering it null and void in the harmless error setting.").

Davenport also contends that there is no circuit split, arguing that none of the cases cited by the State in its petition resulted in the particular *outcome* that the State argues should have occurred here. Namely, Davenport says that "the State does not cite a single case . . . in which a habeas petitioner who would have prevailed under *Brecht* was nonetheless denied relief under AEDPA/*Chapman*." (Opposition to Application, 18.) But that none of those cases resulted in that particular outcome does not annul the law laid out in those opinions. Regardless of the outcome that each of the cited cases reached after analyzing their underlying facts, the law in each of the identified circuits is that both tests must be met before granting habeas relief.[2] Had Davenport's case arisen in the Second, Third, Seventh, Ninth, or Tenth circuits, the respective courts of appeals would have performed an AEDPA/*Chapman* analysis. And because the Michigan courts' decisions did not run afoul of that highly deferential standard of review, habeas relief would have been denied. This is a clear circuit split.

Because there is a reasonable probability that certiorari will be granted and a fair prospect that the judgment below will be reversed, this Court should grant the stay.

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[2] And, as pointed out in the State's petition, "none of these circuits have *granted* habeas relief before making an explicit determination regarding the reasonableness of the underlying state-court decision." (State's Pet., 20.)

III. Trying a 14-year-old murder case with barely a month's notice will irreparably harm the State.

As a final argument against the application for a stay, Davenport asserts that the State will not suffer irreparable harm, stating that "the State's concerns are unfounded" and are "of its own making." (Opposition to Application, 21, 22.) In so arguing, Davenport ignores wholesale the problems with trying a 14-year-old murder case during a global pandemic that has nearly ground to a halt the criminal justice system.

As discussed in the application, the *earliest* this Court will rule on the petition is March 26, and it likely will not be decided until April 1. (State's Application, 12–13.) This is less than five weeks before the new trial must begin. In his analysis, Davenport never engages with the problems of conducting a trial for an act that occurred over a decade ago in such a short timeframe. Finding witnesses, holding pretrial hearings and motions, and finding time on a State trial court's busy schedule in a five-week period is daunting. The resources needed to perform these tasks will undeniably result in sacrifices being made that will prejudice the State's ability to obtain a fair trial. Obviously, the ability to obtain a fair trial is important to Davenport too, and no matter how experienced his own counsel, it is unlikely that he or she will be able to guarantee him a fair trial with only a months' preparation. The State's (and Davenport's) inability to obtain a fair trial is an irreparable harm.

Contrary to Davenport's claim, nothing the State did caused this untenable position. A good-faith appeal is not an unreasonable position. See *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986) ("[I]t hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay.")

And Davenport fails even to mention anywhere in his response that the entire time since he was granted habeas relief the country has been ravaged by a global pandemic that has made usually simple tasks extremely difficult, if not impossible. Indeed, the State trial court where Davenport's retrial must be held is currently in the midst of a nearly three-month jury-trial moratorium. (See State's Appx. H.) It would be irreparably harmful for the prosecution to prepare for a 14-year-old murder case while simultaneously preparing for a backlog of other cases that will have to be tried once it is safe to do so.

Finally, although Davenport mentions the State's ability to release Davenport from his current custody and hold him as a pretrial detainee, that procedural possibility appears foreclosed in this case. Acting according to the Sixth Circuit's panel majority opinion, the district court has directed the State to "commence a new trial against [Davenport] by May 4, 2021." (Application Appx. G, 2.) Because the State cannot do so without suffering irreparable harm, this Court should grant the application for a stay.

CONCLUSION

For these reasons, this Court should stay the Sixth Circuit's mandate that Davenport be released or retried by May 4, 2021. Rather, as requested below, the 180-day period should run from the final disposition of the petition for certiorari in the event that the State does not prevail. The State requests that a decision be made on this motion by February 3, 2021.

Respectfully submitted,

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