HABEAS CORPUS

What Must a Federal *Habeas* Petitioner Show to Obtain Relief for Constitutional Error in the State Trial Court When a State Appeals Court Has Previously Found the Error Harmless Beyond a Reasonable Doubt?

CASE AT A GLANCE

A federal *habeas* petitioner whose state conviction was tainted by constitutional error that a state appeals court found harmless beyond a reasonable doubt must pass two tests to obtain relief. The Supreme Court has said that the second test "subsumes" the first, but disagreement has emerged in the lower courts about whether and how a *habeas* court must apply the first test if the second test has been satisfied. The petition for *certiorari* asks the Court to resolve this disagreement.

Brown v. Davenport
Docket No. 20-826

Argument Date: **October 5, 2021** From: **The Sixth Circuit**

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Introduction

When a federal *habeas* petitioner establishes that a state criminal conviction was marred by federal constitutional error, the petitioner then must establish the harmfulness of the error to obtain relief. In a situation where a state appeals court previously found the error to be harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18 (1967), this entails two different showings. The first, imposed by the federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), requires the petitioner to demonstrate the unreasonableness of the state appeals court's harmlessness determination under *Chapman*. *See Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*) (interpreting AEDPA, 28 U.S.C. § 2254(d)(1), which precludes relief unless the state-court adjudication "was contrary to, or involved an unreasonable application of Federal law, as determined by the Supreme Court of the United States"). The second, imposed by caselaw that predates AEDPA, requires the petitioner to demonstrate "actual prejudice" by showing that the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)).

In *Fry v. Pliler*, 551 U.S. 112 (2007), the Supreme Court stated that the *Brecht* test "subsumes" the AEDPA/*Chapman* test and, therefore, there is no reason to require a *habeas* court to formally apply both tests. But in *Davis v. Ayala*, 576 U.S. 257 (2015), the Court stated that the lack of any need for formal application of the two tests "does not mean…that a state court's harmlessness determination has no significance under *Brecht*." This case arises from a divided Sixth Circuit panel decision awarding a *habeas* petitioner relief after concluding that he satisfied the *Brecht* test without separately and explicitly applying the AEDPA/*Chapman* test.

Issue

May a federal *habeas* court grant relief based *solely* on its conclusion that the *Brecht* test is satisfied, as the Sixth

Circuit held, or must the court also find that the state court's *Chapman* application was unreasonable under AEDPA § 2254(d)(1), as the Second, Third, Seventh, Ninth, and Tenth Circuits have held?

Facts

In July 2008, the state of Michigan tried Ervine Davenport before a jury on a charge of open murder for the 2007 death of Annette White. Under Michigan law, a charge of open murder allows the jury to consider conviction for either first- or second-degree murder. To convict Davenport of first-degree murder, the jury was required to find that he acted with deliberateness and premeditation. But neither deliberateness nor premeditation is an element of second-degree murder.

The general circumstances of White's death were largely undisputed. Davenport had been drinking beer and smoking crack cocaine with White and some friends at their home. White was asked to leave because she was behaving erratically. Davenport drove her home. A physical altercation occurred in the car. Davenport, who was much larger than White, grabbed her by the neck, pinned her against the side of the car, and caused her death. Davenport testified that the death occurred accidentally as he sought to restrain White after she attempted to grab the steering wheel and swung at him with a box cutter. But the jury rejected Davenport's self-defense claim and, finding the necessary premeditation and deliberation, convicted him of first-degree murder.

During the trial, Davenport was bound with a waist chain, a wrist shackle, and ankle shackles. The trial court did not explain on the record why the shackling was necessary. The parties agree that the shackling, without stated justification, violated Davenport's due process rights under *Deck v. Missouri*, 544 U.S. 622 (2005).

On direct appeal, Davenport sought a new trial based on this shackling error. The Michigan Court of Appeals concluded that the issue was unpreserved and did not warrant relief under plain error review. The Michigan Supreme Court reversed, finding that the issue was preserved. It remanded to the trial court for an evidentiary hearing to determine whether the jury saw the shackles and, if so, whether the state could establish beyond a reasonable doubt that the shackling error did not contribute to the verdict.

The trial court subsequently convened an evidentiary hearing at which all 12 jurors testified. Five jurors acknowledged seeing the shackles at some point during jury selection or trial, two others recalled comments by other jurors about the shackles, and one could not remember whether she saw the shackles. The remaining four jurors did not notice or hear about the shackles. All jurors testified that the shackling did not affect their deliberations.

Following the hearing, the trial court ruled that, although some of the jurors saw the shackles, the prosecution had proved beyond a reasonable doubt that the shackling did not affect the jury's verdict. The Michigan Court of Appeals affirmed, and the Michigan Supreme Court denied leave to appeal. In its order, the Michigan Supreme Court criticized the Michigan Court of Appeals for relying in its opinion on juror testimony that the error had not affected deliberations, noting that *Holbrook v. Flynn*, 475 U.S. 560 (1986), bars consideration of such evidence. But it declined to intervene, given the substantial evidence of guilt presented at trial.

Davenport thereafter petitioned a Michigan federal district court for a writ of *habeas corpus* on grounds of his unconstitutional shackling. A magistrate judge issued a Report and Recommendation that the petition be denied because Davenport had not demonstrated the unreasonableness of the state courts' determinations that the error had been harmless. Davenport objected, but the district court overruled his objections, adopted the Report and Recommendation, and denied the petition. The Sixth Circuit permitted Davenport to appeal.

In a 2–1 panel decision, the Sixth Circuit reversed. The majority acknowledged that the AEDPA/*Chapman* and *Brecht* tests both must be satisfied for a federal *habeas* court to award relief to a petitioner whose state trial was tainted by constitutional error that a state appeals court found harmless beyond a reasonable doubt. But because the more stringent *Brecht* test subsumes the AEDPA/*Chapman* test, the majority reasoned, a conclusion that a petitioner has satisfied the *Brecht* test necessarily implies a conclusion that the petitioner also has satisfied the AEDPA/*Chapman* test—even without explicit and formal application of that test.

Applying *Brecht*, the majority concluded that Davenport's shackling resulted in actual prejudice. In reaching its conclusion, the court reviewed the trial evidence in detail and determined that the evidence of deliberation and premeditation necessary to distinguish first-degree murder

from second-degree murder was not overwhelming. The majority's conclusion also was informed by the fact that several jurors observed Davenport's restraints, and the inherently prejudicial nature of shackling.

Judge Readler dissented. He would have held that a federal *habeas* court must explicitly determine that both the *Brecht* and the AEDPA/*Chapman* tests are satisfied before granting relief to a petitioner raising a constitutional trial error that a state appeals court had previously held harmless. Applying the AEDPA/*Chapman* test, Judge Readler would have denied relief on the ground that the Michigan appeals courts' harmlessness determinations did not involve unreasonable applications of *Chapman*. The state petitioned for rehearing *en banc*, but the Sixth Circuit denied the petition by an 8–7 vote.

Case Analysis

In *Davis v. Ayala*, 576 U.S. 257 (2015), the Supreme Court endorsed its prior indication that a federal *habeas* court considering whether to award relief to a *habeas* petitioner who has established constitutional error that a state appeals court found harmless is *not* required to formally apply both the AEDPA/*Chapman* and *Brecht* tests. *Id.* at 268 (reiterating the Court's statement in *Fry v. Pliler*, 551 U.S. 112, 120 (2007), that "it certainly makes no sense to require formal application of both tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former"). But *Ayala* then immediately followed this endorsement by stating "that does not mean…that a state court's harmlessness determination has no significance under *Brecht*." Lower court judges have interpreted these statements in different ways. As described above, a divided Sixth Circuit panel took the statement to mean that if a *habeas* petitioner establishes under *Brecht* that the error caused "actual prejudice" by having "a substantial and injurious effect or influence in determining the jury's verdict," the petitioner necessarily also has established the unreasonableness of the state appeals court's harmlessness determination under AEDPA/*Chapman*.

Petitioner Mike Brown, representing Michigan as acting warden of the facility where respondent Davenport is incarcerated, argues that the Sixth Circuit erred in concluding that a *habeas* petitioner's satisfaction of the *Brecht* standard obviates the need to explicitly evaluate the reasonableness of the state appeals court's harmlessness determination. The state contends that this conclusion ignores the requirements of both the validly enacted AEDPA, 28 U.S.C. § 2254(d)(1), and the Court's precedents.

The state asserts that while the *Brecht* standard is demanding, it differs in kind from the AEDPA/*Chapman* analysis by requiring independent federal court review, as opposed to the deferential review mandated by AEDPA/*Chapman*. *See* 28 U.S.C. § 2254(d)(1) (requiring that the state court's application of *Chapman* be "unreasonable"). Therefore, the state argues, a finding that the *Brecht* test has been satisfied after independent review does not *ipso facto* establish that the state court was unreasonable in concluding that the error was harmless.

Moreover, the state continues, a federal *habeas* court applying independent review under *Brecht* may rely on materials that a court conducting the AEDPA/*Chapman* test is prohibited from consulting. *See id.* (requiring *habeas* courts to make their reasonableness determinations based on only "clearly established Federal law, as determined by the Supreme Court of the United States"). According to the state, materials on which a *habeas* court may rely in conducting an independent *Brecht* analysis, but not the deferential AEDPA/*Chapman* analysis, include Supreme Court dicta (as opposed to holdings), *see White v. Woodall*, 572 U.S. 415 (2014) ("clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions") (cleaned up); circuit court precedent, *see Kernan v. Cuero*, 138 S. Ct. 4 (2017 (*per curiam*) ("circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court'") (cleaned up); and materials such as social science studies that were not before the state court, *see Cullen v. Pinholster*, 563 U.S. 170 (2011) ("§ 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits").

Finally, the state contends, the Sixth Circuit's failure to conduct a deferential AEDPA/*Brecht* analysis materially impacted the outcome of this case. The state supports this argument with three subsidiary assertions. First, no Supreme Court case has clearly established that shackling amounts to prejudicial error requiring reversal. Second, the state appeals courts did not unreasonably conclude, given the juror testimony and the substantial evidence of Davenport's guilt, that the shackling error was harmless. Finally, the Sixth Circuit's nondeferential *Brecht* analysis relied on Supreme Court dicta, federal circuit court precedent, and social science studies—none of which may play any part of an AEDPA/*Chapman* analysis.

Davenport responds to the state's arguments by acknowledging that satisfaction of the statutory requirements of 28 U.S.C. § 2254(d)(1), including its

requirement that a prior state appeals court's harmlessness determination be unreasonable, is a precondition of *habeas* relief. Davenport also acknowledges that a *habeas* court's determination that a *habeas* petitioner suffered "actual prejudice" under *Brecht* necessarily "subsumes" a lesser finding that a state appeals court's harmlessness determination was unreasonable only if the *Brecht* determination was based solely on the legal and factual materials that may be considered under the AEDPA/*Chapman* analysis.

But, Davenport contends, a careful reading of the record shows that the Sixth Circuit did in fact rely only on materials permitted by an AEDPA/*Chapman* analysis—in particular, on the legal standards supplied by *Deck v. Missouri*, 544 U.S. 622 (2005), and *Chapman v. California*, 386 U.S. 18 (1967), and the evidentiary record before the state courts. Davenport says that the Sixth Circuit cited circuit precedent and other materials "only cumulatively to confirm its reliance on Supreme Court precedents that were already clearly established governing law." Thus, the Sixth Circuit's *Brecht* finding necessarily included a finding that the AEDPA/*Chapman* test was satisfied.

In any event, Davenport argues, even if the Supreme Court were to agree with the state that a federal *habeas* court must always formally apply an AEDPA/*Chapman* analysis in addition to finding "actual prejudice" under *Brecht*, he would still be entitled to relief. The Michigan Supreme Court, in Davenport's view, did not actually apply *Chapman*. Moreover, the Michigan Court of Appeals' harmlessness determination was "contrary to, or involved an unreasonable application of, clearly established Federal law," because it was based on juror testimony that the jury was not affected by the shackling. Reliance on this testimony, Davenport says, is forbidden by *Holbrook v. Flynn*, 475 U.S. 560 (1986). In addition, the determination was objectively unreasonable given the thin evidence that Davenport acted with deliberation and premeditation in taking White's life.

Significance

Federal and state appeals courts are regularly called upon to apply harmless-error review. But harmless-error doctrines, as elaborated by the Supreme Court, have become both exceptionally complex and beset with mysteries. The doctrines differentiate among four different categories of error: (1) constitutional "structural" errors, which can never be harmless; (2) constitutional "trial" errors challenged on direct review, which are reviewed for harmlessness under the test established in *Chapman v. California*, 386 U.S. 18 (1967); (3) non-constitutional trial errors challenged on direct review, which are reviewed for harmlessness under the test established in *Kotteakos v. United States*, 328 U.S. 750 (1946); and (4) constitutional trial errors challenged on collateral review, which are reviewed under *Brecht* and, if there has been a prior state appeals court finding of harmlessness, AEDPA/*Chapman*. There is also an entirely different plain error regime applied to errors as to which appellate rights have not been preserved. Finally, there is a federal harmless-error statute, 28 U.S.C. § 2111, which directs courts to disregard "errors or defects which do not affect the substantial rights of the parties," but whose relationship to the various harmless-error doctrines is anything but clear.

Thus, any opportunity for clarification of harmless-error principles is most welcome. In *Brown v. Davenport*, the Court has an opportunity to clarify the mixed signals sent in *Davis v. Ayala* about the obligation of a *habeas* court to apply the AEDPA/*Chapman* test when it concludes that a petitioner whose constitutional trial error was found harmless by a state appeals court has satisfied the demanding standard for relief established by *Brecht*.

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