No. 14-1516

In The Supreme Court Of The United States

STEPHEN DUNCAN,

PETITIONER,

v.

LAWRENCE OWENS,

RESPONDENT.

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

AMICUS BRIEF OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, DELAWARE, FLORIDA, IDAHO, INDIANA, KANSAS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

ROBERT W. FERGUSON
Attorney General

NOAH G. Purcell
Solicitor General

1125 Washington Street SE
Olympia, WA 98504-0100
360-664-9018
alan.copsey@atg.wa.gov

ALAN D. COPSEY
Deputy Solicitor General

JOHN J. SAMSON
Assistant Attorney General

ADDITIONAL COUNSEL LISTED INSIDE

PETITION FOR CERTIORARI FILED JUNE 22, 2015
CERTIORARI GRANTED OCTOBER 1, 2015

QUESTION PRESENTED

Section 2254(d)(1) of Title 28 of the United States Code requires that any claim adjudicated on the merits in state court be contrary to, or an unreasonable application of, clearly established Supreme Court precedent before habeas relief may be granted. In this case, Respondent was convicted of murder at a bench trial, and in announcing the verdict, the trial judge made an inference concerning Respondent's motive, which was not an element of the crime. Respondent claimed that the judge made improper "extrajudicial" findings regarding his motive and thus found him guilty based on evidence not produced at trial. The state appellate court upheld Respondent's conviction, holding that the trial court's inference regarding motive, if error, was harmless. The Seventh Circuit overturned Respondent's conviction on habeas corpus review, finding that the trial court's inference about motive violated Respondent's right to have his guilt adjudicated solely on the evidence introduced at trial, relying on Supreme Court decisions involving juries exposed to impermissible information or influences, and finding the error not harmless.

Did the Seventh Circuit violate 28 U.S.C. § 2254 and a long line of this Court's decisions by awarding habeas relief in the absence of clearly established precedent from this Court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTEREST OF AMICI CURIAE[1]

The amici States have a strong interest in ensuring that the finality of convictions obtained in their state courts is respected in federal court. The States' attorneys general have the primary responsibility for defending the validity of these convictions in federal habeas corpus proceedings, and consequently have a compelling interest in the proper and consistent application of the deferential standards of review Congress imposed in the Antiterrorism and Effective Death Penalty Act (AEDPA). The decision below threatens these interests by granting habeas relief in contradiction to AEDPA's deferential standards. By not giving proper deference to the state court, and using its own precedent to create and apply a rule not clearly established in a holding of this Court, the Seventh Circuit failed to comply with the requirements of 28 U.S.C. § 2254(d)(1).

SUMMARY OF ARGUMENT

AEDPA imposes a highly deferential standard that federal courts must apply when reviewing a state court's decision on a federal claim. This standard creates a modified res judicata rule that bars relitigation of a claim decided in state court unless the petitioner proves the state court decision

---

[1] Counsel of record received timely notice of the States' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the States to file this brief.

was contrary to or an unreasonable application of clearly established federal law as determined by this Court.

AEDPA's deferential standard first requires that the law applied to grant relief be clearly established in a holding of this Court. Circuit courts may no longer grant relief based upon rules developed in their own precedent, even when the circuit law just extended this Court's precedent. If this Court has not decided the issue in a prior holding, the rule is not clearly established federal law, and 28 U.S.C. § 2254(d)(1) bars relief.

AEDPA also requires that the state court decision be either contrary to, or an unreasonable application of, the federal law clearly established by this Court. This requires more than a finding that the state court clearly erred. The state court must have unreasonably applied the applicable federal law. Under this standard, the state court decision must be so unreasonable that fairminded jurists could not disagree as to the incorrectness of the decision. There must have been no reasonable basis for the state court to have denied relief.

Here, the Seventh Circuit did not comply with AEDPA. The circuit court did not apply a rule clearly established in a holding of this Court. Instead, using isolated sentences from this Court's opinions, the Seventh Circuit applied a highly generalized principle to find constitutional error. The circuit court then granted relief after finding that error had caused actual prejudice. Giving no deference to the state court, the Seventh Circuit did not decide whether the state court's harmless error decision was

unreasonable. Instead, the circuit court granted relief based upon its own independent, de novo determination of prejudice. By doing so, the court violated AEDPA.

ARGUMENT

A. AEDPA Reformed Habeas Rules by Imposing a Highly Deferential Standard for Reviewing State Court Adjudications

The Antiterrorism and Effective Death Penalty Act (AEDPA) expressly limits the power of federal courts to grant relief to state prisoners. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). AEDPA circumscribes federal review of claims decided in state court by creating "an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007). Under AEDPA, "a federal court may grant habeas relief on a claim 'adjudicated on the merits' in state court only if the decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting 28 U.S.C. § 2254(d)(1)). Congress imposed this highly deferential standard of review to reform habeas and "'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000)).

Over the course of the 20th Century, the scope of the writ had been expanded, from a limited inquiry into the jurisdiction of the sentencing court,

into a full de novo review of the federal claims. *Kuhlmann v. Wilson*, 477 U.S. 436, 446 (1986) (summarizing the history of the writ); *Wainwright v. Sykes*, 433 U.S. 72, 79 (1977) (same). In this de novo review, a federal court would not defer to the state court's resolution of a claim, but would instead exercise its independent judgment when deciding questions of law and mixed questions of law and fact. *Sykes*, 433 U.S. at 78; *Williams*, 529 U.S. at 400. While the federal court could "give great weight to the considered conclusions of a coequal state judiciary," the court owed no deference to the state court, and was not bound by the state court's conclusions on questions of federal law. *Miller v. Fenton*, 474 U.S. 104, 112 (1985). The state court's decision on the claim was simply "due the same respect as any other 'persuasive, well-reasoned authority.'" *Williams*, 529 U.S. at 402. Unlike most civil cases, the state court resolution of the claim was not res judicata on habeas review. *Sykes*, 433 U.S. at 80 (quoting *Brown v. Allen*, 344 U.S. 443, 458 (1953)).

Congress enacted AEDPA specifically to implement habeas reform by constraining the expansive de novo review that had developed over the 20th Century. *Garceau*, 538 U.S. at 206. Congress recognized that "'[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998) (internal quotation marks omitted)). Habeas review "'disturbs the State's significant interest in

repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Harrington,* 562 U.S. at 103 (quoting *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)). To protect the finality of state court judgements, and to further the principles of comity and federalism, Congress enacted AEDPA to place a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners. *Garceau*, 538 U.S. at 206.

A federal court may no longer grant the writ simply because the court concludes in its independent judgment that prejudicial error has occurred. *Williams*, 529 U.S. at 411; *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). Rather, the federal court may grant relief only if the state court decision on the claim was contrary to or an unreasonable application of clearly established federal law. *Sarausad*, 555 U.S. at 190. The state court must have reached a legal conclusion opposite to that reached by this Court (*Williams*, 529 U.S. at 405) or have unreasonably applied the holdings of this Court to the facts of the case. *Holland v. Jackson*, 542 U.S. 649, 652 (2004). It is not enough that the state court conclusion was erroneous. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). To grant relief, the state court decision must have been unreasonable. *Id.*

Under this standard, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (citing

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). The petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

The AEDPA standard requires the petitioner to bear the heavy burden of showing "there was no reasonable basis for the state court to deny relief." *Harrington,* 562 U.S. at 98. "If this standard is difficult to meet, that is because it was meant to be." *Id*. at 102. While AEDPA "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," the statute does impose a modified res judicata rule that constrains the federal court's authority to substitute its judgment for that of a state court on the correct resolution of the claim of constitutional error. *Id*. "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)." *Id*. at 98. AEDPA preserves the federal court's authority to issue the writ only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Id*. at 102. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id*. at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)).

AEDPA "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). Readiness to find reversible constitutional error is inconsistent with the deferential standard demanded by AEDPA. *Id.*; *see also Brown v. Payton*, 544 U.S. 133, 141-47 (2005); *Bell v. Cone*, 543 U.S. 447, 455 (2005).

B. The Seventh Circuit Failed to Apply the Deference Required Under AEDPA

1. AEDPA Limits Review to Clearly Established Federal Law

The phrase "clearly established Federal law" in 28 U.S.C. § 2254(d)(1) refers "to the holdings, as opposed to the dicta," of this Court's decisions. *Williams*, 529 U.S. at 412. As a general matter, the holding of a decision is limited to the final result of the case as well as the portions of the opinion necessary to that result. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). A sentence in an opinion is dicta if it was not essential to the disposition of the contested issues. *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001). An expression by the Court that goes beyond the point actually decided is not a holding. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626-27 (1935). "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001).

As this Court's cases construing § 2254(d) make clear, implications that purportedly follow from a holding are insufficient to create clearly established federal law. *Glebe v. Frost*, 135 S. Ct.

429, 430-32 (2014) (decision that a complete denial of summation was structural error did not clearly establish that a lesser restriction of argument was also structural error); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (decision establishing the right to self-representation did not clearly establish a right to access the law library); *Thaler v. Haynes*, 559 U.S. 43, 47-49 (2010) (holdings on *Batson* claims did not clearly establish a rule that a judge must personally observe the juror's demeanor before concluding the demeanor provides a race neutral reason for excluding the juror); *Berghuis v. Smith,* 559 U.S. 314, 329-33 (2010) (precedent did not clearly establish a specific method state courts must use in reviewing a claim that the jury was not drawn from a fair cross section of the community); *Renico v. Lett*, 559 U.S. 766, 773-79 (2010) (precedent did not clearly establish a particular standard for determining whether a trial court abused its discretion in declaring a mistrial on a hung jury); *Mickens v. Taylor*, 535 U.S. 162, 174-76 (2002) (precedent on conflict of interest did not clearly establish the rule applied to other types of conflicts).

A highly generalized principle derived from isolated sentences of this Court's opinions does not constitute clearly established federal law under § 2254(d). *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) ("We have before cautioned the lower courts . . . against 'framing our precedents at such a high level of generality.'" (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam))); *see also Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (in the qualified immunity context, the Court has "repeatedly told courts . . . not to define clearly

established law at a high level of generality"); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (same). While "the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law" (*Marshall v. Rodgers*, 133 S. Ct. 1446, 1449 (2013)), "clearly established" still requires, at the very least, that "existing precedent must have placed the statutory or constitutional question beyond debate." *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (quoting *al-Kidd*, 131 S. Ct. at 2083 (concluding that a police officer was entitled to qualified immunity because the constitutional rule applied by the circuit court was not clearly established)).

If this Court has not addressed the issue in a holding, the rule is not clearly established, and the state court adjudication cannot be an unreasonable application of clearly established federal law. *Carey v. Musladin*, 549 U.S. 70 (2006). Similarly, "'if a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.'" *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (quoting *Yarborough*, 541 U.S. at 666). "AEDPA's carefully constructed framework 'would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.'" *Id.*

Similar to the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), AEDPA's standard protects both the reasonable judgments of state courts and the State's interest in the finality of those judgments. *Williams*, 529 U.S. at 412; *see also Beard v. Banks*, 542 U.S. 406, 413 (2004). Like

Teague, the AEDPA standard reflects that the primary function of habeas review is to ensure that a conviction comported with clearly established law, and "not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990).

A rule is not clearly established unless reasonable jurists would have felt compelled by existing precedent to grant the relief required by the rule. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). Application of an old rule in a new setting, or in a manner not dictated by precedent, constitutes the creation of a new rule. *Stringer v. Black*, 503 U.S. 222, 228 (1992); *Butler v. McKellar*, 494 U.S. 407, 415 (1990). Extending precedent so as to apply an old rule in a novel setting does as much harm to the interests of finality, predictability, and comity as does the invocation of a new rule that was not dictated by precedent. *Stringer*, 503 U.S. at 228. Invalidating the state court adjudication because the state court did not extend this Court's precedent in a manner that this Court has not yet done would severely compromise the deference required under AEDPA. *See Glebe*, 135 S. Ct. at 430-31 (Ninth Circuit improperly extended structural error rule to grant relief). "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Yarborough*, 541 U.S. at 666 (citing *Teague*, 489 U.S. 288).

2. Clearly Established Law Precludes an Inquiry into the Trier of Fact's Intrinsic Reasoning

The Seventh Circuit believed the state trial judge's comment about motive showed the verdict was based solely upon speculation, and not on the evidence presented at trial. But even if the comment showed impermissible speculation, this Court has stressed that reviewing courts should not grant relief based upon errors in the intrinsic reasoning and deliberations of the trier of fact. *United States v. Powell*, 469 U.S. 57, 66 (1984) (court should not inquire into reasoning of jury reaching inconsistent verdicts); *Harris v. Rivera*, 454 U.S. 339, 344-48 (1981) (court would not inquire into reasoning behind inconsistent verdicts in a bench trial). The Court has disapproved of an individual assessment of the reason for a particular verdict because it "would require inquiries into the jury's deliberations that the courts generally will not undertake." *Powell,* 469 U.S. at 66.

Clearly, if this were a jury trial, the federal courts could not inquire into the validity of the verdict based upon alleged intrinsic defects in the jury deliberations, even when jurors disclosed these defects in post-trial affidavits. Fed. R. Evid. 606(b); *Warger v. Shauers*, 135 S. Ct. 521, 525-30 (2014) (courts could not consider statements made by juror during deliberations about her prior experiences); *Tanner v. United States*, 483 U.S. 107, 117-27 (1987) (courts could not inquire post-trial into whether jurors were intoxicated during trial). The Court similarly has not clearly established a constitutional requirement for a judge to explain the reasoning

behind a verdict. *Rivera*, 454 U.S. at 344-45. Even where the trier of fact makes a comment that showed speculation about the defendant's motive, clearly established federal law does not allow an inquiry into the intrinsic reasoning used to reach the verdict. By invalidating the verdict based upon the alleged intrinsic reasoning of the trier of fact, the Seventh Circuit applied a rule that is not supported by, and conflicts with, this Court's existing precedent.

3. Sufficiency of the Evidence is the Proper Standard for Reviewing the Alleged Error in this Case

In reviewing the judge's comment, the proper standard is not to inquire into the judge's intrinsic reasoning, but to review the record for sufficiency of the evidence. "[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Powell*, 469 U.S. at 67. "'The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached.'" *Rivera*, 454 U.S. at 348 n.20 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319-20 n.13 (1979)). The proper standard for reviewing the verdict does not permit the court to scrutinize "'the reasoning process actually used by the factfinder—if known.'" *Id.* Instead, the proper standard focuses on the sufficiency of the evidence presented at trial.

The clearly established law that the circuit court should have applied is the sufficiency of evidence standard. *Jackson*, 443 U.S. at 319. Under

this standard, "the relevant question is whether . . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. The court must view the evidence in the light most favorable to the prosecution. *Id.* The court may grant relief only "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

The review of the record for sufficiency of the evidence is sharply limited, and the Court necessarily owes great deference to the trier of fact. *Wright v. West*, 505 U.S. 277, 296-97 (1992). To produce sufficient evidence to support a conviction, "the prosecution need not affirmatively 'rule out every hypothesis except that of guilt . . . .'" *Wright*, 505 U.S. at 296 (quoting *Jackson*, 443 U.S. at 326). "[A] reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Wright*, 505 U.S. at 296-97 (quoting *Jackson*, 443 U.S. at 326). Under AEDPA, the federal court must provide a high level of deference to the state court's determination of the sufficiency of the evidence. *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012); *Cavazos v. Smith*, 132 S. Ct. 2, 6 (2011).

The Seventh Circuit failed to review the record for sufficiency of the evidence and it failed to give any deference to the state court's consideration of the evidence. Instead of deferring to the state court, the Seventh Circuit justified its conclusion that there

was reversible error by characterizing the evidence of Owens' guilt as "weak proof." App. 10a. Conducting an independent examination of the record, the circuit court found flaws in the testimony of the two witnesses who saw Owens hit the victim in the head with a bat. App. 3a-4a. The circuit court simply failed to apply the proper deference required under AEDPA. *See Waddington v. Sarausad*, 555 U.S. 179, 194 (2009) (Ninth Circuit incorrectly characterized evidence as "thin" when finding the jury instruction violated due process).

The state appellate court reasonably determined the evidence was sufficient to prove the elements of the crime beyond a reasonable doubt. App. 116a-22a. The court recognized that the eyewitnesses contradicted each other on some points, and that one eyewitness was significantly impeached, but the court determined their testimony still supported the conviction. App. 119a-20a. Despite the contradictions, both eyewitnesses put Owens at the scene of the crime, and both identified Owens as the victim's assailant. App. 120a. There was no evidence that the eyewitnesses knew each other or had any reason to fabricate their testimony. App. 120a. Contrary to the conclusion of the Seventh Circuit, the state court determined that the testimony of one eyewitness was especially reliable. App. 120a-21a. The killing occurred in a well-lit area, just a few feet from that witness, and he saw Owens' face before and after the attack. App. 120a-21a.

In finding constitutional error, the Seventh Circuit failed to apply the correct legal standard, failed to view the evidence in the light most favorable to the prosecution, and failed to give any deference to

the state court's evaluation of the evidence. The Seventh Circuit violated AEDPA.

C. The Circuit Court Gave No Deference to the State Court's Determination of Harmless Error

A petitioner is entitled to relief on a constitutional trial error only if the error caused prejudice. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Like a ruling on the underlying error, the state court's determination that the error was harmless is an adjudication "on the merits" entitled to deference under 28 U.S.C. § 2254(d). *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015). Thus, "when a state court determines that a constitutional violation is harmless, a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Fry v. Pliler*, 551 U.S. 112, 119 (2007) (citing *Mitchell v. Esparza*, 540 U.S. 12 (2003)). The federal court may not grant relief "if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell*, 540 U.S. at 18.

This Court has held that because the *Brecht* actual prejudice standard subsumes AEDPA, there is no need to formally apply both standards before the federal courts *deny* relief. *Davis*, 135 S. Ct. at 2199 (citing *Fry*, 551 U.S. at 119-20). A court may deny relief if the state court decision was not unreasonable, or the error did not cause prejudice. *Fry*, 551 U.S. at 120; *Davis*, 135 S. Ct. at 2199. But while a federal court need not formally apply both

the AEDPA and *Brecht* standards before denying relief, "AEDPA nevertheless 'sets forth a precondition to the grant of habeas relief.'" *Davis*, 135 S. Ct. at 2198 (quoting *Fry*, 551 U.S. at 119). The "Court did not hold—and would have had no possible basis for holding—that *Brecht* somehow abrogates the limitation on federal habeas relief that § 2254(d) plainly sets out." *Davis*, 135 S. Ct. at 2198.

Some courts, however, like the Seventh Circuit here, are *granting* relief after only finding actual prejudice. These lower courts have improperly construed the "subsume" language in *Fry* and *Davis* to eliminate the need to consider the reasonableness of the state court harmless error determination before granting relief. *See, e.g.*, *Blackston v. Rapelje*, 780 F.3d 340, 359 (6th Cir. 2015) (declining to apply both *Brecht* and AEDPA before granting relief); *Deck v. Jenkins*, 768 F.3d 1015, 1025 (9th Cir. 2014) (applying *Brecht* without deference to state court decision that error was harmless). Here, after finding actual prejudice under *Brecht*, the Seventh Circuit simply granted relief. The court did not consider whether the state court harmless error decision was an unreasonable application of clearly established federal law. App. 9a. But even when the federal court finds actual prejudice under *Brecht*, the state court's harmless error determination still has significance. *Davis*, 135 S. Ct. at 2198. The Seventh Circuit's avoidance of the state court's evaluation of the evidence fails to give the deference required under AEDPA. *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1309 (11th Cir. 2012) (in determining prejudice issue, district court erred by affording no deference to the state court's view of the evidence).

The circuit court's determination that the error caused prejudice is nothing more than an independent determination that the state court erred in concluding the error was harmless. Such a ruling "fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). It is not enough that the federal court, in its independent review of the record, is left with a firm conviction that the error was prejudicial. *Id.* Before granting relief, the court must find the state court decision on the issue was unreasonable. *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002). Because the Seventh Circuit did not find the state court decision was unreasonable, AEDPA barred the grant of relief. *Davis*, 135 S. Ct. at 2198 ("Because the highly deferential AEDPA standard applies, we may not overturn the California Supreme Court's decision unless that court applied *Chapman* 'in an "objectively unreasonable" manner.'").

The finding of actual prejudice is not equivalent to finding the state court decision was unreasonable. Under the actual prejudice standard, "relief is proper only if the federal court has 'grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict."'" *Davis,* 135 S. Ct. at 2197-98 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). But if the courts are granting relief based upon a "doubt," or even a "grave doubt," then it is also possible fairminded jurists could necessarily disagree as to whether the error was prejudicial. If fairminded jurists could disagree, relief is barred

under 28 U.S.C. § 2254(d)(1). *Davis*, 135 S. Ct. at 2198-99. A determination that actual prejudice occurred, and the state court erred in finding harmless error, is not the same as finding the state court decision was unreasonable.

Here, the Seventh Circuit did not decide the reasonableness of the state court harmless error decision. In giving zero deference to the state court decision, the Seventh Circuit violated AEDPA. *Davis*, 135 S. Ct. at 2199 ("Ayala therefore must show that the state court's decision to reject his claim 'was 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, 102 (2011) ("even a strong case for relief does not mean the state court's contrary conclusion was unreasonable").

The state court could reasonably determine the error was harmless. The court reviewed the evidence of Owens' guilt, which included the direct identification of Owens by two unrelated eyewitnesses. App. 120a-21a. Even considering the defects in their testimony, the state court determined that one of the eyewitness identifications was highly reliable. App. 120a-21a. In light of this testimony, the state court determined any error in the judge's comment was harmless error. App. 120a ("in light of these identifications, the trial court's speculation as to defendant's motive for assaulting Nelson, will be construed as harmless error"). A fairminded jurist could agree that the state court's decision on harmlessness was correct. Owens has not borne the

heavy burden of showing "there was no reasonable basis for the state court to deny relief." *Harrington*, 562 U.S. at 98. The Seventh Circuit erred in granting relief.

CONCLUSION

The Seventh Circuit applied a rule not clearly established in a holding of this Court, and failed to give proper deference to the state court adjudication of the claim. For these reasons, the Court should reverse.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General

NOAH G. Purcell
Solicitor General

ALAN D. COPSEY
Deputy Solicitor General

JOHN J. SAMSON
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
360-664-9018

November 23, 2015

Luther Strange
Attorney General
State of Alabama

Craig W. Richards
Attorney General
State of Alaska

Mark Brnovich
Attorney General
State of Arizona

Matthew P. Denn
Attorney General
State of Delaware

Pamela Jo Bondi
Attorney General
State of Florida

Lawrence G. Wasden
Attorney General
State of Idaho

Gregory F. Zoeller
Attorney General
State of Indiana

Derek Schmidt
Attorney General
State of Kansas

Bill Schuette
Attorney General
State of Michigan

Jim Hood
Attorney General
State of Mississippi

Timothy C. Fox
Attorney General
State of Montana

Douglas J. Peterson
Attorney General
State of Nebraska

Adam Paul Laxalt
Attorney General
State of Nevada

Joseph A. Foster
Attorney General
State of New Hampshire

Michael DeWine
Attorney General
State of Ohio

Ellen F. Rosenblum
Attorney General
State of Oregon

Bruce R. Beemer
First Deputy Attorney General
Commonwealth of Pennsylvania

Peter F. Kilmartin
Attorney General
State of Rhode Island

Alan Wilson
Attorney General
State of South Carolina

Marty J. Jackley
Attorney General
State of South Dakota

Ken Paxton
Attorney General
State of Texas

Sean D. Reyes
Attorney General
State of Utah

Mark R. Herring
Attorney General
State of Virginia

Patrick Morrisey
Attorney General
State of West Virginia

Brad D. Schimel
Attorney General
State of Wisconsin

Peter K. Michael
Attorney General
State of Wyoming