No. 16-886

In the Supreme Court of the United States

MARK HOOKS, Warden,
Ross Correctional Institution,

Petitioner,

v.

MARK LANGFORD,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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During Mark Langford's murder trial, the prosecutor, defense counsel, and trial judge agreed that a complicity instruction should contain the mental state for murder—a purpose to kill. The court's instruction misplaced the adverb "purposely" by five words as compared to the model instruction, but nobody at trial believed that this word placement inadequately described Ohio complicity law. Pet. App. 36a-40a (Boggs, J., dissenting). When, for the first time on appeal, Langford challenged the instruction's placement of "purposely," a unanimous state court held that the "jury could not have been misled by the charge given, nor could it have found Langford guilty based upon an error in the jury charge." Pet. App. 115a. A split Sixth Circuit found this decision unreasonable under the Antiterrorism and Effective Death Penalty Act (AEDPA). Pet. App. 13a-26a. And it reaffirmed its holding even after this Court remanded for reconsideration in light of *Davis v. Ayala*, 135 S. Ct. 2187 (2015). Pet. App. 3a.

The petition demonstrated why this Court should now summarily reverse. *First*, the Sixth Circuit's jury-instruction analysis conflicts with this Court's jury-instruction and AEDPA cases. *Second*, the Sixth Circuit's harmless-error analysis conflicts with this Court's harmless-error cases. *Third*, these conflicts justify a summary-reversal remedy, which this Court regularly grants when courts do "not apply the appropriate standard of review under AEDPA." *Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016).

Langford's responses confirm the need for a summary reversal because he does nothing to minimize the Sixth Circuit's legal errors.

I. LANGFORD DOES NOT RECONCILE THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S JURY-INSTRUCTION AND AEDPA CASES

As the petition showed (at 17-25), the decision below conflicts with this Court's jury-instruction cases and with its AEDPA cases.

A. Langford Cannot Salvage The Sixth Circuit's Jury-Instruction Errors

To challenge a jury instruction, a "defendant must show both that the [challenged] instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009) (internal quotation marks omitted). Langford's arguments on each element are mistaken.

1. *Ambiguity*. The petition showed that the Sixth Circuit failed to view the challenged sentence "'in the context of the overall charge.'" *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (citation omitted). In response, Langford remains focused on that single sentence, arguing that the "purposely" *unambiguously* conveyed *only* that the principal offender must act with purpose. Opp. 13, 15. Yet the sentence, by itself, is at least ambiguous, and must be read in the context of the entire charge. The clause "in purposely committing the offense[]" is a prepositional phrase with a gerund as an object. It may serve as an adjectival phrase modifying "another," an adverbial phrase modifying "aid[ing] and abett[ing]," or a compound modifying both. *Cf. The Chicago Manual of*

Style §§ 5.110, 5.166, at 176, 188 (Univ. of Chi. Press 15th ed. 2003).

As Langford concedes, jurors would *not* have lingered on this ambiguous sentence's grammatical niceties. Opp. 15-16; *Boyde v. California*, 494 U.S. 370, 380-81 (1990). That is why a single instruction "must be considered in the context of the instructions as a whole and the trial record." *Waddington*, 555 U.S. at 191 (citation omitted). Langford refuses to do so. Among other things, he ignores instructions three paragraphs later explaining how the jury could find that an accomplice possessed intent. Doc.12-7, Tr., PageID#2337-38. They explained that a "*common purpose* among two or more people to commit a crime need not be shown by direct evidence" and that "*[c]riminal intent* may be inferred from presence, companionship, and conduct before and after the offense is committed." *Id.* (emphases added). These instructions clarified the need to prove intent.

2. *Reasonable Likelihood*. The petition next showed that the Sixth Circuit ignored the reasonable-likelihood element. In response, Langford *concedes* that the court "did not couch its discussion of the error's effect in the 'reasonable likelihood' language," but says this does not matter because the Sixth Circuit found the error harmful under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Opp. 14. Yet the reasonable-likelihood and harmless-error tests ask *different* questions. The former test asks whether the "jury applied the instruction in a way that relieved the State of its burden of proving" the disputed element. *Waddington*, 555 U.S. at 190-91. It resolves *whether or not* the jury considered that element. The latter test *assumes* that the jury did *not*

consider it, but "asks whether the record contains evidence that could rationally lead to a" finding for the defendant on that element. *Neder v. United States*, 527 U.S. 1, 19 (1999). Answering one test does nothing to answer the other. *Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998).

Langford adds that the *dissent below* applied the reasonable-likelihood test so it "is unlikely that the panel majority" overlooked it. Opp. 14 n.1. Yet nowhere does the majority find this test met, even though this Court "made it a point" to settle on the test. *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991). Nor should the Court *assume* from silence that the Sixth Circuit applied the proper test. This Court defers to unreasoned *state* decisions, not unreasoned *circuit* decisions. *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

Langford lastly confronts two of the petition's reasons why he cannot meet the reasonable-likelihood test: nobody raised a concern with the adverb placement at trial, and the closing arguments discussed intent. For the first reason, Langford claims that the jurors would have been *more* attentive to the instructions' grammar than the lawyers. Opp. 17-18 n.4. Unlikely. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380-81. And "the probability that [an erroneous instruction] substantially affected the jury deliberations seems remote" when it "escaped notice on the record until" appeal. *Henderson v. Kibbe* 431 U.S. 145, 155 (1977).

For the second reason, Langford cherry-picks one sentence from the prosecutor—that "anybody who

helped" could be complicit—to contend that he *disclaimed* intent. Opp. 1, 18. But the prosecutor made this statement when discussing intent. After detailing Langford's admissions to police, Doc.12-7, Tr., PageID#2301-06, the prosecutor argued that "[c]riminal intent may be inferred from presence, companionship, and conduct," and that Langford's presence (as a "lookout") sufficed "if it [was] intended to and does aid the primary offender," *id.*, PageID#2306. Indeed, Langford's opposition alleges that intent was his "main defense at trial." Opp. 29. It strains credulity to suggest that the jury would believe that Langford's allegedly *main* defense was entirely beside the point because intent was not even an element.

B. Langford Ignores AEDPA

The Sixth Circuit disregarded AEDPA, which precludes relief if a "fairminded jurist" could find that Langford failed to satisfy the two jury-instruction elements. *Etherton*, 136 S. Ct. at 1152. Langford makes the same mistake.

He suggests that this Court has established that the State must "prove '*every element of the offense*' beyond a reasonable doubt." Opp. 12 (citation omitted). This "frame[s] the issue at too high a level of generality." *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015). AEDPA requires specificity: Could "fairminded jurists" find that the instructions as a whole unambiguously conveyed the intent element because of, among other things, the intent discussion after the challenged sentence? *Harrington*, 562 U.S. at 102. And could "fairminded jurists" find, based on the record as a whole, that no reasonable likelihood existed that the jury would have overlooked the in-

tent element? *Id.*; *Waddington*, 555 U.S. at 193. Langford does not address these questions, instead engaging in a de novo application of the two jury-instruction elements. Opp. 15-18.

To be sure, Langford pays *lip service* to AEDPA, asserting that the Sixth Circuit "correctly stated the deferential standard of review under AEDPA." Opp. 2; Opp. 14-15. What matters, however, is what the Sixth Circuit *did*, not what it *said*. *Harrington* criticized the Ninth Circuit for conducting a de novo review of an ineffective-assistance claim, and then conclusorily *stating* that the state court's rejection of the claim was unreasonable. 562 U.S. at 100-02. That is precisely what the Sixth Circuit and Langford do here. "[I]t is not apparent how [their] analysis would [be] any different without AEDPA." *Id.* at 101.

II. LANGFORD DOES NOT RECONCILE THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S HARMLESS-ERROR CASES

As the petition demonstrated (at 25-30), the decision below conflicts with this Court's harmless-error cases and with its remand for reconsideration after *Ayala*. Langford's contrary arguments fail here too.

A. Langford Cannot Dispute That The Sixth Circuit Asked The Wrong Harmless-Error Question

The petition showed that the Sixth Circuit did not ask the right harmless-error question. That court held that the error was harmful *solely* because the jury could have found Langford guilty as an accomplice rather than as a principal offender. Pet. App. 22a-24a. It did not ask whether the evidence would have allowed a rational jury to find for the *State* on

the undisputed aiding-and-abetting elements, but for *Langford* on the allegedly omitted element. *Neder*, 527 U.S. at 19. Langford's responses do not overcome this legal error.

Langford initially suggests that the instructional error was structural. Opp. 20. The decision he cites—*Neder*—*explicitly* rejected this argument. 527 U.S. at 15. At the least, Langford responds, an omitted element can be harmless *only* in two circumstances: if the jury *necessarily* had to find the disputed element to reach its verdict, or if the defendant did not *contest* that element. Opp. 20-21. Not so. *Neder* set the harmless-error test as "whether the record contains evidence that could rationally lead to a contrary finding [i.e., a finding for the defendant] with respect to the omitted element." 527 U.S. at 19. If, based on the evidence presented, a rational jury could *not* find for the defendant on that element, the error is harmless. *Id.*

Langford next argues that the "Sixth Circuit's reasoning comports with" *Neder*. Opp. 21. *Only* the dissent, however, applied *Neder*'s test by considering whether the evidence would have allowed a rational jury to convict Langford of aiding and abetting, but only "unwittingly." Pet. App. 41a (Boggs, J., dissenting). The majority nowhere even asks that question.

Departing from the Sixth Circuit's reasoning, Langford attempts to meet *Neder*'s test. He notes that it requires a "'thorough review of the record,'" and that intent was "hotly disputed" here. Opp. 20-21 (citation omitted); Opp. 29. *Neder*, however, was a *direct-review* case. The government had to show *beyond a reasonable doubt* that no jury could have found for the defendant on the disputed element.

Neder, 527 U.S. at 15-16, 19-20 (citing *Chapman v. California*, 386 U.S. 18 (1967)). This is a *collateral-review* case. Langford must "establish that [the omitted element] resulted in actual prejudice." *Brecht*, 507 U.S. at 637 (citations omitted). Under this test, "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." *Ayala*, 135 S. Ct. at 2197-98 (internal quotation marks omitted).

Here, however, Langford identifies *no* evidence that shows any injurious effect on the verdict. He identifies nothing that would have allowed the jury to find that he aided and abetted the murder, but did so *unintentionally*. Langford cites, for example, evidence "undermining the credibility of a witness who testified that he had a motive to murder." Opp. 21. The "jury certainly was entitled to disbelieve this testimony," but the jury's aiding-and-abetting finding shows that it did not. Pet. App. 41a (Boggs, J., dissenting). And "there was simply no evidence that would have allowed the jury to convict Langford under a strict-liability conception of complicity." *Id.* One cannot "accidentally" be a lookout.

B. Langford Does Not Justify The Sixth Circuit's Decision To Ignore *Ayala*

The petition showed that the Sixth Circuit wrongly "ignore[d] this [Court's] directive" to reconsider its analysis in light of *Ayala*. Pet. App. 4a (Boggs, J., dissenting). Langford's contrary arguments lack merit.

Langford offers reasons why the state court should not be deemed to have decided the harmless-

error question. Opp. 22-28. For example, he notes that other Ohio decisions have addressed harmless-error issues with more detail. Opp. 23-24. This Court, however, has refused to impose opinion-writing standards on state courts. *Johnson v. Williams*, 133 S. Ct. 1088, 1095 (2013). Langford next claims that the state court could not have addressed harmless error without citing *Chapman*. Opp. 24-25. But AEDPA "does not require citation of [this Court's] cases—indeed, it does not even require *awareness* of [those] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002). Langford also argues that the state court could not have determined *both* that no error occurred *and* that any error was harmless. Opp. 24. To the contrary, courts make alternative holdings all the time. *Cf. Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989).

Even assuming that the state court did not decide the harmless-error issue, moreover, it was still wrong for the Sixth Circuit to ignore *Ayala*. *Ayala* clarified how deferential the harmless-error standards are on collateral review. 135 S. Ct. at 2197-99. A violation of AEDPA requires "extreme malfunctions in the state criminal justice system[]." *Id.* at 2202 (internal quotation marks omitted). And the *Brecht* test "subsumes" this deferential standard, showing that it is even *more* deferential than this demanding standard. *Id.* at 2199. This Court's remand thus "'call[ed] the panel's attention to [a Supreme Court] opinion[] highlighting the necessity of deference to state courts in § 2254(d) cases.'" Pet. App. 4a (Boggs, J., dissenting) (quoting *Cavazos v. Smith*, 565 U.S. 1, 9 (2011)). The decision below ignored that call for deference.

III. LANGFORD DOES NOT REBUT THE NEED FOR SUMMARY REVERSAL

The petition demonstrated that this Court should summarily reverse. Pet. 30-34. Langford's contrary arguments fail.

First, Langford asserts that summary reversals are rare. Opp. 30. In the habeas context, however, the Court routinely summarily reverses where, as here, an appellate court "did not apply the appropriate standard of review under AEDPA." *Etherton*, 136 S. Ct. at 1152; *see Kernan v. Hinojosa*, 136 S. Ct. 1603 (2016); *White v. Wheeler*, 136 S. Ct. 456 (2015); *Donald*, 135 S. Ct. 1372; *Glebe v. Frost*, 135 S. Ct. 429 (2014); *Lopez v. Smith*, 135 S. Ct. 1 (2014); *Nevada v. Jackson*, 133 S. Ct. 1990 (2013); *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013); *Parker v. Matthews*, 132 S. Ct. 2148 (2012); *Coleman v. Johnson*, 132 S. Ct. 2060 (2012); *Wetzel v. Lambert*, 565 U.S. 520 (2012); *Hardy v. Cross*, 565 U.S. 65 (2011); *Cavazos v. Smith*, 565 U.S. 1 (2011); *Bobby v. Mitts*, 563 U.S. 395 (2011).

Second, Langford contends that the Court should not summarily reverse because the petition asks it "to make new law" by applying a doubly deferential standard to jury-instruction claims under AEDPA. Opp. 30-31. Yet double deference here follows from what this Court has said elsewhere. For insufficient-evidence or ineffective-assistance claims, AEDPA triggers a "twice-deferential" standard because those claims already contain a deferential test. *Parker*, 132 S. Ct. at 2152; *Harrington*, 562 U.S. at 105. This case allows the Court to make the same point for jury-instruction claims because those claims, too, receive deferential review. *Henderson*, 431 U.S. at 154.

And contrary to Langford's suggestion, Opp. 30, *Parker* made this point in a *summary-reversal* case. 132 S. Ct. at 2156. The Court can do the same here.

Third, Langford argues that the petition seeks "factbound error correction." Opp. 31. This conflicts with Langford's argument that the petition seeks a new rule. Regardless, this Court routinely corrects misapplications of AEDPA. For example, nothing could be *more* established than the two-part test for ineffective-assistance claims. But this Court has *repeatedly* granted certiorari to reverse circuit decisions holding that state courts unreasonably applied that test. *E.g.*, *Etherton*, 136 S. Ct. at 1151-53; *Bobby v. Van Hook*, 558 U.S. 4, 7-13 (2009); *see also Burt v. Titlow*, 134 S. Ct. 10, 17-18 (2013) (reversing after plenary review). A reversal here would be less factbound than reversals in many AEDPA cases, especially considering that the decision below failed even to apply the governing legal tests.

Fourth, Langford contends that summary reversal is not used for "'mere technical, harmless, or parochial error.'" Opp. 31 (citation omitted). While the misplaced adverb certainly qualifies as "harmless," the Sixth Circuit's violation of AEDPA does not. "'Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Harrington*, 562 U.S. at 103 (citation omitted). Under our form of government, concerns with federal intrusion on state authority should never be described as "parochial." The Sixth Circuit required a potential redo of a week-long murder trial. This is a concrete harm—much more substantial than the harm from the Sixth Circuit's fail-

ure to follow AEDPA in *Etherton*, which concerned a drug-possession charge. 136 S. Ct. at 1150.

Fifth, Langford notes the allegedly "'fact-intensive character of the case.'" Opp. 32 (citation omitted). Yet this case is no more fact intensive than, for example, the insufficient-evidence cases that this Court has reversed. *See Parker*, 132 S. Ct. at 2152-53; *Coleman*, 132 S. Ct. at 2063-65; *Cavazos*, 565 U.S. at 3-5. Indeed, the Sixth Circuit committed two *purely legal* errors that are evident on the face of its decision—ignoring the reasonable-likelihood test for jury-instruction claims and asking the wrong question for harmless-error review. In any event, a review of the twenty-five-page instructions alone shows that fairminded jurists could conclude that no reasonable likelihood existed that jurors would have convicted Langford without finding the required intent. Doc.12-7, Tr., PageID#2321-45.

CONCLUSION

The Court should grant the petition for certiorari and reverse the Sixth Circuit's decision.

Respectfully submitted,

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