No. 16-___

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A jury instruction explaining a *state-law* element of a crime violates *federal* due process only if (1) the instruction misstates, or is ambiguous on, that element and (2) there is "'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) (citation omitted). Here, a state court held that no such violation occurred when a murder instruction about accomplice liability placed the adverb "purposely" (which identified the required *mens rea*) in a location different from its location in a model instruction. The state court further held that, even if there was an instructional error, the jury could not have based its guilty finding on that error. The Sixth Circuit, by contrast, found that the misplaced adverb inadequately conveyed the purpose element, and that the state court's contrary holding unreasonably applied this Court's cases under 28 U.S.C. § 2254(d)(1). It further held that the error was harmful, and reaffirmed its decision after this Court remanded in light of *Davis v. Ayala*, 135 S. Ct. 2187 (2015). The two questions presented are:

1. Did a state court unreasonably apply this Court's cases under § 2254(d)(1) when it held that a misplaced adverb in one jury instruction on state law did not violate federal due process?

2. Did the Sixth Circuit properly hold that the alleged instructional error was harmful and that *Davis v. Ayala*, 135 S. Ct. 2187 (2015), was irrelevant to the harmless-error inquiry?

LIST OF PARTIES

Petitioner is Mark Hooks, the Warden of the Ross Correctional Institution.

Respondent is Mark Langford, an inmate currently imprisoned at the Ross Correctional Institution.

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JURISDICTIONAL STATEMENT

The Sixth Circuit entered its judgment on October 31, 2016. The Warden timely invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No

State shall . . . deprive any person of life, liberty, or property, without due process of law."

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1).

INTRODUCTION

Relying on a jury instruction that misplaced an adverb by five words as compared to the model instruction, a split Sixth Circuit granted Respondent Mark Langford relief from his murder conviction. The Sixth Circuit did so even though a state court had held that the jury could not have "found Langford guilty based upon an error in the jury charge." Pet. App. 115a. And it did so even though this Court had vacated its earlier opinion and remanded for further consideration in light of *Davis v. Ayala*, 135 S. Ct. 2187 (2015). The Court should now summarily reverse to call the Sixth Circuit's "attention to this Court's opinions highlighting the necessity of deference to state courts in § 2254(d) habeas cases." *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011).

A jury convicted Langford of murdering a rival gang member in a barrage of gunfire. At trial, the State presented alternative theories: that Langford fired the fatal shot or that he assisted the individual who did. This case concerns an instruction about accomplice liability, which requires an accomplice to harbor the mental state necessary for the offense (for murder, a purpose to kill). As Judge Boggs's original dissent noted, "[t]he *actual* jury instruction that was given read: 'Before you can find the defendant guilty of a crime as a complicitor or an aider and abettor, you must find . . . that . . . the defendant aided or abetted another in purposely committing the offense[].'" Pet. App. 36a-37a. Yet "the *ideal* jury instruction would have read: 'Before you can find the defendant guilty of a crime as a complicitor or an aider and abettor, you must find . . . that . . . the defendant purposely aided or abetted another in committing the offense[].'" Pet. App. 37a.

This case asks whether the panel majority: (1) correctly determined that the state court unreasonably applied this Court's cases when holding that the misplaced "purposely" did not violate federal due process, and (2) correctly dismissed this Court's *Ayala* decision as irrelevant to its conclusion that the alleged error was harmful. The Court should reverse because the Sixth Circuit's holdings conflict with this Court's cases in many respects.

Jury Instructions. The decision below conflicts with this Court's jury-instruction cases. Before AEDPA, this Court had held that a petitioner seeking federal relief based on alleged state-law errors in jury instructions must meet a burden more demanding than the plain-error standard. *Henderson v.*

Kibbe, 431 U.S. 145, 154 (1977). With respect to ambiguous instructions, the petitioner must show that the jury charge *as a whole* retained this ambiguity and that a *reasonable likelihood* existed that the ambiguity led the jury to apply the charge in a way that relieved the State of proving all of the crime's elements. *Boyde v. California*, 494 U.S. 370, 378, 380 (1990). After AEDPA, a federal court may grant relief only if a state court's application of this test 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, 103 (2011).

Here, the state court reasonably held that the instructions as a whole were not ambiguous and that no reasonable likelihood existed that the jury applied them unconstitutionally. Several aspects of the entire jury charge support this conclusion. The sentence on which Langford relies itself could reasonably be read to require an accomplice to have an intent to kill. The "offense" of murder *already* included a purpose element—because the instructions defined murder as "purposely causing the death of another," Doc.12-7, Tr., PageID#2331—so reading the word "purposely" in the accomplice instruction to reach only the principal offender would make it superfluous. The state court's reading is also confirmed by other instructions describing, among other things, when an *accomplice* may have the "*purpose* . . . to commit a crime." Doc.12-7, Tr., PageID#2337-38 (emphasis added). These instructions clarified for the jury that an accomplice needs to act with purpose. Further, neither the parties nor the trial court noticed the

misplaced adverb—which confirms that a lay jury would not have found it significant either.

Respectfully, it is the Sixth Circuit that unreasonably applied this Court's cases. It focused solely on the sentence with the misplaced adverb at the expense of other instructions. Yet "'[a] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (citation omitted). And the Sixth Circuit did not even cite (let alone apply) the reasonable-likelihood test, even though this Court has "made it a point to settle on a single standard of review for jury instructions—the 'reasonable likelihood' standard—after considering the many different phrasings that" it had previously used. *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991) (citing *Boyde*, 494 U.S. at 379-80).

Harmless Error. The decision below also conflicts with this Court's harmless-error cases. Before *Ayala*, this Court required petitioners seeking federal relief under § 2254 to establish "'actual prejudice'" from an alleged constitutional violation. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted). *Ayala* clarified that when a state court has found an error harmless, AEDPA's "highly deferential standards" also apply. 135 S. Ct. at 2198-99. After *Ayala*, therefore, petitioners may not obtain relief unless they can show that the error actually prejudiced them and that a state court's harmless-error finding was "'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Harrington*, 562 U.S. at 103).

Here, the state court reasonably held that a jury could not "have found Langford guilty based upon an error in the jury charge." Pet. App. 115a. The evidence gave the jury a binary choice: either find that Langford aided and abetted the murder in an intentional way or find that he did not aid and abet it at all. No evidence would have supported "a strict-liability conception of complicity" in which the jury could have found that Langford helped carry out the murder, but only *accidentally*. Pet. App. 41a (Boggs, J., dissenting). As the dissent below noted, "there was no evidence at all to support conviction under a theory of accomplice liability where Langford, say, performed in a production of *Hamlet* and, thereby, unwittingly motivated Jones's shooter to take purposeful action and to avenge immediately the attack on Langford." *Id.* A harmless-error finding on these facts at least does not manifest the "'extreme malfunction' required for federal habeas relief" under AEDPA. *Woods v. Donald*, 135 S. Ct. 1372, 1378 (2015) (citation omitted).

The Sixth Circuit, in its initial decision on harmless error, relied only on *Brecht* and did not apply AEDPA. Pet. App. 22a-24a. On remand, it "ignore[d]" this Court's "directive" to revisit that decision in light of *Ayala*. Pet. App. 4a (Boggs, J., dissenting). The Sixth Circuit instead "reinstat[ed] its judgment without seriously confronting the significance of the case[] called to its attention." *Cavazos*, 132 S. Ct. at 7 (citations omitted). It found *Ayala* irrelevant because "there was no state court review of harmless error in this case." Pet. App. 3a. But, as the dissent highlighted, the state court had held that the jury could not "'have found Langford guilty based

upon an error in the jury charge.'" Pet. App. 4a-5a (citation omitted). By refusing to accept that holding as triggering AEDPA, the Sixth Circuit did precisely what this Court has repeatedly warned federal courts not to do—impose a "mandatory opinion-writing standard[]" on the state courts. *Johnson v. Williams*, 133 S. Ct. 1088, 1095 (2013).

Finally, for both of these questions, additional considerations cement the need for a reversal. To begin with, the Court has repeatedly intervened in similar cases. It, for example, has reversed circuit courts that invoke their *own* precedent as the "clearly established" law. *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014); *Parker v. Matthews*, 132 S. Ct. 2148, 2155-56 (2012). Here, the Sixth Circuit did not even have Sixth Circuit precedent to *rely* on; instead, it was forced to *distinguish* circuit precedent limiting relief to "extraordinary cases." *Daniels v. Lafler*, 501 F.3d 735, 741 (6th Cir. 2007). Pet. App. 25a-26a (distinguishing *Daniels*). The error here thus exceeds the error in these cases: Some precedent is better than none. In addition, the Court's review would make a useful jurisprudential point. For other claims where the underlying constitutional test is deferential—such as ineffective-assistance or insufficient-evidence claims—the Court has noted that AEDPA requires a "'doubly'" deferential standard. *Harrington*, 562 U.S. at 105 (citation omitted). This case allows the Court to say the same thing for instructional-error claims. The decision below also overturns the most serious of convictions (murder), so the harms to federalism and comity that AEDPA was designed to prevent reach their apex here.

STATEMENT

I. THE STATE PROCEEDINGS

Langford and Marlon Jones were members of rival gangs. Pet. App. 116a. Langford was beaten up as a result of that rivalry. *Id.* In July 1995, Jones was shot and killed in retaliation. *Id.*

A. After Dismissing An Initial Indictment, The State Again Charged Langford With Jones's Murder

In August 1995, the State initially indicted Langford for murdering Jones. Pet. App. 106a. It dismissed that indictment three months later when Nicole Smith, a key witness, failed to appear for trial. *Id.* Although police continued to investigate Jones's murder, they eventually transferred the investigation to the cold-case unit. Pet. App. 107a-108a.

The police reopened the investigation when an Assistant U.S. Attorney relayed that two federal prisoners communicated information about the murder. Pet. App. 108a. A detective interviewed the prisoners, who claimed that Langford had confessed to his involvement in Jones's shooting. *Id.* The detective also located Smith, the witness who had previously failed to appear. *Id.*

In 2008, the State again indicted Langford. Pet. App. 107a. It charged Langford with two counts (aggravated murder and murder), each of which included an additional "firearm specification." *Id.* Langford moved to dismiss the charges based on the gap between the shooting and the second indictment. *Id.* The trial court denied that motion. Pet. App. 109a-110a.

B. A Jury Convicted Langford Of Murder, And A State Court Upheld His Conviction

1. At trial, the State presented two theories. It alleged that Langford was the principal offender who fired the shot that killed Jones or, alternatively, that he was an accomplice to the killing. Pet. App. 114a.

Witnesses testified about Langford's involvement. Pet. App. 113a. Smith said she was with Langford and two men when they shot at Jones. Pet. App. 118a-119a. James Arnold, a federal prisoner, testified that Langford confessed to shooting at Jones with two men. Pet. App. 113a. According to Arnold, Langford said that he fired only a .22 caliber handgun, not the larger handgun that fired the fatal shot. *Id*. Isaac Jackson, the other federal prisoner, testified that Langford confessed to participating in Jones's murder. Pet. App. 118a.

The State also introduced Langford's statements to police over a series of interviews. In one interview, Langford said he had helped the shooters obtain the guns that they had used. Doc.12-6, Tr., PageID#2083. In others, although Langford initially told police that he was not present during the shooting, he later said that he had driven one of the shooters to the scene, had watched while they shot Jones, and had accompanied them while they disposed of the guns. *Id.*, PageID#2084-90.

At the close of the evidence, the court and parties reviewed the jury instructions. *Id.*, PageID#2175-2211. When discussing the complicity instructions, the prosecution suggested that they note that accomplice liability requires the defendant to have "aided or abetted another in committing the" offense. *Id.*,

PageID#2193. The defense responded that the "complicity section" of the model instructions "says that you need to insert the culpable mental state and then go into the aided or abetted language and definitions, and I presume that will be done when we revise." *Id.* The prosecution agreed that "a mental state needs to be in there" and that it would be "purposely" for the murder counts and "knowingly" for the lesser-included offense of involuntary manslaughter. *Id.* The parties then debated instructions about when presence at the scene can prove this necessary intent. *Id.*, PageID#2194-2204.

The next day of trial, the parties reviewed revised instructions. Pet. App. 39a-40a. The complicity instructions largely matched the ones given to the jury. They noted that Langford could be found guilty for complicity if he "aided or abetted another in purposely committing the offenses of Aggravated Murder or Murder or aided and abetted another and knowingly committed the offense of Involuntary Manslaughter." Doc.12-7, Tr., PageID#2337; Pet. App. 39a-40a. With respect to the draft instructions, Langford's counsel objected to a typo—the instructions said "knowingly committing" rather than "knowingly committed." Doc.12-7, Tr., PageID#2223; Pet. App. 40a.

After closing arguments, the trial court instructed the jury on the law. Doc.12-7, Tr., PageID2327-38. The "murder" instructions indicated that murder required the jury to find that Langford "purposely caused the death of Marlon Jones." *Id.*, PageID#2335. They incorporated the definition of "purpose" given for aggravated murder. *Id.* Those instructions defined "purposely" as requiring a "specific intention to cause a certain result," adding that "[t]o

do an act purposely is to do it intentionally and not accidentally" and that "[p]urpose and intent mean the same thing." *Id.*, PageID#2327.

The "complicity" instructions noted that Langford "may be convicted as a principal offender or as a complicitor or an aider and abettor to any or all counts." *Id.*, PageID#2336. For murder, the instructions explained that the jury must find that Langford "aided or abetted another in purposely committing the offense[] of . . . Murder." *Id.*, PageID#2337. The instructions noted that a "common purpose among two or more people to commit a crime need not be shown by direct evidence but may be inferred from circumstances surrounding the act and from defendant's subsequent conduct." *Id.*, PageID#2337-38. They added that "[c]riminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed," and that "mere presence can be enough if it is intended to and does aid the primary offender." *Id.*, PageID#2338. But they clarified that "absent evidence that a person assisted, incited, or encouraged the principal offender to comit [sic] the offense, a person may not be convicted of aiding and abetting a principal offender in the commission of an offense." *Id.*

The jury returned a split verdict. It acquitted Langford of aggravated murder and of the firearm specifications. Pet. App. 11a. But it convicted him of murder. Pet. App. 11a, 104a. The court sentenced Langford to an indeterminate sentence of fifteen years to life imprisonment. Pet. App. 11a.

2. On appeal, Langford argued that: (1) the trial court violated due process by failing to dismiss the

case because of the delay before the second indictment; (2) the trial court's complicity instructions violated due process because they failed to indicate that Langford had to act purposely; (3) the trial court erred in the admission of evidence; (4) the trial court erred in finding sufficient evidence; and (5) the trial court erred in not crediting him sufficiently with jail time. Pet. App. 104a-106a.

The state appellate court affirmed the conviction, but remanded with instructions to award Langford more jail-time credit. Pet. App. 119a-120a. As relevant here, the court rejected Langford's argument that the trial court improperly instructed the jury about complicity's purpose element. Pet. App. 114a-115a. For the first time on appeal, Langford argued that the placement of "purposely" in the instruction did not match the model instruction. Unlike the instruction given, the model instruction placed "purposely" before "aided or abetted" and stated that an accomplice can be found liable if he purposely aided or abetted another in committing the offense. Pet. App. 25a-26a. By moving "purposely" to modify "committing," Langford asserted, the instruction, "[g]rammatically speaking," "told the jury that to find [Langford] guilty as a complicitor or aider and abettor they must find that [he] aided or abetted *another*, who *purposely* committed the offense of Murder." Doc.7-1, Exs., PageID#182. Langford thus argued that the jury could have convicted him without finding that he had an intent to kill. *Id.* He conceded that "all but 'plain error' [was] waived" because trial counsel did not object to the placement of "purposely" in the final instruction. *Id.*, PageID#183.

The appellate court rejected this argument. It noted that Langford did not object to the instruction. Pet. App. 115a. It then concluded that "[t]he jury, by its verdict, found that Langford had a specific intention to cause the death of Marlon Jones," holding that "[t]he jury could not have been misled by the charge given," and that the jury could not "have found Langford guilty based upon an error in the jury charge." Pet. App. 115a. The Ohio Supreme Court declined jurisdiction. Pet. App. 103a.

II. THE FEDERAL PROCEEDINGS

A. In his § 2254 petition, Langford argued that he was entitled to relief based on the claims raised in the state appellate court (and in a later application asserting ineffective assistance of appellate counsel). Pet. App. 54a-56a. A magistrate judge and the district court found that Langford was entitled to conditional relief on his jury-instruction claim, but rejected all other claims. Pet. App. 52a, 88a-89a, 101a.

The magistrate judge's report held that the jury instructions—with the misplaced "purposely"—wrongly failed to clarify that the intent required for accomplice liability is the same as the intent required for murder. Pet. App. 81a-84a. The report added that the error was not harmless. Pet. App. 87a-89a. It gave only one reason—that the jury "may well have" found Langford guilty as an accomplice rather than as the principal offender. Pet. App. 88a.

The district court agreed. Pet. App. 50a-52a. The court said that "[t]he record indicates that the jury was never advised that in order to find [Langford] guilty as a complicitor or on aiding and abetting the crimes of murder or aggravated murder, it must con-

clude, beyond a reasonable doubt, that he acted with the required intent—*i.e.*, purpose to kill." Pet. App. 51a-52a. The district court also incorporated the magistrate judge's harmless-error rationale. *Id.*

B. A divided Sixth Circuit upheld the grant of relief on the jury-instruction claim. Pet. App. 36a. The Sixth Circuit started by identifying undisputed points. A defendant has the right to have the jury resolve every element beyond a reasonable doubt. Pet. App. 13a (citing *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995)). And, under Ohio law, an aider and abettor must have the same intent as the principal offender. *Id.* (citing Ohio Rev. Code § 2923.03(A)). Finally, while the state court's reasoning on the merits was "terse," it was entitled to AEDPA deference. Pet. App. 14a-15a.

Applying AEDPA, the Sixth Circuit rejected the Warden's argument that the instructions "as a whole were not ambiguous." Pet. App. 16a-17a. Nowhere, the court suggested, did the instructions tell the jury that it had to find that Langford acted purposely to convict him, and the state court had engaged in an "unreasonable application of Supreme Court law" in holding otherwise. Pet. App. 16a-18a. The misplaced "purposely," the Sixth Circuit found, could not "reasonably be read to accurately convey that Langford must act with the kind of complicity required for the underlying offense." Pet. App. 18a-19a. The court also distinguished *Henderson v. Kibbe*, 431 U.S. 145 (1977), which held that a jury-instruction claim generally must fail when the instruction mirrored the statutory language. Pet. App. 19a-20a. And it rejected the contention that closing arguments

would have confirmed that the jury must find that Langford acted purposely. Pet. App. 20a-21a.

The Sixth Circuit next found this error harmful. Pet. App. 22a-24a. It conceded that a trial court's failure to explain an element is subject to harmless-error review, but noted that such a failure is harmful if a court has "'grave doubt'" about whether the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'" Pet. App. 22a (citation omitted). The jury-instruction error had "a substantial influence" on the verdict, the Sixth Circuit found, simply because the jury may have found Langford guilty as an accomplice rather than as the principal offender. Pet. App. 24a.

Judge Boggs dissented. The dissent concluded that "the misplacement of the word 'purposely' by five words" did not warrant relief. Pet. App. 37a. It noted that Langford's counsel corrected a typo in the same sentence but did not object to the placement of the word "purposely." Pet. App. 40a. If neither the attorneys nor the judge "noticed the displacement of one word," the jury instruction was not so unreasonable as to violate due process. Pet. App. 42a.

The dissent also disagreed on harmless error. Pet. App. 40a-42a. It described the prosecutor's evidence as showing only that Langford was *purposely* involved in Jones's death. Pet. App. 41a. While the "jury certainly was entitled to disbelieve this" evidence, "there was no evidence at all to support conviction under a theory of accomplice liability where Langford, say, performed in a production of *Hamlet* and, thereby, unwittingly motivated Jones's shooter to take purposeful action and to avenge immediately

the attack on Langford." *Id.* In other words, "there was simply no evidence that would have allowed the jury to convict Langford under a strict-liability conception of complicity." Pet. App. 41a.

C. The Warden filed a petition for certiorari. While that petition was pending, this Court decided *Davis v. Ayala*, 135 S. Ct. 2187 (2015). In *Ayala*, the Court held that when a state court has determined that an error was harmless, federal courts must apply AEDPA's "deferential standards." *Id.* at 2198-99. This Court vacated the Sixth Circuit's decision in this case and remanded with instructions to reconsider in light of *Ayala*. Pet. App. 6a.

On remand, the Sixth Circuit reinstated its earlier decision. Pet. App. 2a-3a. It concluded that *Ayala* did not apply because "there was no state court review of harmless error." Pet. App. 3a.

Judge Boggs again dissented. The dissent challenged the majority's conclusion that the state court had not considered whether the error in question was harmless. The dissent instead would have held that the state court's conclusion that the jury "'could [not] have found Langford guilty based upon an error in the jury charge'" triggered AEDPA's deferential standards. *See* Pet. App. 4a-5a (citation omitted). And it criticized the majority for not applying those standards, noting that federal courts are "*required* to 'presume[] that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.'" Pet. App. 5a (citation omitted).

REASONS FOR GRANTING THE WRIT

The Court should summarily reverse the Sixth Circuit's decision. *First*, that decision conflicts with this Court's jury-instruction cases. *Second*, the decision conflicts with the Court's harmless-error cases. *Third*, compelling reasons exist for the Court to exercise its discretion to correct these errors.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S JURY-INSTRUCTION CASES

This Court gives great deference to state courts when resolving claims that their jury instructions misapplied their own law, and its deference has only grown after AEDPA. Here, the misplaced adverb would not have authorized relief without AEDPA, and AEDPA now affirmatively bars that relief.

A. Due Process And AEDPA Set A Doubly Deferential Test For Federal Review Of A State Court's Jury Instructions

1. Petitioners face a heavy burden when asserting a claim that jury instructions miscommunicated state law. After all, a "state-law violation[]" alone "provide[s] no basis for federal habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 68 n.2 (1991). Instead, the flawed state-law instruction must have "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). This happens rarely. "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish

plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

An instruction does not violate due process even if it is "undesirable, erroneous, or even 'universally condemned.'" *Cupp*, 414 U.S. at 146. Instead, when a petitioner alleges that an instruction miscommunicated state law, the instruction violates federal due process only if "it fails to give effect to [the] requirement" that "the State must prove every element of the offense" beyond a reasonable doubt. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). In the case of potentially ambiguous jury instructions, that due-process showing contains two elements. *See Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009); *Boyde v. California*, 494 U.S. 370, 378, 380 (1990).

First, a court must find that the instructions *as a whole* are ambiguous on the state-law issue. *Id.* In that respect, "'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Boyde*, 494 U.S. at 378 (citation omitted). If the entire charge unambiguously conveys state law, federal courts may not grant relief. "[T]he charge as a whole" must retain the ambiguity. *Middleton*, 541 U.S. at 437.

Second, the petitioner must show that the ambiguity created "'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*, 555 U.S. at 191 (citation omitted). This test demands more than "some 'slight *possibility*' that the jury misapplied the instruction." *Id.* (citation omitted). It examines such things as the closing arguments,

Middleton, 541 U.S. at 438, and whether the attorneys or court noticed the issue, *Henderson*, 431 U.S. at 155. These factors reflect that "the process of instruction itself is but one of several components of the trial." *Cupp*, 414 U.S. at 147.

2. AEDPA stacks a deferential standard of review on top of this deferential test. 28 U.S.C. § 2254(d)(1). The state decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). This deferential standard applies to *both* elements for proving that an instruction violated due process. A federal court must find that a state court unreasonably held that the jury charge as a whole sufficiently conveyed state law. *Waddington*, 555 U.S. at 190-92. And a federal court must also conclude that the state court unreasonably found no reasonable likelihood that the jury applied the instructions in an unconstitutional manner. *Middleton*, 541 U.S. at 437-38.

These standards are exemplified by *Waddington*. There, the petitioner drove the car in which a passenger shot and killed a student at a school. 555 U.S. at 182-83. The petitioner argued that he believed that his gang planned on merely getting into a fistfight, not on firing shots. *Id.* at 183-84. Yet the accomplice-liability instruction, he argued, allowed the jury to convict him if it found that he intended to commit *a crime*, even if he did not intend to commit *the murder*. *Id.* at 187-88. While the state courts rejected this argument, the district court granted relief and the Ninth Circuit affirmed. *Id.* at 188-90. This Court reversed. The state courts "reasonably con-

cluded that the trial court's instruction to the jury was not ambiguous." *Id.* at 191. Alternatively, those courts "reasonably applied this Court's precedent when they determined that there was no 'reasonable likelihood' that the prosecutor's closing argument caused [the petitioner's] jury to apply the instruction in a way that relieved the State of its burden to prove every element of the crime beyond a reasonable doubt." *Id.* at 193.

B. The Sixth Circuit's Decision Failed To Follow The Court's Controlling Framework For Alleged Instructional Errors

The state court found that "[t]he 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. That holding was at least not objectively unreasonable. Each element of the due-process test confirms this conclusion.

1. The state court reasonably concluded that the instructions *as a whole* were unambiguous

a. The state court could reasonably conclude that the jury instructions conveyed that Langford must act purposely when aiding or abetting murder. Start with the sentence that Langford criticizes. It says the jury could find Langford guilty of complicity if it found that he "aided or abetted another in purposely committing the offense[] of . . . Murder . . . ." Doc.12-7, Tr., PageID#2337. It was at least a reasonable reading to interpret this "purposely" as establishing an intent element for the *aider or abettor*. After all, the jury had *already* been told that the "offense of murder" contains a purpose element. *Id.*, Page-

ID#2331 (defining "murder" as "purposely causing the death of another"). The instruction thus asked whether Langford "aided or abetted another in purposely committing the offense of . . . [purposely causing the death of another] . . . ." *Id.*, PageID#2337; *Waddington*, 555 U.S. at 191. If the sentence's "purposely" did not also relate to the aider or abettor, it served no purpose whatsoever.

To be sure, "[j]urors 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. The jurors here likely did not debate whether "in purposely committing" was an adjectival phrase modifying the principal-offender "another" or an adverbial phrase modifying the accomplice's "aid[ing] and abett[ing]." But, as the Sixth Circuit itself conceded, not a single jury instruction suggested that aiding and abetting was a "strict-liability crime." Pet. App. 18a. Instead, the surrounding instructions would have left no doubt that an accomplice, like a principal offender, must act purposely.

For one, instructions *three paragraphs* later explained when the jury could find that an accomplice harbored the necessary purpose. They indicated that a "common purpose among two or more people to commit a crime need not be shown by direct evidence but may be inferred from circumstances surrounding the act and from defendant's subsequent conduct." Doc.12-7, Tr., PageID#2337-38. They also said that "[c]riminal intent may be inferred from presence, companionship, and conduct before and after the offense is committed." *Id.*, PageID#2338. And the definition of "purposely" made clear that "[p]urpose and

intent mean the same thing." *Id.*, PageID#2327. These instructions left a clear impression that an aider and abettor had to *purposely* commit the crime; they would have served no purpose otherwise.

For another, the terms used to describe "aiding and abetting" had an intent connotation. The instructions said that "[a]n aider or abettor is one who aids, assists, supports, encourages, cooperates with, advises, or incites another to comit [sic] a crime, and participates in the commission of the offense by some act, word, or gesture." *Id.*, PageID#2337. This language suggests that mere accidental "participation" was not enough; there had to be "encouragement" or "incitement" to commit the murder.

More generally, the instructions explained that accomplice liability and principal-offender liability were two different ways to commit the *same* crime of murder. *Id.*, PageID#2336 (noting that a defendant "may be convicted as a principal offender or as a complicitor or an aider and abettor to any or all counts"). The instructions thus would have led the jury to the general definitions for "murder" and "purpose" if they had any question about the necessary elements for accomplice liability. The murder instruction indicated that "[b]efore you can find the defendant guilty of Murder, you must find that the State has proved beyond a reasonable doubt that . . . the defendant purposely caused the death of Marlon Jones." *Id.*, PageID#2335. And, as the state court noted, the purpose instruction indicated that "'[a] person acts purposely when it is his specific intention to cause a certain result . . . .'" Pet. App. 115a.

b. In response, the Sixth Circuit claimed that the Warden did "not dispute that the trial court failed to instruct on the mens rea of complicity." Pet. App. 16a. Not so. The Warden noted that "the jury was advised that a defendant convicted of complicity to murder had to have acted purposely, that is, with an intent to kill." Br. of Appellant at 24, *Langford v. Warden, Ross Corr. Inst.*, 593 F. App'x 422 (6th Cir. 2014) (No. 13-3855).

The Sixth Circuit next relied on the misplaced "purposely" for its view that the instructions did not convey that an aider and abettor must purposely act. Pet. App. 16a-19a. It noted that the relevant sentence conflicted with Ohio's model instruction, and that the instruction's "purposely committing" language unambiguously indicated that only the principal offender had to act with the required intent. *Id.* This was wrong. For starters, that "the trial court deviated in part from [the] standard jury instruction" "is not a basis for habeas relief." *Estelle*, 502 U.S. at 71-72. In addition, the Sixth Circuit made no effort to consider its reading of this sentence with "the charge as a whole." *Middleton*, 541 U.S. at 437. As noted, those instructions made clear that an accomplice had to act purposely and nowhere hinted that aiding and abetting was some type of strict-liability crime that lacked any *mens rea* element.

2. The state court reasonably concluded that there was no reasonable likelihood that the jury would have unconstitutionally applied the instructions

a. Even if some ambiguity remained in the charge, no "reasonable likelihood" exists that the jury

read the instructions in a manner that relieved the State of its burden to prove Langford's intent. *Boyde*, 494 U.S. at 380-81. As an initial matter, all *agreed* that accomplice liability required the accomplice to have the intent associated with the crime. Doc.12-6, Tr., PageID#2193. Yet *nobody* thought that the challenged instructions failed to convey that requirement—even though, as the dissent noted, defense counsel fixed a typo in the challenged sentence. Pet. App. 40a. Instead, an appellate attorney noticed the misplaced adverb for the first time on appeal, but he conceded it should be reviewed for plain error. Doc.7-1, Exs., PageID#182-83. Because the grammar debate "escaped notice on the record" until appeal, "the probability that it substantially affected the jury deliberations seems remote." *Henderson*, 431 U.S. at 155.

In addition, the parties' arguments would have confirmed that an accomplice must harbor the necessary purpose. Defense counsel questioned whether Langford possessed the requisite accomplice intent, arguing that even though Langford was present at the time of the shooting, he did not "assist[], incite[], or encourage[] the principal offender." Doc.12-7. Tr., PageID#2276. He contended that the fact that Langford "may have learned" that others "had a beef does not make [him] guilty of aggravated murder or complicity." *Id.*, PageID#2274. And he suggested that knowledge was not enough: "Knowing what they were going to do is insufficient in the absence of some act to aid or abet them." *Id.* Similarly, when the prosecutor noted that Langford might have been "there to help his buddies" by acting as a lookout, he added that "[c]riminal intent may be inferred from

presence, companionship, and conduct, before and after the offense is committed." *Id.*, PageID#2306. He even directed the jury to the intent "instruction when you have it." *Id.* The prosecutor's suggestion that accomplice liability required "intent" clarified the meaning of any allegedly ambiguous instructions. This conclusion "is particularly apt when it is the *prosecutor's* argument that resolves an ambiguity in favor of the *defendant*." *Middleton*, 541 U.S. at 438.

b. The Sixth Circuit did not consider whether there was a "reasonable likelihood" that the jury applied the allegedly mistaken instruction in an unconstitutional way. *Boyde*, 494 U.S. at 380-81. Indeed, it did not identify that reasonable-likelihood test or cite *Boyde*. *Cf. Estelle*, 502 U.S. at 72 & n.4. Instead, the Sixth Circuit immediately jumped to a harmless-error review after concluding that the challenged sentence did not convey that an accomplice had to act with the required intent. Pet. App. 16a-24a. That, too, was error.

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE COURT'S HARMLESS-ERROR CASES

Even if a constitutional error infected the state-court proceedings, this Court does not permit federal courts to grant relief unless that error has actually prejudiced a petitioner. Here, nothing suggests that the alleged error was harmful.

A. A Petitioner Must Show That A Constitutional Error Caused Actual Prejudice And That A State Court's Harmlessness Finding Was An Extreme Malfunction

To grant federal relief under § 2254, a federal court must do more than determine that a state court's resolution of a jury-instruction claim unreasonably applied clearly established federal law. *See Calderon v. Coleman*, 525 U.S. 141, 145-46 (1998). Even when a state court makes a state-law instructional error that is so egregious as to violate AEDPA, a federal court must still consider whether or not the constitutional error was harmless. *See Fry v. Pliler*, 551 U.S. 112, 119-20 (2007).

Before AEDPA, this Court had held that petitioners were "not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted). This "*Brecht*" test is more deferential than the harmless-beyond-a-reasonable-doubt standard that otherwise applies on direct review under *Chapman v. California*, 386 U.S. 18 (1967). *See Fry*, 551 U.S. at 116. 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.'" *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (citation omitted). That deferential test applies when a state court does *not* itself consider whether the error was harmless. *Fry*, 551 U.S. at 119-20.

But what happens when a state court does reach an independent harmless-error conclusion? In *Davis*

v. Ayala, 135 S. Ct. 2187 (2015), this Court clarified that federal courts must review that harmless-error finding through AEDPA's deferential lens. *Id.* at 2198. As *Ayala* confirmed, federal courts may not grant habeas relief "'unless *the harmlessness determination itself* was unreasonable.'" *Id.* at 2199 (quoting *Fry*, 551 U.S. at 119). It also emphasized that, as with any other type of claim, a state court's harmless-error decision "is not unreasonable if fairminded jurists could disagree on its correctness." *Id.* (internal quotation marks and alterations omitted).

Finally, a state court's harmless-error analysis need not be lengthy to trigger AEDPA. Federal courts "have no power to tell state courts how they must write their opinions," *Coleman v. Thompson*, 501 U.S. 722, 739 (1991), nor do they have the "authority to impose mandatory opinion-writing standards on state courts," *Johnson v. Williams*, 133 S. Ct. 1088, 1095 (2013). Instead, courts must "presume[] that [a] state court adjudicated [a] claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 562 U.S. at 99.

B. The Sixth Circuit Ignored *Ayala* By Refusing To Analyze The Harmless-Error Question With A Deferential Lens

The Sixth Circuit's decision to find the alleged instructional error harmful conflicts with this Court's cases in two basic ways.

First, the Sixth Circuit failed to identify any "'actual prejudice'" caused by the instructional error. *Brecht*, 507 U.S. at 637 (citation omitted). When jury instructions allegedly omit a required element of a

state-law crime, the harmless-error test "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder v. United States*, 527 U.S. 1, 19 (1999). To determine whether the missing scienter element prejudiced Langford, therefore, a court should ask whether a rational jury could have concluded, based on the evidence, that Langford assisted the murder, but did so only accidentally—without the necessary purpose to kill.

Langford cannot meet this standard. No evidence suggests that the jury could have rationally concluded that even though Langford assisted the murder (something the jury indisputably found), he did so only *accidentally* rather than *purposely*. As the dissent noted, "there was no evidence at all to support conviction under a theory of accomplice liability where Langford, say, performed in a production of *Hamlet* and, thereby, unwittingly motivated Jones's shooter to take purposeful action and to avenge immediately the attack on Langford." Pet. App. 41a. Either Langford participated in the murder purposely or he did not participate in it at all—there was no support for a middle ground where he could have been found to have unintentionally assisted in the murder. *Cf. California v. Roy*, 519 U.S. 2, 3 (1996) (noting that the district court found an accomplice-intent instruction harmless because "no rational juror could have found that [the defendant] knew the confederate's purpose and helped him but also found that [the defendant] did not *intend* to help him").

The Sixth Circuit never even attempted to apply this test. Instead, it found the alleged error harmful solely because the evidence was "more consistent

with a theory of accomplice liability than principal liability." Pet. App. 23a. This asked and answered the wrong question. The proper harmless-error analysis does not turn on whether the jury could have found Langford guilty as an accomplice (it could have). The proper test instead asks whether the jury could have found Langford guilty as an accomplice while, at the same time, finding him not guilty of harboring the necessary intent (it could not have). *See Neder*, 527 U.S. at 19.

Second, the Sixth Circuit doubled down on its mistake after this Court asked it to reconsider in light of *Ayala*. AEDPA deference should have applied to this harmlessness question. In response to Langford's jury-instruction challenge in state appellate court, the State argued that even if the instruction was erroneous, that error did not prejudice Langford. Doc.7-1, Exs., PageID#233-35. Among other things, the State contended that any error "was not outcome determinative." *Id.*, PageID#234. After considering these arguments, the state court held that the jury could not have found Langford guilty "based upon an error in the jury charge" and that "[n]o reversible error [was] present with respect to the jury charge or complicity." Pet. App. 115a. That holding sufficed to trigger AEDPA. The state court's analysis triggered the presumption that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits." *See Harrington*, 562 U.S. at 99; *see also Johnson*, 133 S. Ct. at 1094 (presumption applies when a state court addresses some, but not all, of the claims). AEDPA thus bars relief because the state

court's harmless-error holding cannot be characterized as an "'extreme malfunction.'" *Woods v. Donald*, 135 S. Ct. 1372, 1378 (2015) (citation omitted).

The Sixth Circuit's contrary holding "ignore[d] this [Court's] directive" to reconsider the court's earlier decision in light of *Ayala*. Pet. App. 4a (Boggs, J., dissenting). The Sixth Circuit did so by holding that *Ayala* "does not apply" because "there was no state court review of harmless error in this case." Pet. App. 3a. Yet the court should have presumed that the state court "*did* adjudicate the harmless-error issue" when it concluded that the error did not affect the outcome. Pet. App. 4a (Boggs, J., dissenting). Its failure to apply the deference that *Ayala* requires conflicts with this Court's instructions in *Harrington* and *Johnson*. *See Kernan v. Hinojosa*, 136 S. Ct. 1603, 1606 (2016) (summarily reversing the Ninth Circuit because it wrongly refused to consider a claim "through AEDPA's deferential lens" on the ground that a state court had not decided an issue).

III. Compelling Reasons Exist For The Court To Summarily Reverse

The Court should exercise its discretionary jurisdiction to summarily reverse the Sixth Circuit's decision for several additional reasons on top of the clear conflict with the Court's cases.

First, the Sixth Circuit's errors equal or exceed errors that have led this Court to summarily reverse in similar cases. In recent years, the Court has summarily reversed a circuit court's grant of relief under § 2254 that was based on: a state court's refusal to allow a defendant to put on alternative defenses, *Glebe v. Frost*, 135 S. Ct. 429 (2014); a state

court's refusal to appoint counsel for post-trial proceedings, *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013); a prosecutor's belated request for an aiding-and-abetting instruction, *Lopez v. Smith*, 135 S. Ct. 1 (2014); a state court's refusal to allow evidence of a rape victim's prior accusations, *Nevada v. Jackson*, 133 S. Ct. 1990 (2013); and a prosecutor's improper arguments, *Parker v. Matthews*, 132 S. Ct. 2148 (2012); *cf. Woods v. Etherton*, 136 S. Ct. 1149 (2016); *White v. Wheeler*, 136 S. Ct. 456, (2015).

The Sixth Circuit's underlying errors are, if anything, more substantial than in these other cases. In many instances, for example, the Court has instructed circuit courts that they should not rely on their own precedent to identify the legal principles qualifying as "'clearly established Federal law, as determined by the Supreme Court.'" *Parker*, 132 S. Ct. at 2155 (quoting 28 U.S.C. § 2254(d)(1)); *Lopez*, 135 S. Ct. at 4; *Marshall*, 133 S. Ct. at 1450-51. Here, by contrast, the Sixth Circuit did not even have circuit precedent to fall back on. When granting relief under AEDPA, it was forced to *distinguish* its own precedent—precedent that further clarified that courts "may grant the writ based on errors in state jury instructions only in extraordinary cases." *Daniels v. Lafler*, 501 F.3d 735, 741 (6th Cir. 2007); Pet. App. 25a-26a. Indeed, the Sixth Circuit failed to cite a single case (either from this Court or from the circuit courts) that has granted federal relief based on a state-law instructional error.

In addition, many cases have "cautioned the lower courts . . . against 'framing [the Court's] precedents at . . . a high level of generality'" to make them appear like they "clearly establish" specific principles

that they do not address. *Lopez*, 135 S. Ct. at 4 (quoting *Jackson*, 133 S. Ct. at 1994); *see Donald*, 135 S. Ct. at 1377. Here, the Sixth Circuit, at most, identified the undisputed and undisputedly general rule that a defendant has the right to have the jury decide every element of the crime. Pet. App. 13a (citing *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995)). But that rule is far too general to decide whether the jury instructions in this case adequately identified the "purpose" element of accomplice liability. *Cf. Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."). While the Sixth Circuit cited AEDPA, Pet. App. 12a-13a, "it is not apparent how the Court of Appeals' analysis would have been any different without [it]," *Harrington,* 562 U.S. at 101.

Second, this Court's review would serve a significant jurisprudential purpose for jury-instruction claims. In other contexts, the Court has taken cases to explain that a deferential direct-review standard becomes *doubly* deferential under AEDPA. Defendants, for example, face a difficult task when attempting to demonstrate ineffective assistance of counsel. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). When conducted under AEDPA, review of an ineffective-assistance claim becomes "'doubly'" deferential. *Harrington*, 562 U.S. at 105 (citation omitted). Defendants likewise face a difficult task to show that the evidence against them was constitutionally insufficient. *Cavazos v. Smith*, 132 S. Ct. 2, 3-4 (2011). When AEDPA applies, that standard becomes "twice-deferential." *Parker*, 132 S. Ct. at 2152.

This case allows the Court to make the same point for jury-instruction claims. Its prior decisions confirm that, even aside from AEDPA, courts should apply deferential standards when determining whether ambiguous jury instructions under state law violate federal due process. *Henderson*, 431 U.S. at 154. Thus, the AEDPA deference sitting on top of this deferential standard makes it doubly deferential. *Cf. Waddington*, 555 U.S. at 193-96. Saying so here would bring this Court's jury-instruction jurisprudence in line with its ineffective-assistance and insufficient-evidence jurisprudence.

Third, a summary reversal would provide further explanation about what this Court expects when it remands for further consideration in light of an intervening decision. It is not uncommon for the Court to grant, vacate, and remand a circuit decision in light of a recent AEDPA decision when it believes that the circuit court has failed to apply the properly deferential standard of review. In *Cavazos*, 132 S. Ct. 2, for example, the Court summarily reversed the Ninth Circuit. *Id.* at 8. When doing so, the Court pointed out that it had "vacated and remanded [the same case] twice before" to "call[] the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in § 2254(d) habeas cases." *Id.* at 7-8. Likewise, in *Wright v. Van Patten*, 552 U.S. 120 (2008), this Court summarily reversed the Seventh Circuit only after it had previously taken the less dramatic step of remanding for reconsideration in light of a different AEDPA case. *Id.* at 121; *cf. Knowles v. Mirzayance*, 556 U.S. 111, 121-22 (2009) (reversing after appellate court "reiterated the same analysis on which it had relied prior to this

Court's remand"). Here, too, the Court should summarily reverse the Sixth Circuit because that court "reinstat[ed] its judgment without seriously confronting the significance of the case[] called to its attention." *Cavazos*, 132 S. Ct. at 7.

Finally, the Sixth Circuit's decision overturns the most serious of offenses—murder. Pet. App. 2a. Harms to federalism, finality, and comity reach their apex when federal courts overturn such convictions. Particularly with respect to them, federal 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 (citation omitted). It should come as no surprise, then, that many of the Court's reversals involved murder convictions. *See, e.g.*, *Lopez*, 135 S. Ct. at 2; *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013); *Metrish v. Lancaster*, 133 S. Ct. 1781, 1785 (2013); *Johnson*, 133 S. Ct. at 1092; *Parker*, 132 S. Ct. at 2149.

CONCLUSION

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

Respectfully submitted,

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