No. 16-886

In the Supreme Court of the United States

MARK HOOKS, PETITIONER

v.

MARK LANGFORD

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in a manner warranting summary reversal when it concluded that a state court unreasonably applied this Court's instructional error cases by finding no due process violation for omitting the element of mens rea for an accomplice-to-murder charge.

2. Whether summary reversal is warranted to review the Sixth Circuit's factbound conclusion that the state court did not address the harmlessness of the jury error, and that there was therefore no state determination on harmlessness to which to defer.

TABLE OF CONTENTS

Page

Table Of Authorities III
Jurisdiction 1
Introduction 1
Statement 3
A. State Proceedings 3
B. Federal Proceedings 7
Reasons For Denying The Petition 12
I. The Jury Instructions Violated Due Process By Omitting The Element Of Mens Rea Entirely 12
II. The Sixth Circuit Correctly Found That The Instructional Error Was Not Harmless, Under Any Applicable Standard Of Review 18
A. The Sixth Circuit Correctly Applied *Brecht* In Concluding The Instructional Error Was Not Harmless 19
B. The Sixth Circuit Was Not Required To Accord AEDPA Deference To The Ohio Court Of Appeals 22
C. Even Under AEDPA, The State Court Could Not Have Reasonably Found The Error To Be Harmless 28
III. Summary Reversal Is Inappropriate 30
Conclusion 34

TABLE OF AUTHORITIES

Cases: **Page(s)**

Boyde v. *California*,
494 U.S. 370 (1990) 2, 14, 16

Brecht v. *Abrahamson*,
507 U.S. 619 (1993) ..... *passim*

Brosseau v. *Haugen*,
543 U.S. 194 (2004) 30

Brumfield v. *Cain*,
135 S. Ct. 2269 (2015) 27

California v. *Roy*,
519 U.S. 2 (1996) 20

Cavazos v. *Smith*,
565 U.S. 1 (2011) 30, 32, 33

Chapman v. *California*,
386 U.S. 18 (1967) 24, 25, 28

City & Cty. of San Francisco v. *Sheehan*,
135 S. Ct. 1765 (2015) 31

Coleman v. *Thompson*,
501 U.S. 722 (1991) 25, 26

Cromer v. *Children's Hosp. Med. Ctr. of Akron*,
29 N.E.3d 921 (Ohio 2015) 16

Davis v. *Ayala*,
135 S. Ct. 2187 (2015) ..... *passim*

Dep't of Nat. Res. v. *Ebbing*,
28 N.E.3d 682 (Ohio Ct. App. 2015) 16

Cases: **Page(s)**

Elonis v. *United States*,
135 S. Ct. 2001 (2015) 29

Harrington v. *Richter*,
562 U.S. 86 (2011) ..... *passim*

Harris v. *Rivera*,
454 U.S. 339 (1981) 32

Harris v. *Thompson*,
698 F.3d 609 (7th Cir. 2012) 27

Hedgpeth v. *Pulido*,
555 U.S. 57 (2008) 22

In re Winship,
397 U.S. 358 (1970) 8, 9

Johnson v. *Williams*,
133 S. Ct. 1088 (2013) 25, 26

Lamie v. *United States Tr.*,
540 U.S. 526 (2004) 16

Middleton v. *McNeil*,
541 U.S. 433 (2004) 12, 14, 22

Mireles v. *Waco*,
502 U.S. 9 (1991) 30

Mitchell v. *Esparza*,
540 U.S. 12 (2003) 20, 21

Neder v. *United States*,
527 U.S. 1 (1999) 10, 20, 21, 22

O'Neal v. *McAninch*,
513 U.S. 432 (1995) 10, 19, 20, 29

O'Sullivan v. *Boerckel*,
526 U.S. 838 (1999) 33

Cases: **Page(s)**

Parker v. *Matthews*,
132 S. Ct. 2148 (2012) 30

People v. *Ayala*,
6 P.3d 193 (Cal. 2000) 25

Presley v. *Georgia*,
558 U.S. 209 (2010) 30

Sandstrom v. *Montana*,
442 U.S. 510 (1979) 10

Schweiker v. *Hansen*,
450 U.S. 785 (1981) 31

Spears v. *United States*,
555 U.S. 261 (2009) 32

State v. *Brown*,
605 N.E.2d 46 (Ohio 1992) 25

State v. *Dixon*,
805 N.E.2d 1042 (Ohio 2004) 24

State v. *Fisher*,
789 N.E.2d 222 (Ohio 2003) 23

State v. *Fontes*,
721 N.E.2d 1037 (Ohio 2000) 24

State v. *Johnson*,
754 N.E.2d 796 (Ohio 2001) 12

State v. *Marcum*,
994 N.E.2d 1 (Ohio Ct. App. 2013) 24

State v. *Rahman*,
492 N.E.2d 401 (Ohio 1986) 25

State v. *Salaam*,
47 N.E.3d 495 (Ohio Ct. App. 2015) 24

Cases: **Page(s)**

Tolan v. *Cotton*,
134 S. Ct. 1861 (2014) 31

United States v. *Gaudin*,
515 U.S. 506 (1995) 9, 13

United States v. *Olano*,
507 U.S. 725 (1993) 23

Visciotti v. *Martel,*
839 F.3d 845 (9th Cir. 2016) 33

Waddington v. *Sarausad*,
555 U.S. 179 (2009) 3, 14, 17

Wiggins v. *Smith*,
539 U.S. 510 (2003) 23, 27

Ylst v. *Nunnemaker*,
501 U.S. 797 (1991) 27

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 7

Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ..... *passim*

Ohio Rev. Code § 2901.22 17

Ohio Rev. Code § 2923.03(A) 4

Ohio Rev. Code § 2923.03(F) 12

Ohio Rev. Code §§ 2903.01-2903.05 29

Ohio Rev. Code §§ 2903.041-2903.05 30

Other Authorities: **Page(s)**

2 Ohio Jury Instructions, Crim. § 523.03 6

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 31, 33

U.S. Const. amend. VIII 13

JURISDICTION

The judgment of the court of appeals was entered on October 31, 2016. The petition for a writ of certiorari was filed on January 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Thirteen years after Marlon Jones's death, a grand jury indicted respondent, Mark Langford, for his murder. Pet. App. 107a, 8a. At trial, the State offered two theories of guilt: Langford was either the actual shooter or an accomplice. *Id.* at 114a. After a weeklong trial, the court reminded the jury of their "sworn duty to accept" the jury instructions as law, "and to apply the law as it is given." 7 Trial Tr. 109.

But the trial court made a critical one-time error adapting the state's model instruction to this case: instead of instructing the jurors (in accordance with the model instruction) that Langford was guilty of complicity only if "*the defendant purposely aided or abetted* another in committing the offenses," it instructed them to find Langford guilty if he "aided or abetted *another in purposely committing* the offenses." See Pet. App. 14a, 37a; Pet. 20 (emphases added). The change altered the requisite finding in a key respect; rather than deciding whether *Langford* had acted purposely, the instruction asked the jury to determine whether he aided and abetted *someone else's* purposeful act. The prosecution reinforced that mistaken understanding by urging jurors in closing that "[i]t doesn't matter who actually fired the bullet * * *. *Anybody who helped in any way is equally guilty*, equally guilty of complicity." Pet. App. 21a (emphasis added).

The Ohio Court of Appeals upheld Langford's conviction, concluding that the trial court had committed "[n]o reversible error" in instructing the jury. Pet. App. 115a. But because that court found no error, it never reached the question of whether such an error was harmless. Three tiers of federal judges have reviewed that conclusion, each reaching the same result: The Ohio Court of Appeals not only erred, but its judgment was an unreasonable application of federal law sufficient to warrant reversal even under the deferential standards of the Antiterrorism and Effective Death Penalty Act (AEDPA). See Pet. App. 3a, 24a, 51a-52a, 89a.

The petition does not deign to discuss any of the ordinary criteria that justify granting certiorari. It identifies no split of authority, and does not (nor could it) contend that this issue—a one-time departure from a model instruction that is unlikely to happen again—is sufficiently important or recurring to warrant a place on this Court's plenary docket. Instead, petitioner claims the Sixth Circuit was so badly mistaken that this Court should summarily reverse. But the Sixth Circuit correctly stated and applied well-settled federal law. Among other things, it: correctly stated the deferential standard of review under AEDPA, Pet. App. 3a, 12a-13a; considered the erroneous instructions in their entirety, *Boyde* v. *California*, 494 U.S. 370, 378 (1990), Pet. App. 16a-17a; concluded that failure to instruct the jury on Langford's required mens rea had relieved the state of its burden of proving a necessary element of the crime, contrary to clearly established law of this Court, *Waddington* v. *Sarausad*, 555 U.S. 179, 191

(2009), Pet. App. 24a; and held that the error had a "'substantial and injurious effect or influence in determining the jury's verdict,'" Pet. App. 22a, 24a (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993)). As the courts below concluded, the state court's ruling was therefore "an unreasonable application of Supreme Court law," Pet. App. 16a; *Waddington*, 555 U.S. at 190-192. On the record here, that conclusion is fully consistent with *Davis* v. *Ayala*, 135 S. Ct. 2187, 2198 (2015). See Pet. App. 115a, 3a.

Judges at three levels of the federal system have already applied settled habeas law to the 1,400-page record in this case. There is no need for this Court to be the fourth to do so.

STATEMENT

A. State Proceedings

1. In the mid-1990s, respondent Mark Langford was a member of the "Detroit boys" gang. Pet. App. 9a, 116a. During the summer of 1995, Langford was beaten by members of a rival gang, the "F and L boys." *Id.* at 9a. On July 18, 1995, members of the Detroit boys fired shots at members of the F and L boys. *Id*. at 9a-10a. Marlon Jones was struck by a bullet fired from a Ruger .357 magnum revolver and later died from his injuries. *Id.* at 113a.

2. In August 1995, respondent was indicted for murder and related charges in connection with Jones's death. Pet. App. 8a. The State dismissed the indictment within a few months, however, because the State failed to produce an essential witness, Nicole Smith. *Ibid.*

More than 13 years later, respondent was again indicted in connection with Jones's death, on counts of aggravated murder and murder. Pet. App. 8a. Each count also included a "firearm specification," accusing respondent with possessing, brandishing, or using a firearm during the offense. *Ibid.*; 7 Trial Tr. 120. Respondent moved to dismiss the indictment, asserting that the 13-year delay, during which several key defense witnesses died, violated his rights to due process and a fair trial. Pet. App. 104a-114a. The trial court denied that motion. *Id.* at 114a.

At trial in October 2009, the State presented two theories of guilt: respondent was either the actual shooter and liable as a principal, or an accomplice in Jones's murder. Pet. App. 114a. Under Ohio law, complicity requires proof that a defendant "'act[ed] with the kind of culpability required for the commission of [the underlying] offense.'" Pet. App. 114a (quoting Ohio R.C. § 2923.03(A)); see also *id.* at 114a-115a ("When the offense is murder, the accomplice must have acted with a purpose to kill.").

The State's case relied on testimony from Smith and jailhouse informants Jason Arnold and Isaac Jackson, as well as respondent's statements during police interviews. Pet. App. 9a-10a, 89a. Smith, an estranged friend of respondent's, testified that she was with respondent and two other men on the night of the murder, and witnessed the group shoot at Jones. *Id.* at 9a-10a. The jailhouse informants testified that respondent had confessed to involvement in Jones's murder. *Id.* at 113a. The prosecution also introduced conflicting and

inculpatory statements respondent made during a series of police interviews. See 6 Trial Tr. 29-36.

After a weeklong trial, the court charged the jury. Pet. App. 10a. The court explained that while "[the jury] decide[s] the disputed facts, * * * the Court provides the instructions of law," and "[i]t is [the jury's] sworn duty to accept these instructions and to apply the law as it is given * * *. [The jury is] not permitted to change the law or to apply [its] own conception of what [it] think[s] the law should be." 7 Trial Tr. 109.

The court instructed the jury that to convict respondent of aggravated murder as a principal, it needed to find that he "purposely and with prior calculation and design caused the death of Marlon Jones." 7 Trial Tr. 115. Similarly, to convict him of murder as a principal, it needed to find that he "purposely caused the death of another." *Id.* at 119. The court also instructed the jury that "[a] person acts 'purposely' when it is his specific intention to cause a certain result * * * ." *Id.* at 115.

The court separately instructed the jury that respondent could be "convicted as a principal offender or as a complicitor or an aider and abettor to any or all counts and specifications of the indictment." 7 Trial Tr. 124. The Ohio Model Jury Instructions for complicity read: "The defendant is charged with complicity in the commission of the offense of (*specify offense*). Before you can find the defendant guilty, you must find beyond a reasonable doubt, that * * * the defendant (*insert culpable mental state if one is required for the commission of the principal offense*) [aided or abetted] another in committing the offense

of (*specify offense*)." Pet. App. 25a-26a; accord 2 Ohio Jury Instructions, Crim. § 523.03. The prosecution agreed with respondent that the jury charge should "insert the culpable mental state and then go into the aided and abetted language." 6 Trial Tr. 139; see also *ibid.* (prosecution agreeing that "mental state" would be "purposely" for aggravated murder and murder, and "knowingly" for involuntary manslaughter).

But the trial judge departed from the model language, by moving the mens rea from the portion of the instruction describing the aider and abettor's conduct, to the portion describing the principal's conduct. See 7 Trial Tr. 125. As delivered, the complicity instruction read: "Before you can find the defendant guilty of a crime as a complicitor or aider and abettor, you must find beyond a reasonable doubt that * * * the defendant aided or abetted another in *purposely* committing the offenses." 7 Trial Tr. 124-125 (emphasis added).

The jury acquitted respondent of aggravated murder and both firearm specifications. Pet. App. 11a. It convicted him, however, of murder, in a verdict form that did not specify whether it had accepted the principal or accomplice theories. *Id.* at 11a, 84a-85a. The trial court sentenced respondent to a term of imprisonment for 15 years to life. *Id.* at 11a.

3. The Ohio Court of Appeals affirmed in pertinent part. Pet. App. 11a. That court rejected respondent's argument that the deficient instructions allowed the jury to convict on a theory of accomplice liability without having to find the necessary culpable intent. *Id.* at 115a. It concluded that "[t]he jury

could not have been misled by the charge given, nor could it have found [respondent] guilty based upon an error in the jury charge." *Ibid.* Thus, "[n]o reversible error [was] present with respect to the jury charge [f]or complicity." *Ibid.*

The Ohio Supreme Court declined jurisdiction. Pet. App. 11a.

B. Federal Proceedings

1. Langford sought relief under 28 U.S.C. § 2254. Pet. App. 53a. His habeas petition raised five constitutional claims. *Id.* at 58a. A magistrate judge rejected four as either procedurally barred or meritless. *Id.* at 101a. However, after exhaustive review of this Court's decisions on jury-instruction error, *id.* at 80a-81a, the instructions given at trial, *id.* at 81a-82a, the requirements of Ohio law, *id.* at 82a, the state appellate court's reasoning, *id.* at 83a, the theories the jury possibly considered, *id.* at 84a-88a, and the error's likely effect on the verdict, *id.* at 88a-89a, the magistrate judge issued a report and recommendation concluding that Langford was entitled to relief on his jury instruction claim. *Id.* at 89a.

The magistrate judge reasoned that by moving the word embodying the crime's mens rea ("purposely") from the phrase addressing the aider and abettor, to the phrase addressing the principal, "the trial judge inexplicably failed" to inform the jury about "the state of mind necessary to convict a defendant of complicity to commit murder." Pet. App. 78a. That omission violated the bedrock rule that the "Due Process Clause protects the accused against conviction except

upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 84a (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

Expressly noting AEDPA's high bar, the magistrate judge nonetheless concluded that the state court's failure to acknowledge the instruction's constitutional defect constituted an unreasonable application of clearly established law, which had a "'substantial and injurious effect or influence in determining the jury's verdict.'" Pet. App. 89a (quoting *Brecht*, 507 U.S. at 637). Accordingly, the magistrate judge determined that "the harmless error standard applicable on collateral review as announced in *Brecht*" had been "satisfie[d]." *Id.* at 88a-89a. The magistrate judge further concluded that "the state [appellate] court did not actually make a [harmless error] finding because it did not consider the question," and that "*any* such finding would, on this record, be an unreasonable application of the proper constitutional standard." *Ibid.* (emphasis added).

The district court adopted the magistrate judge's recommendation. Pet. App. 49a-52a. After considering the Warden's objections and examining the record, the court found 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 conclude, beyond a reasonable doubt, that he acted with the required intent—*i.e.*, purpose to kill." *Id.* at 51a-52a. The district court agreed that this constitutionally

defective omission was not harmless error under *Brecht*. *Id.* at 52a.

2. The Sixth Circuit affirmed. Pet. App. 36a. The Court of Appeals emphasized the considerable deference due to state court decisions under AEDPA, and further acknowledged "the high bar that a petitioner must clear before obtaining relief on a jury instruction claim" when mounting a "collateral attack on the constitutional validity of a state court's judgment." Pet. App. 24a. The panel recognized that a federal habeas court's "concern is with the state court's *decision*—not the adequacy, or even logic, of its reasoning" and that it would "accord the same deference to a state court's adjudication of a claim on the merits regardless of whether it provides any reasoning at all." *Id.* at 14a-15a (citing *Harrington* v. *Richter*, 562 U.S. 86, 98-99 (2011)).

Nonetheless, the Court of Appeals concluded that upholding the omission of the mens rea element from the jury instruction on complicity constituted an unreasonable application of clearly established law. Pet. App. 16a. The panel noted that even "[the Warden] does not dispute that the trial court failed to instruct on the mens rea of complicity," and that "there was nothing [else] in the jury instructions to convey the principle that an accomplice need act with the same mens rea as the principal offender." *Ibid.* That omission clearly violated this Court's command that "the prosecution must prove, beyond a reasonable doubt, every element of the crime charged." *Id.* at 15a (citing *United States* v. *Gaudin*, 515 U.S. 506, 522-523 (1995); *In re Winship*, 397 U.S. 358, 364 (1970); *Sandstrom* v. *Montana*, 442 U.S. 510

(1979)). The panel distinguished cases involving less severe instructional errors, such as the mere "failure to give a desired but unnecessary instruction," "the failure to instruct on an element that was uncontested at trial," and an "instruction that thrice correctly stated the law and once incorrectly stated it." *Id.* at 24a-25a. And the panel considered and rejected the argument that the "totality of the circumstances" at trial, including the prosecutor's closing statement, constructively informed the jury of the required mens rea. *Id.* at 20a-22a.

The Court of Appeals also agreed that the due process violation was not harmless under *Brecht*. Pet. App. 22a-24a. The panel emphasized that Langford was not entitled to relief unless the federal habeas court had "'grave doubt about whether a trial error of federal law had "substantial and injurious effect or influence in determining the jury's verdict."'" *Id.* at 22a (quoting *O'Neal* v. *McAninch*, 513 U.S. 432, 436 (1995) (quoting Brecht, 507 U.S. at 637)). The panel "decline[d] to draw th[e] inference" that the acquittal on the firearm specifications ruled out the possibility that the jury convicted him as a principal offender. *Id.* at 21a. But after carefully surveying the evidence and state-court factual findings, the panel concluded that "the evidence was not great * * * that Langford was a principal offender." *Id.* at 24a. Because the evidence was "more consistent with a theory of accomplice liability than principal liability," *id.* at 23a, and the omitted element was not "uncontested [or] supported by overwhelming evidence," *ibid.* (quoting *Neder* v. *United States*, 527 U.S. 1, 17 (1999)), the court

concluded that the omission "had a substantial influence in determining the jury's verdict" and thus satisfied the heightened *Brecht* standard. *Id*. at 24a.

Judge Boggs dissented. Pet. App. 36a. He suggested that because defense counsel had not noticed the omission of the mens rea element at trial, a jury would not have noticed its absence either. *Id.* at 40a. He expressed doubt that evidence would have supported a theory that Langford had "unwittingly motivated Jones's shooter to take purposeful action" by, for example, "perform[ing] in a production of *Hamlet*." *Id.* at 41a.

3. This Court granted the Warden's petition for certiorari, vacated the Sixth Circuit's judgment, and remanded for reconsideration in light of the intervening decision in *Davis* v. *Ayala*, 135 S. Ct. 2187 (2015). In *Ayala*, this Court held that the *Brecht* standard for harmless error on habeas review "subsumes the limitations imposed by AEDPA," thus requiring federal courts applying *Brecht* to set aside a state court's determination of harmless error only if that harmlessness determination itself constitutes an unreasonable application of clearly established law. *Id.* at 2199.

4. On remand, the Sixth Circuit reconsidered the extensive state and federal record in light of *Ayala*'s requirement that federal courts "give a heightened degree of deference to the state court's review of a harmless error decision." Pet. App. 3a. The panel, however, concluded that "there was no state court review of harmless error," given that the Ohio appellate court held there was no error in the jury instruction and had never addressed harmlessness.

Ibid. Because there was no state court harmlessness determination to which to defer, the Court of Appeals explained that "*Ayala* does not apply to the facts of this case." *Ibid*.

Judge Boggs dissented again. Pet. App. 3a. He agreed that "the majority correctly reads" the rule of law from *Ayala*, but disagreed about the panel's application of that standard to the facts of this case. *Id.* at 4a-5a.

REASONS FOR DENYING THE PETITION

I. The Jury Instructions Violated Due Process By Omitting The Element Of Mens Rea Entirely

Jury instructions must safeguard the defendant's due process right to have the State prove "*every element of the offense*" beyond a reasonable doubt. *Middleton* v. *McNeil*, 541 U.S. 433, 437 (2004) (per curiam) (emphasis added). The mens rea element of accomplice liability under Ohio law requires that the defendant "shared the criminal intent of the principal." *State* v. *Johnson*, 754 N.E.2d 796, 801 (Ohio 2001); accord Ohio Rev. Code § 2923.03(F). Here, all parties agree that a correct instruction that incorporated every element necessary for conviction would have required the jury to find that Langford *purposely* aided or abetted another in committing murder. See Pet. App. 17a-18a; Pet. 20. But the trial court instructed the jury that it could convict Langford as an accomplice if "the defendant aided or abetted another in purposely committing the offenses." Pet. App. 17a.

Contrary to petitioner's suggestion, this error is more than merely a "misplaced adverb." Pet. 5. The dismissive characterization that "purposely" was simply moved "five words," *id.* at 2, overlooks the tremendous difference that such a change in wording can make.[1] The "adverb" here embodies *the entirety of* the required mens rea. The judge's error moved the mens rea element from the portion of the instruction describing the aider and abettor's conduct to the portion describing the principal's conduct. In so doing, the judge made the requisite mens rea that of the principal, rather than the abettor, and *omitted* any mens rea for the accomplice. Nowhere did the instructions require a finding that Langford acted with the *purpose* of aiding or abetting others in committing murder. Accordingly, the instructions violated Langford's due process "right to have a jury determine * * * his guilt of every element of the crime." *Gaudin*, 515 U.S. at 522-523.

Petitioner argues that summary reversal is nonetheless warranted because (1) the Sixth Circuit used the wrong legal framework, Pet. 20-25; (2) the instructions as a whole were correct, *id.* at 20-23; and (3) the instructions were unlikely to mislead the jury, *id.* at 23-25. Each contention is demonstrably false.

1. The governing law in this case is well settled. An incorrect jury instruction violates due process

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[1] Even small movement of modifiers can drastically alter the meaning of sentences. See Pet. 2. For example, moving the word "excessive" in the Eighth Amendment just a few places would create a flat prohibition on bail and restrict only *excessive* cruel and unusual punishment. See U.S. Const. amend. VIII.

when it relieves the State of the requirement of "prov[ing] every element of the offense" beyond a reasonable doubt. *Middleton*, 541 U.S. at 437. In making that determination, the instructions must be "viewed in the context of the overall charge," rather than in "artificial isolation." *Boyde* v. *California*, 494 U.S. 370, 378 (1990). Due process is violated when ambiguous instructions create a "'reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden" to prove every element of the offense. *Waddington* v. *Sarausad*, 555 U.S. 179, 191 (2009). Finally, the federal courts "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 * * *.'" *Id.* at 190-192.

The Sixth Circuit recognized and followed each of these principles. After "viewing the jury instructions in their entirety," the panel held that the instructions were constitutionally deficient because they failed "to include any language informing the jury about the required mens rea of complicity." Pet. App. 16a-17a. Although the Sixth Circuit did not couch its discussion of the error's effect in the "reasonable likelihood" language of *Waddington*, the court specifically concluded that the "failure to instruct on the mens rea of complicity * * * had a substantial influence in determining the jury's verdict." Pet. App. 24a.[2] And the Sixth Circuit explicitly held that,

[2] It is unlikely that the panel majority could have overlooked this issue. Judge Boggs's dissent specifically addressed the "reasonable likelihood" question, Pet. App. 42a (emphasis

even with the deference due under AEDPA, the state court's decision was "an unreasonable application of Supreme Court law." Pet. App. 16a.

The Sixth Circuit applied the proper legal framework. Petitioner's request for summary reversal seeks only factbound error correction in the application of that settled framework to the facts of this case. See Part III, *infra*.

2. Petitioner argues that the instructions "as a whole" were correct, Pet. 20, and the jury would not have been misled, *id.* at 23-25. But as the Sixth Circuit explained, absolutely *nothing* in the instructions "convey[ed] the principle that an accomplice need act with the same mens rea as the principal offender." Pet. App. 16a. The instructions are unambiguous—the jury could convict Langford as an accomplice if "the defendant aided or abetted another in purposely committing the offenses." *Id.* at 17a. The complicity instruction's only mens rea requirement applies not to the abetter, but to "another" person—the principal. The instructions contain no requirement that Langford have *purposely* aided or abetted another in committing murder; it is enough that he assisted "another [who] purposely commit[ed] the offenses."

In an attempt to avoid the plain meaning of the jury instructions, petitioner claims that the jury must have inferred "purposely" into the proper place in the instructions. For example, the petition invokes the

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omitted), and the magistrate decision below found "a reasonable likelihood that the trial court's error affected the jury verdict," *id.* at 84a.

canon against superfluities. Pet. 21 (arguing that the word "purposely" later in the instruction would be superfluous if read in the complicity instruction to apply to the principal). And it speculates that jurors would read a "purpose" requirement into the accomplice instructions—which are silent on the accomplice's mens rea—because *other* instructions mention "purpose." *Id.* at 19, 22. But such arguments are better suited for courses on statutory interpretation than a jury room. Even if canons of statutory construction applied to jury instructions,[3] this Court has cautioned that jurors do not "pars[e] instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380-381. Rather, a juror would likely take the instructions at face value, which would permit a conviction without purposeful aiding and abetting.

Petitioner also argues that the requisite element of "purpose" was conveyed by other instructions describing an aider or abettor as one who, among other things, "aids" or "assists" the principal. Pet. 22. But many of the listed descriptors do not require any showing of purpose. For example, one can "assist"

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[3] The petition has not shown that jury instructions are subject to any presumption against superfluity. Under Ohio law, jury instructions may contain superfluities without being erroneous. See *Cromer* v. *Children's Hosp. Med. Ctr. of Akron*, 29 N.E.3d 921, 933-934 (Ohio 2015); *Dep't of Nat. Res.* v. *Ebbing*, 28 N.E.3d 682, 713 (Ohio Ct. App. 2015). And even as a matter of statutory interpretation, petitioner's arguments fall flat. As this Court has cautioned, the "preference for avoiding surplusage constructions is not absolute. * * * We should prefer the plain meaning" where it is unambiguous. *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004).

another without sharing the same purpose, as the petition implicitly acknowledges. Pet. 28 (denying that the jury found that "Langford *assisted* the murder * * * only *accidentally*" by performing in *Hamlet*) (emphasis added).

In an attempt to minimize the instructional error, petitioner offers a false dichotomy: The jury was limited to finding that Langford aided another purposely, or did so accidentally by starring in *Hamlet*. Pet. 28. This strained argument ignores the range of mental states between purposeful action and strict liability. *E.g.*, Ohio Rev. Code § 2901.22 (defining criminal mens rea of recklessness and negligence). And it fails to grasp the many ways Langford could have aided or assisted another without the *purpose* to help commit murder. The jury could have convicted Langford as an accomplice who *recklessly* or *negligently* aided another by, for example, serving as a lookout or furnishing a ride under the mistaken belief that the gang would only frighten the victim. Accordingly, the failure to instruct on the mens rea for complicity "relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington*, 555 U.S. at 191.[4]

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[4] Petitioner cites *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977), for the proposition that the instructional error was irrelevant because it escaped the notice of defense counsel. See Pet. 24. But in that case, the jury instructions were not erroneous and merely failed to *explain* a causation element. *Henderson*, 431 U.S. at 155. Surely the failure to notice a jury instruction error is not dispositive where, as here, the error lies in *omitting* an element entirely. A lawyer, well versed in the model

3. Petitioner argues that the parties' closing arguments cured these defects. Pet. 24-25. But, if anything, the prosecution's closing arguments *increased* the likelihood that the jury would read the instructions in an unconstitutional manner. See Pet. App. 21a. For example, the prosecutor stated, "It doesn't matter who actually fired the bullet * * *. Everybody helped. *Anybody who helped in any way is equally guilty*, equally guilty of complicity." *Ibid.* (emphasis added). Other than this statement, the prosecutor's closing simply directed the jury to look at the intent "instruction[s] when you have [them]," Pet. 25. Given the instructions' complete failure to require that the accomplice act with purpose, the closing arguments were more likely to *mislead* the jury into believing that Langford, by helping "in any way," was "equally guilty" of murder. Pet. App. 21a.

II. The Sixth Circuit Correctly Found That The Instructional Error Was Not Harmless, Under Any Applicable Standard Of Review

Even if the state court unreasonably applied clearly established law as to the existence of instructional error, petitioner separately argues that the Sixth Circuit (1) misapplied the *Brecht* standard for the harmlessness inquiry on collateral review; and (2) "ignore[d] this [Court's] directive" in *Ayala*, 135 S. Ct. at 2198-2199, about collateral review of harmlessness determinations under AEDPA. Pet. 27, 30. The petition again requests pure error correction

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instructions and expecting them to follow the usual form, will be less prone to notice a misplaced mens rea than a juror, with no independent knowledge of the elements.

as to the Sixth Circuit's analysis of harmless error, failing to identify any split of authority or decisions of other courts that would have reached a contrary conclusion. But there is no error to correct. The Sixth Circuit reached the right result under *Brecht* and *Ayala*.

A. The Sixth Circuit Correctly Applied *Brecht* In Concluding The Instructional Error Was Not Harmless

On collateral review of a state criminal conviction, a federal habeas court may grant relief if it 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 2197-2198 (quoting *O'Neal* v. *McAninch*, 513 U.S. 432, 436 (1995)). This test requires "more than a 'reasonable possibility' that the error was harmful," *ibid.* (quoting *Brecht*, 507 U.S. at 637), but it is by no means insurmountable.

In conducting this analysis, a reviewing court must "evaluate the error in the context of the entire trial record," *Brecht*, 507 U.S. at 641 (Stevens, J., concurring). If a review of the record indicates "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error," he must heed this "grave doubt" and "treat the error * * * as if it affected the verdict." *O'Neal*, 513 U.S. at 435. The Sixth Circuit faithfully and correctly applied that standard here. Pet. App. 22a-23a.

The harmlessness inquiry has special relevance where a trial court fails to instruct the jury on an

element of a crime. Indeed, "[i]t would not be illogical" to treat "failure to instruct on an element of [a] crime" as structural error for which no harmlessness finding is required. *Neder*, 527 U.S. at 15. This Court has qualified that statement by identifying only two circumstances in which a failure to instruct on an element of a crime is harmless error.[5] See *id.* at 15, 17 (element of crime uncontested at trial and likely to be uncontested on remand); *California* v. *Roy*, 519 U.S. 2, 7 (1996) (per curiam) (Scalia, J. concurring) (jury verdict on other charges embraces omitted element); *Mitchell* v. *Esparza*, 540 U.S. 12, 18 (2003) (per curiam) (circumstances resembling those of both *Neder* and *Roy*). Determining that such an error is harmless typically requires a "thorough examination of the record." *Neder*, 527 U.S. at 19. As four out of five federal judges (in three tiers of federal review) have concluded, the record in this case—including eight volumes of trial transcript—forecloses a finding of harmlessness. See Pet. App. 23a, 52a, 84a.

The omission of an instructional element can be harmless if "the jury verdict on other points effectively embraces th[e] [omitted element] or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding th[e] [omitted] point as well." *Roy*, 519 U.S. at 7 (Scalia, J., concurring) (applying "the *Brecht-O'Neal* standard").

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[5] With respect to the omission of a mens rea element from jury instructions, this Court has on occasion not even distinguished between harmless-error analysis on direct review and collateral review under AEDPA. Cf. *Mitchell* v. *Esparza*, 540 U.S. 12, 17-19 (2003) (per curiam) (applying AEDPA and citing *Neder*).

The record here does not support such a conclusion. No other jury finding buttresses the verdict on the wrongly charged count. To the contrary, the jury refused to convict Langford on the firearm specification, indicating that it disbelieved that Langford displayed, brandished, or indicated possession of a gun. See 7 Trial Tr. 123-124 (instructing the jury on the firearm specification); see also Pet. App. 54a.

Alternatively, the error may be harmless where "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 17. Far from being uncontested, mens rea was hotly disputed—indeed, it was a centerpiece of Langford's defense. Respondent argued that he "had no beef" with the victim or his associates. 7 Trial Tr. 66. He supported this argument with cross-examination testimony of the investigating detective. 6 Trial Tr. 55. He also presented evidence undermining the credibility of a witness who testified that he had a motive to murder. See 4 Trial Tr. 58, 84-85. "[W]here the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," a court "should not find the error harmless." *Neder*, 527 U.S. at 19 (applying the *Chapman* standard); cf. *Mitchell*, 540 U.S. at 19 (citing *Neder* for harmlessness standard on habeas review).

The Sixth Circuit's reasoning comports with this Court's decisions. The court found it likely that the jury convicted Langford on an accomplice theory. Pet. App. 24a. It properly applied this Court's cases

involving the omission of a mens rea element. Pet. App. 24a-25a (distinguishing *Hedgpeth* v. *Pulido*, 555 U.S. 57, 58 (2008) (per curiam); *Middleton*, 541 U.S. at 437-438; *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977)). The court then found that the record here does not support the kind of harmlessness analysis that this Court condoned in *Neder*. Pet. App. 25a; see also *id.* at 22a-23a. "[R]ecogniz[ing] the high bar that a petitioner must clear before obtaining relief on a jury instruction claim," the Sixth Circuit found on the record in this case that Langford had cleared the bar. *Id.* at 22a-26a.

B. The Sixth Circuit Was Not Required To Accord AEDPA Deference To The Ohio Court Of Appeals

The petition's central contention is that the Sixth Circuit erred by not applying AEDPA's statutory standard to a supposed finding by the Ohio Court of Appeals that any instructional error was harmless. Pet. 29. Petitioner appears to assume there is a difference between the standard articulated in *Brecht* and that under AEDPA. But cf. *Ayala*, 135 S. Ct. at 2199 ("[A] prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA."). Even assuming petitioner is correct on that question—an unbriefed issue this Court would have to address before granting the requested summary relief—the argument fails because the state court did not reach harmlessness.

In attempting to identify a harmlessness finding in the state-court opinion, petitioner relies entirely on

the court's statement 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. 20; Pet. App. 115a. That statement must be read in the context of Ohio law, which requires a reviewing court to perform two separate analyses before correcting an error on direct appeal: "[f]irst, the reviewing court must determine whether there was an 'error'—i.e., a '[d]eviation from a legal rule,'" and "[s]econd," if such an error exists, the court "engage[s] in a specific analysis of the trial record—a so-called 'harmless error' inquiry—to determine whether the error 'affect[ed] substantial rights' of the criminal defendant." *State* v. *Fisher*, 789 N.E.2d 222, 224-225 (Ohio 2003) (quoting *United States* v. *Olano*, 507 U.S. 725, 732-734 (1993)). *Ayala* instructs that AEDPA applies to a harmlessness determination only where the state court reached the second step of the inquiry. 135 S. Ct. at 2198; cf. *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003) (state court's adjudication of the performance prong of an ineffective assistance claim under *Strickland* is not sufficient to trigger AEDPA deference for the prejudice prong).

Viewed in context, it is clear that the Ohio Court of Appeals only reached the first question—whether the trial court erred—and did not address harmlessness. The court concluded that because the instructions included a definition of "purposely" and the jury "found that Langford had a specific intention to cause the death of Marlon Jones," "[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. In other words, the instructions were not ambiguous; the jury knew that it had to find intent. There was no error.

As four of five federal judges to consider the issue have concluded, having found no error, the state court had no reason to, and therefore did not, analyze harmlessness. See Pet. App. 86a (magistrate judge concluding that the question of harmlessness "is not an easy question to answer, and it is one which the state court of appeals did not address directly because it found no error at all in the instructions"); *id.* at 52a (district court adopting the magistrate judge's reasoning); *id.* at 3a (Sixth Circuit holding that "there was no state court review of harmless error in this case"). That understanding is a familiar one for those who, like the courts below, frequently review Ohio state-court decisions. See, *e.g.*, *State* v. *Dixon*, 805 N.E.2d 1042, 1056-1059 (Ohio 2004) (conducting harmless-error analysis where it found error, but refraining from doing so where it found no error); *State* v. *Fontes*, 721 N.E.2d 1037, 1040 (Ohio 2000) (finding no error and proceeding no further); *State* v. *Salaam*, 47 N.E.3d 495, 489-499 (Ohio Ct. App. 2015) (conducting harmless-error analysis where it found error, but refraining from doing so where it found no error); *State* v. *Marcum*, 994 N.E.2d 1, 6, 9 (Ohio Ct. App. 2013) (finding no error and proceeding no further).

Had the state court addressed harmlessness, it would have presumably applied the standard articulated in *Chapman* v. *California*, 386 U.S. 18, 20-21, 24 (1967): "before a federal constitutional error can be held harmless, the court must be able to

declare a belief that it was harmless beyond a reasonable doubt." Ohio courts consistently do so. See *State* v. *Brown*, 605 N.E.2d 46, 47-48 (Ohio 1992) (per curium) ("Before constitutional error can be considered harmless, we must be able to declare a belief that it was harmless beyond a reasonable doubt.") (internal quotation marks omitted). The Ohio Supreme Court has explained that it is only appropriate to find an error harmless where there is "either overwhelming evidence of guilt or some other indicia that the error did not contribute to the conviction." *State* v. *Rahman*, 492 N.E.2d 401, 406 (Ohio 1986). Here, the Ohio Court of Appeals did not acknowledge that standard or give any indication that it had analyzed the evidence or other indicia of guilt; it cited only the verdict. Pet. App. 115a. This constitutes a stark difference from the state court in *Ayala*, which expressly stated that the trial court's error was "harmless beyond a reasonable doubt" under *Chapman* and spent numerous pages analyzing the record to explain why the error "could not have affected the outcome." *People* v. *Ayala*, 6 P.3d 193, 204-206 (Cal. 2000).

Petitioner argues that the Sixth Circuit should have presumed the Ohio court addressed harmlessness. Pet. 27. But the Sixth Circuit's decision is consistent with each of the cases the Petition cites as supposedly compelling a contrary approach. See Pet. 27 (citing *Coleman* v. *Thompson*, 501 U.S. 722, 739 (1991); *Johnson* v. *Williams*, 133 S. Ct. 1088, 1095 (2013); and *Harrington* v. *Richter*, 562 U.S. 86, 99 (2011)).

Under *Coleman*, federal courts cannot require state courts to use "particular language" to indicate that a ruling rests on an adequate and independent state-law ground. 501 U.S. at 739. *Coleman* does not, however, impose any rigid presumption that a state court made a particular determination where the court's actual language suggests otherwise; nor does Langford's case involve concerns about a procedural bar or other adequate and independent state law grounds.

Williams provides that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits" unless that presumption is rebutted. 133 S. Ct. at 1096. *Williams* is inapplicable here because the state court *did* expressly address the instructional error claim. Pet. App. 115a. *Williams* does not require a federal court to presume that a state court reached a conclusion beyond what was necessary to resolve a claim.

Last, *Harrington* stated that AEDPA deference was not "excused" when "state courts issue summary rulings" because opinion-writing standards are "influenced by considerations other than avoiding scrutiny by collateral attack." 562 U.S. at 99. As such, federal courts should presume that a state court determination was made on the merits "in the absence of any indication or state-law procedural principles to the contrary." *Ibid.* *Harrington* does not require federal courts to presume that a state court decided an issue that was unnecessary to dispose of the claim in question. This Court has

explained that *Harrington* is only applicable where the state court issues no opinion, not where an issued opinion simply does not reach a particular determination. See *Brumfield* v. *Cain*, 135 S. Ct. 2269, 2282-2283 (2015) (contrasting *Harrington*, "where there is no opinion explaining the reasons relief has been denied," with *Wiggins*, where the state court's "reasoned decision * * * was premised solely on" one prong of a two-pronged test, and thus applying *de novo* review to an unanalyzed portion of a multi-prong inquiry) (internal quotations omitted).[6]

This Court's habeas review of other multi-pronged claims further demonstrates that such a presumption would be inappropriate. *Wiggins* v. *Smith* explained that a habeas court is not required to afford AEDPA deference to both prongs of an ineffective assistance claim when the state court's decision is based on just one prong. 539 U.S. at 534; see also *Harris* v. *Thompson*, 698 F.3d 609, 625 (7th Cir. 2012) ("federal courts apply AEDPA deference to the prong the state courts reached but review the unaddressed prong *de novo*"). *Brumfield*, 135 S. Ct. at 2282-2283, extended

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[6] Langford's case will be unaffected by this Court's consideration of *Wilson* v. *Sellers*, No. 16-6855 (cert. granted, Feb. 27, 2017). *Wilson* concerns *Harrington*'s interaction with the pre-AEDPA case, *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991). Under *Ylst*, federal habeas courts "look through" a state appellate court's summary disposition to the last reasoned state court judgment to determine whether the state court adjudicated the claim on the merits or found a procedural bar. *Ylst*, 501 U.S. at 805-806. Here, there is no question Langford's jury instruction claim was adjudicated on the merits. See Pet. App. 114a-115a. *Ylst* and, by extension, any decision in *Wilson*, are inapplicable.

that rule to other partial adjudications of multi-prong inquiries by reviewing *de novo* the unanalyzed prong of an *Atkins* claim. Like the other multi-prong inquiries that this Court has addressed, it should not be presumed that the state court reached both prongs of error and harmlessness.

Accordingly, the Ohio Court of Appeals did not make a harmlessness determination and is not entitled to any presumption that it did. Under *Ayala*, the Sixth Circuit was not required to apply AEDPA to the state court's decision.

C. Even Under AEDPA, The State Court Could Not Have Reasonably Found The Error To Be Harmless

Even if the state court had conducted harmless-error review, its judgment would still have been an unreasonable application of clearly established federal law. Cf. Pet. App. 89a ("[A]lthough the state court did not actually make a contrary finding because it did not consider the question, any such finding would, on this record, be an unreasonable application of the proper constitutional standard.").

Ayala does not require a contrary conclusion. *Ayala* acknowledged that a federal court can grant habeas relief if a state court unreasonably applied the *Chapman* harmlessness inquiry. 135 S. Ct. at 2199. Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief"—and the prosecution bears the burden to prove—"that [the error] was harmless beyond a reasonable doubt." 386 U.S. at 24. The Ohio Court of Appeals could not have reasonably

found it certain beyond a reasonable doubt that omitting the mens rea element did not affect the verdict. The record readily distinguishes this case from those in which omitting the element of a crime was harmless.[7] See Part II.A, *supra*. As a result, the record here yields "grave doubt about whether [the] trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Ayala*, 135 S. Ct. at 2197-2198 (quoting *O'Neal*, 513 U.S. at 436).

The petition conducts no close examination of the record, and instead echoes Judge Boggs's strained hypothetical of Langford acting in a production of *Hamlet* and "accidentally" inciting his cohorts to take revenge. See Pet. 28. But the record did not present the jury with such a binary choice. Ohio law contemplates six different gradations of homicide, with mens rea ranging from purpose with prior calculation to negligence. See Ohio Rev. Code §§ 2903.01-2903.05. Langford's main defense at trial was that he lacked the mens rea for the crimes charged; he elicited witness testimony to support that position. See Part II.A, *supra*. Given the faulty instruction, the jury may have convicted Langford on the belief that he acted with recklessness or negligence—even though those mens rea would have at most supported convictions for crimes he was not

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[7] So heavy is the prosecution's burden in showing harmlessness where a jury instruction incorrectly states an element of a crime that this Court has occasionally dispensed with harmless-error analysis entirely. Cf. *Elonis* v. *United States*, 135 S. Ct. 2001, 2012 (2015); see also *id.* at 2018 (Alito, J., concurring in part and dissenting in part).

charged with committing: reckless or negligent homicide. See Ohio Rev. Code §§ 2903.041-2903.05. Or the jury may have credited Langford's argument that he bore the victim no ill-will, but erroneously convicted him of murder based on the mens rea of others.

III. Summary Reversal Is Inappropriate

"[S]ummary reversal * * * is a rare and exceptional disposition, usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Mireles* v. *Waco*, 502 U.S. 9, 15 (1991) (per curiam) (Scalia, J., dissenting) (internal quotation marks and citations omitted); accord *Cavazos* v. *Smith*, 565 U.S. 1, 16-17 (2011) (per curiam) (Ginsburg, J., dissenting). These conditions are absent here.

1. This case does not present a "clear misapprehension" of a well-settled, stable principle "govern[ed] squarely and directly" by this Court's existing precedent. *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam); *Presley* v. *Georgia*, 558 U.S. 209, 216-217 (2010) (per curiam) (Thomas, J., dissenting). Instead, petitioner expressly invites this Court to make new law in the instructional-error context, by holding that AEDPA and *Henderson* v. *Kibbe* together require a "doubly deferential" standard. Pet. 7, 32-33. Questions of that import should not be decided by summary disposition, and this Court has not done so in the past. Cf. *Parker* v. *Matthews*, 132 S. Ct. 2148, 2152 (2012) (per curiam) (establishing twice-deferential standard for sufficiency claims following plenary review);

Harrington, 562 U.S. at 105 (same, for ineffective assistance claims).

The petition alleges no circuit split and does not contend that this one-time instructional mistake is a recurring, important issue. Nor does it make any real contention that the Sixth Circuit misstated the relevant rule; even the dissenting judge acknowledged that the Sixth Circuit's latest opinion "correctly reads * * * *Ayala*." Pet. App. 3a (Boggs, J., dissenting). Thus, aside from petitioner's desire to establish a new rule of double deference, the petition rests entirely on a request for factbound error correction, which is "outside the mainstream of the Court's functions." Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007); accord *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1868 (2014) (per curiam) (Alito, J., concurring in the judgment) (internal quotation marks and citation omitted); see also *City & Cty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia J., concurring in part and dissenting in part). Even if the Sixth Circuit could be said to have misapplied a settled rule to the particular facts of this case, it ultimately reached the right result: The state court could not reasonably have found the instructional error harmless beyond a reasonable doubt. See Part II.C, *supra*.

Summary reversal is not appropriate for "mere technical, harmless, or parochial error." *Supreme Court Practice* 351; accord *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (per curiam) (Marshall, J., dissenting). That is especially true where, as here, the question at issue—whether moving the term "purposely" relieved the State of its burden to prove

mens rea—has no broader significance. This case involves a one-time misapplication of a state model instruction that is unlikely to be repeated. This Court should reject the invitation to employ "the bitter medicine of summary reversal," *Spears* v. *United States*, 555 U.S. 261, 268 (2009) (per curiam) (Roberts, C.J., dissenting), for such a narrow holding.

2. Summary reversal is especially inappropriate here because the "fact-intensive character of the case calls for attentive review of the record." *Cavazos*, 565 U.S. at 16-17 (Ginsburg J., dissenting). This case involves seven lower-court opinions, a 122-page petition appendix, a 376-page state-court record, and 916-page trial transcript. Granting summary reversal against this complex procedural and factual background risks "rendering [an] erroneous or ill-advised decision[] that may confuse the lower courts." *Harris* v. *Rivera*, 454 U.S. 339, 349 (1981) (per curiam) (Marshall, J., dissenting).[8]

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[8] Indeed, it is unclear on this record whether the questions presented in the petition are even properly before this Court. See Pet. i (claiming that case presents question whether the Sixth Circuit erred in reviewing Ohio Court of Appeals' application of the "harmless-error inquiry"). Both the State and Langford briefed the instructional issue in the framework of *plain error* before the Ohio Court of Appeals, not *harmless* error. See Br. of Pl.-Appellee 23; Br. of Def.-Appellant 18. The Ohio Court of Appeals never indicated it was applying *harmless* error analysis, or used any language that would necessitate that conclusion. See Pet. App. 104a-120a. In fact, the first mention of *harmless* error appears in the federal magistrate judge's opinion, Pet. App. 87a, and that judge, the district court (which adopted the opinion), and the Sixth Circuit all concluded that

Because "[a]t the certiorari stage, the parties' submissions are—quite properly—not designed comprehensively to inform the Court about the merits," they are ill-equipped to provide the Court "the same complete understanding of a case" that full briefing would allow. See *Visciotti* v. *Martel,* 839 F.3d 845, 869 (9th Cir. 2016) (Berzon, J., concurring); *Supreme Court Practice* 417 n.46; see also *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 858 (1999) (Stevens, J., dissenting). Taking dispositive action in this case based on abbreviated certiorari-stage briefing would in a very real sense deprive Langford of his day in court, with potentially unforeseen consequences. See *Visciotti*, 839 F.3d at 870 (Berzon, J., concurring). In "fact-intensive" cases such as this, "[c]areful inspection of the record would be aided by the adversarial presentation that full briefing and argument afford." *Cavazos*, 565 U.S. at 16-17 (Ginsburg, J., dissenting). This Court should decline the invitation to summarily reverse.

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the Ohio Court of Appeals did not apply harmless error analysis, but simply concluded there was no error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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