No. 13-946

In The
Supreme Court of the United States

RAUL LOPEZ, Warden,

Petitioner,

v.

MARVIN VERNIS SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should review on certiorari a Ninth Circuit decision which, after correctly stating habeas law and accurately summarizing this Court's jurisprudence defining a criminal defendant's due process right to adequate and timely notice of the charges against him, ruled on case-specific and fact-intensive grounds that the state court's denial of Defendant Smith's due process notice claim was objectively unreasonable.

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BRIEF IN OPPOSITION

Respondent Marvin Vernis Smith (hereinafter "Defendant" or "Smith") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by the Petitioner State of California ("the State").

INTRODUCTION

Rejecting the arguments that the State now repackages for this Court, five federal judicial officers (a magistrate judge (Pet. App. D), a district judge (Pet. App. C), and three appellate judges (Pet. App. A)) all agreed that habeas relief was warranted in this case. Following the unanimous Ninth Circuit panel decision, the State sought rehearing *en banc* and not a single judge of the 29-judge court of appeals requested a vote on the petition. (Pet. App. I.) This unanimity of opinion alone indicates that the decision at issue is a poor candidate for this Court's discretionary exercise of its certiorari jurisdiction.

That suggestion is overwhelmingly proven by the certiorari petition itself, permeated as it is with a fundamental misapprehension of both federal habeas law and the decision below. The petition fails entirely to differentiate between AEDPA review under 28 U.S.C. § 2254(d)(1) and (d)(2). The Ninth Circuit explicitly found that this case merited *de novo* review under the (d)***(2)*** gateway because the state appellate court based its decision on two unreasonable findings

of fact. (Pet. App. A at 23-24.) As will be demonstrated, the unreasonableness of those findings is beyond fairminded debate. Yet, the State asks this Court to intervene because the Court's fair-notice cases do not provide clearly established federal law within the meaning of § 2254(d)***(1)*** to permit *de novo* review of the state courts' disposition of the due process issue presented by Smith. That proposition is simply untrue, as will be discussed in section III, *infra*. But even if the court of appeals also relied (albeit far less explicitly) on (d)(1), that reliance would be entirely beside the point given that subsection (d)(2) provides an alternative, independent, and sufficient gateway to *de novo* review and habeas relief.

Section 2254(d) is written in the disjunctive. The Ninth Circuit properly exercised *de novo* review of the state appellate court's decision following its § 2254(d)(2) review because of the state court's unreasonable *factfinding*. Whether there was an unreasonable application or infringement of "clearly established Federal law" by the state court within the meaning of § 2254(d)(1) does not constrain a federal court's analysis under (d)(2). *See*, *e.g.*, *Drake v. Portuondo*, 553 F.3d 230, 239 n.4 (2d Cir. 2009) ("The terms of Section 2254(d)(2) do not limit a federal court's power to grant a writ to situations in which a state court acted in violation of 'clearly established Federal law.'"). The State seeks to gloss over that fundamental point in, among other places, a "Question Presented" premised entirely on the purported absence of a sufficiently on-point holding of this

Court. (Pet. at i.) The State then *begins* its statement of reasons why, in its view, certiorari should be granted with the following:

> The Ninth Circuit set aside Smith's state murder conviction without any demonstration that the state courts' treatment of his notice claim was contrary to a rule of federal law clearly established by decisions of this Court . . . [Pet. at 13].

No such demonstration is required in a § 2254(d)(2) case.

The State argues certiorari should be granted because the court of appeals did not, in its opinion, proceed with a proper (d)(1) analysis (Pet. at 14-15) – it framed its "Question Presented" in just those terms (Pet. at i) – but the circuit's (d)(2) analysis is dispositive.

Both the state appellate court and the Ninth Circuit agreed that, to satisfy the federal constitution's fair-notice mandate, greater specificity may be required beyond the mere stating of charges in a charging document. (Pet. App. A at 12.) The state and federal courts differed only on the case-specific, factual question of whether such greater specificity was timely provided to Defendant Smith. The precise question answered by the federal district and appellate courts under 28 U.S.C. § 2254(d) review is whether the last reasoned state-court decision unreasonably found that such greater specificity was provided by certain statements of a jailhouse informant,

conveyed to Smith through a testifying law enforcement official at the preliminary hearing. (*See* Pet. App. G at 88 (state appellate court's holding that "the information and preliminary examination testimony adequately notified defendant he could be prosecuted for murder as an aider and abettor").)

Those informant statements plainly did not provide meaningful notice. The hearsay informant statements, *on their face*, provided no notice of a possibility that the State might pursue an aiding-and-abetting theory of liability; furthermore, it was settled prior to trial that the informant would not be testifying in any event. *Either* fact, standing alone, defeats the State's claim that adequate and timely notice was provided of the State's eleventh-hour gambit – announced for the first time after the parties rested and closing arguments were about to commence – to pursue a vicarious-liability theory. *No* amount of AEDPA deference could uphold the state court's adequate-notice finding.

This Court is not a court of error correction. *See*, *e.g.*, Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."); *Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting) ("The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally . . . be denied."). Yet, as framed by the State, the "Question Presented" asks this Court to do nothing other than

correct the court of appeals' purported failure to properly apply habeas law that the circuit correctly stated. There is, consequently, no "compelling reason" (Sup. Ct. R. 10) warranting this Court's intervention in this unique, heavily fact-bound case *even if* the State were correct in its legal analysis, which it is not. This case presents a fact pattern unlikely to repeat itself. (*See*, *e.g.*, Pet. App. D at 54 (Magistrate Judge's "recogniz[ing] the uniqueness of the circumstances in this case."))

Moreover, this Court has *already* provided guidance, through multiple decisions, on how federal habeas courts should "apply the deferential standard of review required by 28 U.S.C. § 2254(d)." (Pet. at I.) There is no circuit split regarding that deferential standard, let alone with respect to its application in the context of the deprivation of a defendant's bedrock, due process right to adequate and timely notice of the charges against which he must defend, and the State does not argue otherwise. There is no unsettled question of federal law presented by the State's petition.

Although the State seeks to portray the Ninth Circuit decision as of a piece with other Ninth Circuit habeas decisions that this Court has reversed over the last decade (Pet. at 24 & n.2-n.4), it is simply not so. The judges who sat on the appellate panel have no history of defiance of this Court's AEDPA jurisprudence, or a demonstrated inability to follow it. They are, rather, judges who recognized the glaring unfairness perpetrated against Smith at trial: wielding the

vicarious-liability instruction he was belatedly and erroneously given, the prosecutor sandbagged Smith's counsel by waiting until his rebuttal closing argument to argue that the jury could entirely credit Smith's defense, namely, that he was physically incapable of having perpetrated the charged murder, yet still convict him as an aider and abettor.[1] Likewise, the panel recognized the equally glaring unreasonableness of the state appellate court's disposition of the due process claim. This is a case that has been correctly decided, and there is no reason whatsoever for this Court to modify it.

STATEMENT

A. Factual Background

It is undisputed that the prosecution proceeded during the evidentiary phase of Smith's trial solely on a direct-perpetrator theory. As the prosecutor set it out in his opening statement: "[T]he evidence will show that man over there at the end of counsel table,

[1] In *United States v. Maloney*, ___ F.3d ___, 2014 WL 801450 (9th Cir. Feb. 28, 2014) (*en banc*), the court of appeals recently granted a government motion, filed while the case was under submission, to reverse the defendant's conviction, vacate the sentence, and remand to the district court based on the prosecutor's waiting until his rebuttal closing argument to make a new argument, thereby improperly "sandbagging" the defense. The State herein, in stark contrast, evinces no awareness of any impropriety whatsoever in the prosecutor's actions.

wearing the nice sweater, murdered his wife of 27 or 28 years, and then he staged the crime scene to make it look like a burglary and to avoid detection." (Pet. App. A at 5.) The prosecution introduced no evidence tending to prove that the homicide was perpetrated by a third party working in cahoots with Smith, nor did it mention any such theory to the judge, jury, or opposing counsel at any time prior to the close of evidence. As a result, Smith reasonably prepared for, and presented at trial, a defense to counter the direct-perpetrator theory. He had no cause to do otherwise.

Nonetheless, after both sides had rested and instructions were being settled, the prosecutor requested that the jury be instructed on aiding and abetting as set out in the state pattern jury instructions, a theory that encompassed elements different than those of the theory tried to the jury. The trial court agreed to so instruct over Smith's objections that (1) there was no evidence to support the instruction and (2) the prosecution had not announced its reliance on its new theory at a point in time when the defense could have countered it with evidence. The prosecutor then withheld his argument on the aiding-and-abetting theory until his rebuttal closing argument, thereby depriving the defense of any opportunity to even address his discussion of the theory, a discussion which would expressly urge the jury to reject Smith's defense, even if believed, as irrelevant under the vicarious-liability principles provided in the instructions he had secured.

More specifically, during the conference to settle instructions, just prior to the commencement of closing arguments, the prosecutor argued:

> The jury does not necessarily have to believe, and I think the defense will argue that the defendant did not or could not have committed the crime himself. But that doesn't mean that if he didn't commit the crime himself, that if they find that he aided and abetted in the crime that he's still not guilty of the crime.
>
> So if he didn't swing the murder weapon, it doesn't mean he's not guilty of the crime.

Defense counsel objected that there was "no evidence of any aider and abettor being involved in this crime," nor had the prosecution relied on such a theory. In the absence of evidence of aiding and abetting, counsel asserted, to instruct the jury on the theory merely because the defense introduced evidence that Smith could not have committed the crime would "invit[e] the jury to speculate about a universe of possibilities for which there is absolutely no evidence." Counsel noted, "This is the first time that aiding and abetting has been mentioned, right now." She was factually correct in all that she said.

The trial court, nonetheless, ruled that it had a *sua sponte* duty to give the instruction. Strikingly, it was the very strength of Smith's defense that led the court to that conclusion:

> There is a reasonable interpretation of the evidence, in the court's view, where the jury can go back and say, jeez, the defense put on all that testimony and evidence about Mr. Smith's injury and how he – his shoulder was so debilitated he couldn't have swung this object in such a way as to cause her death, so we don't find him to be the person that struck the blow.

The court also noted that the defense had presented a "strong case[ ] casting doubt on [Smith's] ability to inflict the blows that caused her death." It expressed its concern that the jury needed "guidance" should it adopt that "reasonable interpretation of the evidence" (apparently being unsatisfied that the guidance *already* contained in the instructions – that a jury must acquit if the prosecution has not proven its case beyond a reasonable doubt – sufficed):

> If we don't give the aiding and abetting instruction, essentially, we are leaving [the jurors] without legal guidance on what they can and cannot do if that's the way they determine the facts to be.

The court justified its decision with specific citation to the "considerable evidence that [Smith] was involved or benefitted from [the murder], had a motive for it, therefore, even though he is not the principal, he may very well have been an aider and abettor."[2]

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[2] This equation of motive with aider-and-abettor liability, rendering any heir of a murder victim a likely principal in the

(Continued on following page)

Having succeeded in obtaining the aiding-and-abetting instructions, the prosecutor rather remarkably *never mentioned* the theory in his initial closing argument later that day, instead belittling the notion that anyone other than Smith had bludgeoned the victim to death.

Following the conclusion of the prosecution's initial closing argument and just before the beginning of the defense argument, defense counsel filed a motion requesting that the court reconsider its decision to give aiding-and-abetting instructions. The motion pointed out to the court that, under California law, aiding-and-abetting liability could not be premised on an anonymous principal as to whom no evidence had been introduced by the prosecution. Midway through the defense closing argument, the court again addressed the issue, asking the prosecutor, "Is aiding and abetting a theory that you are relying on in this case?" After the prosecutor answered in the affirmative, the court noted that the "defense has repeatedly presented evidence pointing away from the defendant to some other person having killed Minnie Smith," but that did not preclude "the reasonable inference that, although maybe another person is the person who swung the log roller that killed Minnie Smith, that the defendant was not [*sic*] significantly involved in the commission of the offense."

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crime, is likely unprecedented in the annals of American criminal jurisprudence.

Deprived of any information as to what specifically the prosecution would say about its newly minted aiding-and-abetting theory, defense counsel, in the latter part of her closing argument, predicted that, during the State's rebuttal, "for the first time ever . . . you're going to hear the prosecution say there had to be a second person involved." The prosecution would introduce a "phantom second person," counsel warned, precisely because the defense had shown that Smith could not have done it.

In his closing rebuttal, as predicted, the prosecutor for the first time did indeed address the significance of the aiding-and-abetting instructions:

> But the fact of the matter is – and this is just the law – the defendant killed his wife. He wielded that fireplace tool himself. But if you don't believe that – or let's say three of you get back in the deliberations and say, I just don't know. I know he's involved. I know he's lying about the jewelry. He's got the jewelry. He's got duct tape that matches duct tape from his crime scene. I know he's in on it, but I'm not sure that he could have wielded that weapon.
>
> Well, guess what? You don't have to be. And that's the law.
>
> Is it my theory? Heck, no it's not my theory. That's not what I think happened. But it's not something that stops you from convicting him. [Defense counsel] knew I was going to address this.

Aiding and abetting means that – well, before I talk about aiding and abetting and you can be guilty, you are either the actual perpetrator, the guy who wielded the murder weapon or you aided and abetted someone else in committing the crime.

Aiding and abetting. All that means – all that means is, you aid or encourage or help in some way somebody else commit the crime with the intent that they commit that crime. That's all that means. And I'm – for the purpose of this case, I could care less which one you believe.

But the fact of the matter is, there is zero doubt that the defendant is involved in the murder of his wife and that he aided and abetted somebody or did it himself. None. Because there's no other explanation on the face of the planet that explains his lies, the possession of that jewelry wrapped in duct tape.

It's as simple as that.

And that's why I gave up on the 15 or 20 pages of notes I had on all the other stuff on the case, because it's that simple.

You do not even need to be present. We can talk about alibis and time of death and windows of opportunity and everything else until we're blue in the face.

The prosecution theory: He killed her before he left the house and he went to work. Does it matter if you buy that theory? He doesn't

> even have to be the one who wielded the murder weapon. He was. And he did.
>
> *And half of you can think it was one way and the other half think it's the other way, doesn't matter. That's still a guilty verdict.*

(Emphases added.)

B. The First State Appellate Court Decision

In its first decision, the state appellate court reversed Smith's conviction, holding that the evidence was insufficient to support the aiding-and-abetting instruction and that Smith was prejudiced by the trial court's error in so instructing. (Pet. App. E.) Viewing the record in a light most favorable to conviction, including resolving all evidentiary conflicts and drawing all reasonable inferences in support of the conviction, the court, nonetheless, found that no reasonable factfinder could have found Smith guilty on an aiding-and-abetting theory based on that record. (*Id.* at 70-71.) After citing the evidence adduced by the defense that someone other than Smith had killed the victim (namely, Sam Matthews), the court relied on the fact that, nonetheless, there was no evidence that "another person [in concert with Matthews] participated in accomplishing this criminal enterprise." (*Id.* at 69.)

In distinguishing case law cited by the State, the court noted that, in this case, "the prosecutor relied solely on the theory that defendant killed his wife," the prosecutor only requested the aiding-and-abetting

instruction following the close of evidence precisely because he was concerned that the defense might have engendered a reasonable doubt regarding his direct-perpetrator theory, and there was a complete absence of evidence that Smith had ever discussed killing his wife with anyone or ever attempted to hire anyone to accomplish that end. (Pet. App. E at 69-70.) As the court summed it up, "An instruction on aiding and abetting as an alternative theory of liability is not justified merely because a defendant presents an arguably successful defense concerning his identity as the perpetrator of a crime." (*Id.* at 70.)

In analyzing the prejudice question in its initial opinion, the state court then reviewed the entire record to ascertain whether a reasonable probability existed that the jury found Smith guilty solely on the unsupported theory. In finding such reasonable probability, the court cited the prosecutor's own acknowledgment that some of the jurors might not be sure that Smith could have wielded the murder weapon (on account of his then-recent shoulder surgery). (Pet. App. E at 71.) It then cited the jury's request during deliberations to view the murder weapon as well as Smith's medical records, which evinced the jury's focus on that very question. (*Id.*)

The state appellate court also initially factored into its decision legal errors in the aiding-and-abetting instructions, which it found "exacerbated" the error of giving a factually unsupported instruction. (Pet. App. E at 71.) It here cited the standard that, where legally erroneous instructions are given,

the question becomes whether a reasonable likelihood exists that the jury applied them in an objectionable manner. (*Id.* at 71-72.) Because the trial court had erroneously included a natural-and-probable-consequences theory and withdrawal doctrine in its instruction, the appellate court refused to presume that the jury understood the instructions. (*Id.*)

C. The Second State Appellate Court Decision

After the California Supreme Court issued a summary order, *i.e.*, without merits briefing or oral argument, directing the state appellate court to reconsider its ruling, the lower court, again without further briefing or oral argument by the parties, completely reversed itself in a second opinion. (Pet. App. G.) This time, it discerned no prejudicial error. It again found no evidence to support the aiding-and-abetting instruction, but concluded that the record did not "affirmatively indicate the jury based its guilty verdict solely on the aider and abettor theory." (*Id.* at 82.) In theory at least, it was applying precisely the same prejudice standard it had previously applied, namely, whether a reasonable probability existed that the jury found Smith guilty solely on the unsupported theory. (*See* Pet. App. E at 71; Pet. App. G at 82 (citing same standard).) This time around, however, the evidence of the jury's focus during deliberations on Smith's strength was no longer evidence supporting a reasonable probability that it relied on the aiding-and-abetting theory, but, rather, was now entirely irrelevant because it would have

been unreasonable, in the court's view, for the jury to have relied on that theory. (Pet. App. G at 82-83.) The fact that the trial court had itself asserted the exact opposite was left unmentioned. Likewise, the legal errors in the instruction were no longer evidence of a reasonable likelihood that the jury applied the instruction in an objectionable manner, but, rather, "likely had no effect on its deliberations." (*Id.* at 83.)

Having reached these contrary conclusions, the state appellate court went on to discuss other of Smith's claims that it had not previously addressed. In perhaps its most baffling finding, the court concluded that Smith was not denied his ability to have countered the aiding-and-abetting theory with evidence because both sides had adduced evidence regarding his ability to have inflicted the fatal blow and because other evidence established his motive and involvement. (Pet. App. G at 84-85.)

Likewise, the state appellate court also found that Smith was not denied his ability to counter the aiding-and-abetting theory in his closing argument because he knew before that argument that the trial court was going to instruct on that theory. (Pet. App. G at 85.) The court was entirely unconcerned about the prosecution's not referencing the theory until its rebuttal argument because that reference was only "abbreviated" and "meager." (*Id.*)

Specifically with respect to the question of adequate notice, the court first noted the adequacy of the information that charged murder in compliance with

the governing statutes (*i.e.*, there was no requirement that the information specify every theory of liability). (Pet. App. G at 86.) It went on to find that, even if greater specificity were required with respect to the State's theory of liability, it was provided by evidence adduced at the preliminary hearing. (*Id.*) Specifically, a state investigator testified at that hearing that a jail informant had reported to police that Smith had made statements to him that "suggested" that Smith "may not have" personally committed the murder. (*Id.* at 86-87.)

Smith must quote in its entirety this hearsay testimony that the state appellate court found had "meaningfully apprised [him] of the potential for an aiding and abetting theory" (Pet. App. G at 87-88) as the quotation alone convincingly demonstrates that the Ninth Circuit did not err in finding objectively unreasonable the state appellate court's reliance on it as providing constitutionally adequate notice:

> Chris McShane, an investigator in this case, testified [during the preliminary examination] the police received information from David Moraga, a jail inmate who shared a cell with defendant during the latter's pretrial detention. McShane testified Moraga claimed defendant "had told him that he [defendant] had to get rid of his wife because she was standing in the way of his future plans; that she was threatening to divorce him and he wasn't going to give up half of his property he worked so hard for his entire life. [Defendant] [s]aid on the day of the murder

he had left the house earlier than he normally does, that [when] he left, he took the jewelry and the money out of the safe with him. He staged it to look like a home invasion robbery. He left a window open. He exited the house without setting the alarm. He went through the front door of the house, and that he went to work that day."

On cross-examination, McShane provided the following additional testimony: "Q. Did Mr. Moraga . . . tell you the manner in which the killing was carried out? [¶] A. He said that she was beat up real bad. [¶] Q. Did he give any further details? [¶] A. No. [¶] Q. Did he tell you who specifically did the killing? [¶] I notice you're pausing. . . . [¶] . . . [¶] Q. And [Moraga] really didn't have any information about who specifically did the homicide, did he? [¶] A. [Defendant] never told him specifically who did it, no. [¶] Q. And [Moraga] didn't really have any information, for example, about the wrist[s] being bound with wire, correct? [¶] A. Correct. [¶] Q. Or any anal tears, correct? [¶] A. Correct. [¶] Q. Or that she was bludgeoned with a type of fireplace implement? [¶] A. Correct. [¶] Q. He didn't know any of the details of the homicide itself and how it was carried out, correct? [¶] A. Correct. [¶] Q. Did he tell you that the homicide was committed before [defendant] left the house or was he vague on that point? [¶] A. He was vague. [¶] Q. In fact, he wasn't able to tell you whether this supposedly occurred in the morning, in the afternoon, or the evening, correct? [¶] A. Correct."

(Pet. App. G at 86-87.) No fair-minded jurist could conclude in an objectively reasonable manner that this exchange put Smith on notice, meaningfully or otherwise, of the possibility of the prosecution's pursuing an aider-and-abettor theory, *especially at a trial where the parties knew before opening statements that Moraga would not be called to testify*.

Turning next to the legal errors contained in the trial court's aiding-and-abetting instruction, the state appellate court rejected its earlier conclusion that these errors exacerbated the error of giving the instruction in the first place and precluded reliance on the presumption that jurors understand and faithfully apply instructions. Now, suddenly, the court found that it *could*, after all, rely on that presumption. (Pet. App. G at 90.) Now, in the court's view, the jurors understood that the errors were errors and simply ignored them, because they presumptively followed the trial court's *other* instruction that "[s]ome of these instructions may not apply at all." (*Id.*) Now, the injection by the trial court of a legal path to conviction for first-degree murder that eliminated the essential elements of malice aforethought, deliberation, and premeditation was merely a "technical" error. (*Id.*) The appellate court concluded that it was not reasonably likely that these errors influenced the jury. (*Id.* at 91.)

D. The District Court Decision

The district court accepted without revision (Pet. App. C) the Magistrate Judge's Report and Recommendation (Pet. App. D; hereinafter "R&R") and, accordingly, entered judgment granting habeas relief (Pet. App. B).

The R&R first accurately summarized the facts and procedural history of the case. (Pet. App. D at 31-41.) It found that the hearsay testimony at the preliminary examination relied upon by the state appellate court as having provided Smith constitutionally adequate notice "could plausibly" have provided sufficient notice (*id.* at 49), but it found that said testimony became irrelevant once it became clear that the informant was not going to testify at trial (*id.* at 51-55). The R&R took specific note of the salient facts that, first, the trial court prohibited the prosecution from referencing its informant in its opening statement (*id.* at 51-52); second, that the prosecutor expressly informed the court prior to the close of his case-in-chief that he would *not* be calling the informant in his case, and would only try to do so in his rebuttal case were Smith to testify (*id.* at 52); and third, that the prosecution presented no evidence that anyone other than Smith killed the victim or was involved in the crime (*id.*).

The R&R deferred to two factual findings of the state appellate court, namely:

> (1) the charging document and the informant's potential testimony as explained at the

> preliminary hearing served to give Petitioner notice of the aiding and-abetting theory before trial began; and (2) the prosecution presented no actual evidence (whether from the informant or any other source) to establish that [Smith] helped another person commit the homicide.

(Pet. App. D at 50.) It then found that Smith passed through the § 2254(d)(1) gateway. (*Id.* at 55.) It *also* found that the state appellate court made an unreasonable determination of fact, and that Smith thereby met his (d)(2) burden, because it took no account of the impact on Smith's reasonable expectations of the trial court's order, entered in the midst of the prosecution's opening statement, directing the parties not to mention the jailhouse informant. (*Id.* at 55-56.)

The R&R then found that the constitutional error was not harmless under the pertinent habeas standard because Smith was prevented from "offer[ing] evidence during the trial to refute the contention that he acted with another person to commit the crime . . . by the late assertion of the aiding-and-abetting theory," and because the evidence of guilt "was too close to have overriding confidence in the verdict." (Pet. App. D at 57-58.)

E. The Ninth Circuit Decision

Following the district court's acceptance of the R&R without revision upon its *de novo* review (Pet. App. C), the Ninth Circuit affirmed the grant of

habeas relief (Pet. App. A), albeit with somewhat different reasoning. Analyzing the state appellate court's decision under 28 U.S.C. § 2254(d)(2), it found two factual findings that had formed the basis of the state appellate court's decision objectively unreasonable. (Pet. App. A at 23-24.) First, it found that the state court materially misapprehended the record when it concluded "that Detective McShane's preliminary hearing testimony about statements Smith purportedly made to Moraga 'meaningfully apprised [Smith] of the potential for an aiding and abetting theory.'" (*Id.* at 23.) In doing so, it incorporated its earlier discussion of the issue, where it wrote:

> It is puzzling . . . how anyone could divine even a remote possibility of an aiding-and-abetting theory from the preliminary hearing transcript. Moraga's statements to Detective McShane suggested only that Smith had a motive to kill his wife and that he took several steps to make the house appear as if it had been burglarized. His statements did not indicate that Smith took these steps so that some other, unmentioned person could enter the house and commit the murder. Nor did defense counsel's cross-examination of Detective McShane raise the possibility that the prosecution would pursue an aiding-and-abetting theory. When defense counsel asked the detective whether Moraga knew any details about the murder – including the manner of the killing, who specifically did the killing, and when the killing occurred – she was seeking to impeach Moraga's credibility

> by showing that Moraga, after spending six months in a cell with Smith, knew very little about the crime that he claimed Smith confessed to committing. By impeaching Moraga, the defense did not acknowledge that the prosecution was pursuing an aiding and abetting theory. Indeed, it does not even appear that the defense's cross-examination gave the *prosecution* that idea – the prosecution's trial brief and motions in limine, filed nearly three months after the preliminary hearing, argued that Moraga's testimony served only to identify *Smith* as the perpetrator.

Id. at 21 (emphasis in original).

Second, the Ninth Circuit found the state court's factual finding that "[t]he prosecution's request for aiding and abetting liability instructions occurred during the parties' general discussion of the jury instructions and *not just prior* to closing argument" (emphasis added by Ninth Circuit) to be simply false. (Pet. App. A at 24.) As it accurately explained:

> [T]he prosecution requested, and the trial judge decided to issue, the aiding-and-abetting instruction on the morning of the day of closing arguments. . . . Defense counsel had only the lunch recess to formulate a response to the new theory.

(*Id.*)

The State does not contend that the state appellate court made a reasonable determination of either

of the facts with which the Ninth Circuit took such issue. It, rather, argues that they were simply immaterial because of the purported absence of the clearly established federal law required by § 2254(d)(1), or that they were not sufficiently unreasonable.

The court of appeals also determined that a violation of the Sixth Amendment's notice requirement occurred (Pet. App. A at 14-22) and that said violation was not harmless under the applicable habeas standard (*id.* at 22-23). It reached the former conclusion by relying on the language of the Sixth Amendment itself, "basic principles of due process," this Court's fair-notice cases, and its own precedent. (*Id.* at 14-22.) It reached the latter conclusion by applying the harmless-error standard of *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), and concluding that it had grave doubts about the reliability of the jury's verdict because of the evenly balanced record, which earlier had been recognized by both the state trial and appellate courts, and the fact that the prosecutor "invited the jury to speculate – at the last minute and without any evidence – about Smith's liability as an aider and abettor." (*Id.* at 22-23.)

REASONS FOR DENYING THE PETITION

I. THE QUESTION PRESENTED BY PETITIONER HAS LITTLE IF ANYTHING TO DO WITH THIS CASE

The Ninth Circuit decision at issue represents nothing other than a garden-variety, straightforward application of 28 U.S.C. § 2254(d)***(2)*** – the last-reasoned state-court decision made unreasonable determinations of fact by failing to consider key aspects of the record and by plainly misapprehending that record.

The greatest part of the State's argument is misplaced, arguing as it does that this Court needs to further school the Ninth Circuit as to how to properly apply 28 U.S.C. § 2254(d)(1) in a case decided on the basis of (d)(2). The State does finally get around to the case at hand at page 21 of its petition, where it addresses how the court of appeals "sought to justify its result." The State first asserts in a short paragraph that the findings of fact at issue are not really findings of fact at all and, consequently, *should have* been reviewed under (d)(1). (Pet. at 21.) With precious little explanation, it asserts that they are "more legal or mixed questions." (*Id.*) It is small wonder that the State has so little to say about this critical issue because the state-court findings are no such thing. Those findings – that preliminary-hearing testimony about statements Smith purportedly made to a jailhouse informant meaningfully apprised him of the potential for an aiding-and-abetting theory, and the prosecution's request for aiding-and-abetting

instructions did not occur just prior to closing argument (App. A at 23-24) – are materially indistinguishable from other findings routinely considered factual. *See*, *e.g.*, *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (*per curiam*) (treating question of whether evidence required competency hearing as question of fact); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (treating state court's finding that records, purportedly relied on by defense counsel to limit their penalty-phase investigation, contained instances of sexual abuse when they did not, as question of fact); *Batchelor v. Cain*, 682 F.3d 400, 406-07 (5th Cir. 2012) (affirming grant of habeas relief based on *Faretta* violation and treating question of whether it reasonably appeared to trial court that defendant has abandoned his initial request to represent himself as question of fact); *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1049 (7th Cir. 2005) (affirming grant of habeas relief based on *Griffin* error and treating question of whether prosecutor's closing argument could reasonably be interpreted by the jury as an invitation to draw adverse inference from defendant's silence as question of fact); *Norton v. Spencer*, 351 F.3d 1, 7 (1st Cir. 2003) (affirming grant of relief based on *Brady* violation and treating question as to whether affidavits submitted in support of claim were cumulative as question of fact), *cert. denied*, 542 U.S. 933 (2004).

The State also claims, repeating its primary error, that the findings at issue were immaterial because "there is no 'clearly established' federal rule that proper notice in a charging document may be

superseded by inferences from the prosecutor's later conduct." (Pet. at 22.) Again, whether there is a clearly established federal rule is irrelevant to § 2254(d)(2) review, but, regardless, as shown in section III, *infra*, there is such a rule.

The final argument by the State is that the state appellate court findings were not shown to be false by clear and convincing evidence, as demanded by § 2254(e)(1). (Pet. at 22.) Leaving aside that this Court has not yet addressed the relationship between subsections (d)(2) and (e)(1) (*see Burt v. Titlow*, 134 S.Ct. 10, 15 (2013); *Wood v. Allen*, 558 U.S. 290, 293 (2010)), the findings at issue were false by *any* standard. The Ninth Circuit did not "merely substitute[ ] its own view of the facts . . . for the reasonable conclusions of the state court" (Pet. at 22), it substituted the *facts* for what were, most definitively, unreasonable conclusions. This is not a close question.

II. THE NINTH CIRCUIT CORRECTLY DECIDED THE CASE

That a state court made an unreasonable determination of the facts does not alone suffice to warrant habeas relief under § 2254(d)(2). "[H]abeas relief may be afforded to a state prisoner" only if his confinement also "violates federal law." *Wilson v. Corcoran*, 131 S.Ct. 13, 17 (2010) (*per curiam*) (citing § 2254(a)). That is a *different* question, however, than the § 2254(d)(1) question of whether a state court decision is contrary to or an unreasonable application of

"clearly established Federal law," which must be answered in light of the subsequent constructions of that phrase by this Court.

There is *no* question but that a violation of a defendant's right to notice of the nature and cause of the charges against him has been violated is a violation of the United States Constitution. The Sixth Amendment alone establishes as much – "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." The State castigates the court of appeals for having the temerity to cite in its opinion its own habeas precedent after citing this Court's fair-notice cases upon which it relied. (Pet. at 8.) The State's claim that the Ninth Circuit's decision "is indistinguishable from *de novo* review on direct appeal" (Pet. at 13) completely ignores the § 2254(d)(2) review that took place. (Pet. App. A at 23-24.) As shown, *supra*, the state court's factual findings were such that no fairminded jurist could agree with them. Once the Ninth Circuit correctly so decided, it was entirely *proper* for it to apply *de novo* review. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *Carlson v. Jess*, 526 F.3d 1018, 1024 (7th Cir. 2008).[3]

There is no greater reason to grant certiorari in this case than there was in *Cash v. Maxwell*, 132

[3] Perhaps if the Ninth Circuit had placed its § 2254(d)(2) review *before* its constitutional analysis, the State might have grasped the point better.

S.Ct. 611 (2012), where this Court declined to grant the writ. In *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010), the Ninth Circuit held that the state court had made an unreasonable determination of fact when it concluded that a jailhouse informant who had testified against the defendant did so truthfully. *Id.* at 504-05. Based thereon, the Court of Appeals reversed the district court's denial of habeas relief, finding that the defendant's conviction, premised on the informant's false testimony, violated his due process rights under the Fourteenth Amendment. *Id.* at 506. The circuit expressly relied on its own precedent to find constitutional error in such circumstances (*id.* at 506-07), that is, the very reliance that so offends the State herein (*see*, *e.g.*, Pet. at 16-17). Certiorari was denied (*see* 132 S.Ct. at 613), an apparent rejection of the contention that a habeas petitioner must establish a violation of clearly established federal law within the meaning of § 2254(d)(1) when a federal habeas court finds that a state court decision passes AEDPA review under (d)(2).

Finally, the State imagines a threat to "longstanding practices under [California] state law" by the Ninth Circuit's decision. (Pet. at 23.) The behavior of the prosecutor in this case, who had a history of misconduct, did not represent a "longstanding practice[ ]." Motivated by a well-founded fear that he had not succeeded in proving his theory that the entire case had been tried upon, namely, that Smith had bludgeoned the victim to death, he secured an aiding-and-abetting instruction that had no place in Smith's

trial. He then waited until his rebuttal closing argument, at a time when defense counsel obviously had no opportunity to respond, to drop his bombshell based thereon. It is the *duty* of federal courts to threaten such unethical gamesmanship.

III. EVEN WERE THE "QUESTION PRESENTED" BY THE STATE RELEVANT, IT SHOULD BE ANSWERED IN FAVOR OF RESPONDENT SMITH

As discussed, the court of appeals properly determined that Smith cleared AEDPA's statutory hurdle through its § 2254(d)(2) review, in which it explicitly engaged. (Pet. App. A at 23-24.) The court went on, however, to dispose of an argument that the State had raised at oral argument, namely, that § 2254(d)(1) precludes habeas relief because the state court decision was not contrary to nor an unreasonable application of *Griffin v. United States*, 502 U.S. 46 (1991), in which this Court held that due process does not require automatic reversal of a conviction merely because a jury is instructed on a factually unsupported theory as an alternative basis of liability. (Pet. App. A at 24-26.) The court rejected that argument, explaining that *Griffin* was not a Sixth Amendment notice case. (*Id.* at 25-26.) It also explained that it need not defer to the state court's prejudice determination because, under *Brecht*, it was required to apply a different standard. (*Id.* at 26.) It concluded that portion of its discussion by stating that, as a result of the different prejudice standards, it was "not constrained

by § 2254(d)(1) in deciding that the trial court's error in this case was not harmless," citing *Williams v. Taylor*, 529 U.S. 362, 406 (2000). (Pet. App. A at 26.)

On the cited page in the *Williams* decision, this Court explained that, should a state court decide an ineffective-assistance-of-counsel claim under a different prejudice standard than that required by this Court, "a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's 'contrary to' clause."

The State has transmogrified the foregoing discussion into the *ratio decidendi* of the Ninth Circuit's decision, but it should be apparent that it is no such thing. The court was merely explaining why the State's (d)(1) argument was wrong. Its doing so did not alter in the slightest the plain fact that the court held that Smith surmounted AEDPA's statutory hurdle under (d)(2) because of the state court's unreasonable factfinding.

Assuming *arguendo*, despite those obvious facts, that the question presented by the State is a material one, and that it *does* matter whether this Court's Sixth Amendment fair-notice cases provided clearly established federal law under (d)(1) such as was contravened or unreasonably applied in this case, the State still should be denied certiorari. This Court's fair-notice cases would support a finding that (d)(1) is *also* satisfied herein.

"'[C]learly established Federal law' under § 2254(d)(1) *is the governing legal principle or*

principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (citations omitted, emphasis added); *see also id.* at 76 (affirming that AEDPA does not prohibit federal habeas courts from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case in which the principle was announced"). Simply put, "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (internal citations and quotation marks omitted); *see also id.* ("even a general standard may be applied in an unreasonable manner"); *Williams v. Taylor*, 529 U.S. 362, 407 (2000) (construing AEDPA to permit relief, where no case is directly on point, if "a state court either unreasonably extends a legal principle from [the Supreme Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply").

A good, recent illustration of the error in the State's demand for the irrelevant "spotted calf" is *Lafler v. Cooper*, 566 U.S. ___, 132 S.Ct. 1376 (2012). There, this Court held that the *Strickland* test for ineffective assistance of counsel, developed in the context of assessing the harm of an attorney's performance at trial, applies equally in the context of assessing an attorney's advice to reject a plea offer. It specifically defined prejudice in that context, in a

manner it had not previously done, as whether, "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 1385. This Court had no trouble finding that *Strickland* constituted clearly established federal law within the meaning of 28 U.S.C. § 2254(d)(1), despite the fact that it had never before been applied by the Court in the context of a defendant's rejection of a plea offer, let alone in a manner leading to a holding that constitutional error had occurred in such circumstances.

It was the view of only the *dissenting* Justices that the application of *Strickland* to the facts of this case constituted a "new rule of law" that could not "serve as a basis of habeas relief" because the Court had never before held that criminal defendants have a "constitutional right to effective plea-bargainers." *Id.* at 1392 (Scalia, J., dissenting); *see also id.* at 1396 (asserting that (d)(1) gateway not open because the Court had never before held "that a defendant in Cooper's position can establish *Strickland* prejudice").

In the instant case, the Ninth Circuit relied on three decisions of this Court articulating the governing legal principles regarding a defendant's

constitutional right to fair notice of the nature and cause of the accusations against him. (Pet. App. at 14.) Because those cases sufficiently set forth the governing legal principles, the State's efforts to distinguish them on their facts (Pet. at 15-16) accomplish nothing. This Court requires that a criminal defendant be given sufficient notice of the nature and cause of the accusations against him so that he can meaningfully defend himself against them. For all the reasons cited by the district court and court of appeals, that did not happen herein.

Moreover, the State's predicate claim that the constitutional right to sufficient notice dissipates upon the State's filing of a specific charge that provides such notice, is plainly wrong. The due-process requirement of adequate notice is and never was deemed eternally satisfied merely by statement of a legally adequate charge. *Lankford v. Idaho*, 500 U.S. 110 (1991), so demonstrates. There, this Court reversed a death sentence based on defense counsel's not having received adequate notice that the trial court was considering imposing the death penalty. Its holding "reflect[ed] the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure." *Id.* at 121. *Lankford* is irreconcilable with the State's theory of notice. Lankford was charged with first-degree murder and he was expressly advised of this fact at his arraignment. That charge apprised Lankford of the possibility that he would face the death penalty.

After the jury found Lankford guilty and prior to sentencing, "the trial court entered an order requiring the State to notify the court and the state whether it would ask for the death penalty." 500 U.S. at 114. The state responded that it would not. *Id.* at 114-15. Then, following a sentencing hearing in which the propriety of a death penalty was not discussed by either party, the trial court imposed it.

In finding constitutionally inadequate notice that the death penalty could be imposed, this Court relied on the principle that controls regardless of whether the context is insufficient notice of a charge, a theory of prosecution, or a penalty, namely, "[n]otice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." 500 U.S. at 126. Indeed, the Court cited several of its cases in noting that it has applied said principle in "a variety of contexts." *Id.* at 126 n.22.

This Court deemed irrelevant the facts that the charge itself carried the possibility of a death penalty and that the defendant had been expressly so advised at his arraignment because, *as a matter of fact in that case*, Lankford lacked meaningful notice that it would be pursued as the penalty against *him*. The Court *agreed* that the defendant had been given sufficient notice at his arraignment of the availability of the death penalty to the state and that the state's refusal to pursue it did not bind the trial court. It *nonetheless* reversed the denial of post-conviction relief based on constitutionally inadequate notice. In other words, precisely as herein, and directly contrary to the

State's argument that sufficient notice, once provided, cannot be abrogated, this Court found that the circumstances in *Lankford* did indeed abrogate what would otherwise have constituted adequate notice.

Significantly, this Court eschewed the categorical approach urged by the state – notice of the *possibility* of the state court's imposing a death penalty sufficed – in favor of a fact-based analysis of the reality of the case before it. Thus, for example, the Court expressly relied on the fact that the trial court's "silence following the [prosecution]'s response to the presentencing order *had the practical effect* of concealing from the parties the principal issue to be decided at the hearing." 500 U.S. at 126 (emphasis added). It further recognized that, "*[a]s a factual matter*, it is also undisputed that the character of the sentencing proceeding did not provide the state with any indication that the trial judge contemplated death as a possible sentence." *Id.* at 119 (emphasis added).

> During the [sentencing] hearing, while both defense counsel and the prosecutor were arguing the merits of concurrent or consecutive, and fixed or indeterminate, terms, the silent judge was the only person in the courtroom who knew that the real issue that they should have been debating was the choice between life or death. . . . [¶] *[I]t was surely reasonable for the defense to assume that there was no reason to present argument or evidence directed at the question whether*

> *the death penalty was either appropriate or permissible*.

Id. at 120 (emphasis added).

Further, and also apposite herein, the Court looked to defense counsel's actions to answer the question of the adequacy of notice:

> If defense counsel had been notified that the trial judge was contemplating a death sentence based on five specific aggravating circumstances, presumably she would have advanced arguments that addressed these circumstances; however, she did not make these arguments because they were entirely inappropriate in a discussion about the length of the state's possible incarceration.

500 U.S. at 122 (footnote omitted). The Court ultimately concluded that the inadequate notice created an "impermissible risk that the adversary process may have malfunctioned in this case" (*id.* at 127), and reversed. That selfsame risk existed herein, and this Court's precedent permitted the Ninth Circuit to remedy it, even were it to utilize § 2254(d)(1) to do so.

CONCLUSION

"The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 902 (2009) (Scalia, J., dissenting). For the reasons stated, the State's disagreement with the Ninth Circuit's factbound conclusion in this unique case is an insufficient basis for granting certiorari.

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Respectfully submitted,

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