No. ____

In the Supreme Court of the United States

MARK HOOKS, Warden,
Ross Correctional Institution,

Petitioner,

v.

MARK LANGFORD,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
Deputy Solicitor
M. SCOTT CRISS
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, OH 43215
614-466-8980
614-466-5087 fax
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
Mark Hooks, Warden

QUESTIONS PRESENTED

A jury instruction explaining an element of a *state-law* crime results in a *federal due-process* violation only if (1) the instruction misstates, or is ambiguous on, the element and (2) there is "'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009) (citation omitted). Here, a state court held that no violation occurred when an accomplice-liability instruction placed the adverb identifying the "purpose" *mens rea* at a location different from the model instruction, because the jury charge as a whole adequately conveyed that the accomplice must harbor a purpose to kill to be convicted of murder. The Sixth Circuit, by contrast, held that the state court's decision was objectively unreasonable under 28 U.S.C. § 2254(d)(1) because the misplaced adverb did not accurately convey this purpose element.

The questions presented are:

1. Did the Sixth Circuit properly apply the doubly deferential standard under federal due process and 28 U.S.C. § 2254 that governs review of a state court's holding that jury instructions could not have reasonably misled the jury on state law?

2. Did the Sixth Circuit properly find that any alleged error was harmful under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), solely because the jury could have convicted the petitioner as an aider and abettor, not as the principal offender?

LIST OF PARTIES

Petitioner is Mark Hooks, the Warden of the Ross Correctional Institution. Mark Hooks, who became Warden of the Ross Correctional Institution after the briefing concluded in the Sixth Circuit, is automatically substituted for the former Warden. *See* Fed. R. App. P. 41(c)(2); Sup. Ct. R. 35.3.

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

OPINIONS BELOW

The Sixth Circuit's opinion, *Langford v. Warden*, __ F. App'x __, 2014 WL 5870424 (6th Cir. Nov. 12, 2014), is reproduced at Pet. App. 1a. The district court's opinion, *Langford v. Warden*, No. 2:12-CV-96, 2013 WL 3223379 (S.D. Ohio June 25, 2013), is reproduced at Pet. App. 36a. The magistrate's Report and Recommendation, *Langford v. Warden*, No. 2:13-CV-96, 2013 WL 459196 (S.D. Ohio Feb. 7, 2013), is reproduced at Pet. App. 46a. The Ohio Supreme Court's decision declining jurisdiction on direct appeal, *State v. Langford*, 939 N.E.2d 1266 (Ohio 2011), is reproduced at Pet. App. 94a. The Ohio intermediate court's decision on direct appeal, *State v. Langford*, No. 9AP-1140, 2010 WL 3042185 (Ohio Ct. App. Aug. 5, 2010), is reproduced at Pet. App. 95a.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered its judgment on November 12, 2014. The Warden timely invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

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

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

> on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1).

INTRODUCTION

The Sixth Circuit granted Respondent Mark Langford habeas relief and required Ohio to retry him—all because of a misplaced adverb. A jury convicted Langford of murdering a rival gang member in a barrage of gunfire. At trial, the State presented alternative theories: that Langford fired the fatal shot or aided the individual who did. This case concerns the jury instruction explaining accomplice liability, which, all agree, requires an aider or abettor to harbor the mental state necessary for the offense (for murder, a purpose to kill). As the dissent below noted, "[t]he *actual* jury instruction that was given read: 'Before you can find the defendant guilty of a crime as a complicitor or an aider and abettor, you must find . . . that . . . the defendant aided or abetted another in purposely committing the offense[].'" Pet. App. 29-30a. Yet "the *ideal* jury instruction would have read: 'Before you can find the defendant guilty of a crime as a complicitor or an aider and abettor, you must find . . . that . . . the defendant purposely aided or abetted another in committing the offense[].'" Pet. App. 30a. The question presented asks whether it was objectively unreasonable to find that "the misplacement of the word 'purposely' by five words" did not violate due process. *Id.*

The Court should grant this petition because the Sixth Circuit's holding conflicts both with the Court's jury-instruction cases and with its AEDPA cases. Before AEDPA, the Court held that a petitioner seeking federal relief based on alleged state-law errors in jury instructions must meet a burden more demanding than the plain-error standard. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). With respect to a potentially ambiguous instruction, the petitioner must show that the jury charge *as a whole* retained this ambiguity and that a *reasonable likelihood* existed that the ambiguity led the jury to apply the charge in a manner that relieved the State of proving all elements. *Boyde v. California*, 494 U.S. 370, 380 (1990). Now, of course, a federal court may grant relief only if a state court's application of this test was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011).

Here, the state court reasonably held that the instructions as a whole were not ambiguous and that no reasonable likelihood existed that the jury applied the instructions unconstitutionally. The sentence on which Langford relies itself could reasonably be interpreted to require an accomplice to have an intent to kill. The "offense" of murder *already* included a purpose element—as the instructions defined murder as "purposely causing the death of another," Doc.12-7, Tr., PageID#2331—so reading the "purposely" in the accomplice instruction to cover only the principal offender would make it superfluous. The state court's reading is also confirmed by instructions three paragraphs later describing when an accomplice may have the "purpose . . . to commit a crime."

Doc.12-7, Tr., PageID#2337-38. Finally, neither the parties nor the trial court caught the misplaced adverb—which confirms that a lay jury would not have misunderstood the instructions.

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

Additional reasons cement the need for review. To begin with, the Court has repeatedly intervened in similar AEDPA cases. It, for example, has reversed circuit courts that have relied on their *own* precedent as the "clearly established" law. *See Lopez v. Smith*, 135 S. Ct. 1, 4 (2014); *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012). Here, instead of *relying* on circuit precedent, the decision below *distinguished* that precedent—which limited relief in this setting to "extraordinary cases." *Daniels v. Lafler*, 501 F.3d 735, 741 (6th Cir. 2007); Pet. App. 18a-19a. The error here thus exceeds the error in these cases; some precedent is better than none. In addition, the Court's review would make a useful point. For other claims where the constitutional test is deferential—such as ineffective-assistance or insufficient-evidence

claims—the Court has noted that AEDPA requires a "'doubly'" deferential standard. *Harrington*, 131 S. Ct. at 788 (citation omitted). This case allows the Court to make the same point for jury-instruction claims. Finally, the decision below overturns the most serious of convictions (murder), and so the harms to federalism and comity that AEDPA was designed to prevent reach their apex here.

At the least, this case presents important questions about harmless-error review. The Sixth Circuit found that the misplaced adverb was harmful under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Pet. App. 15a-17a. This Court is currently reviewing another case involving *Brecht*'s proper application. *See Chappell v. Ayala*, 135 S. Ct. 401 (2014). Because the Court's application of *Brecht* there could shed light on whether the Sixth Circuit properly applied *Brecht* here, this case should be held for that one.

STATEMENT

I. THE STATE PROCEEDINGS

Langford and Marlon Jones were in rival gangs. Pet. App. 97a, 106a. Langford was beaten badly as a result of that rivalry. In July 1995, Jones was shot and killed in retaliation. *Id.*

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

In August 1995, the State initially indicted Langford for murdering Jones. Pet. App. 97a. It dismissed that indictment three months later when Nicole Smith, a key witness, failed to appear for trial. *Id.* Although Columbus police continued to investigate Jones's murder, the department eventually

transferred the investigation to its cold-case unit. Pet. App. 97a-98a.

The Columbus police reopened the investigation when an Assistant United States Attorney relayed that two federal prisoners had information about the murder. Pet. App. 98a-99a. A detective interviewed the prisoners, who claimed that Langford had confessed to his involvement in Jones's shooting. *Id.* The detective also located Smith, the witness who had previously failed to appear. Pet. App. 99a.

In 2008, the State indicted Langford again. Pet. App. 98a. It charged Langford with two counts (aggravated murder and murder), each of which included an additional "firearm specification." *Id.* Langford moved to dismiss the charges based on the gap between the shooting and the second indictment. *Id.* The trial court dismissed this motion after an evidentiary hearing. Pet. App. 100a.

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

1. At trial, the State presented two theories. It alleged that Langford was the principal offender who fired the shot that killed Jones or that he was an accomplice to the killing. Pet. App. 105a.

Witnesses testified about Langford's involvement. Pet. App. 103a. Smith said she was with Langford and two men when they shot at Jones. Pet. App. 108a-09a. James Arnold, one of the federal prisoners, testified that Langford confessed to shooting at Jones with two men. Pet. App. 103a. According to Arnold, Langford said that he fired only a .22 caliber handgun, not the larger handgun that fired the fatal shot. *Id.* Isaac Jackson, the other federal prisoner,

testified that Langford confessed to participating in Jones's murder. Pet. App. 109a.

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

At the close of the evidence, the court and parties reviewed the jury instructions. Doc.12-6, Tr., PageID#2175-2211. When discussing the complicity instructions, the prosecution suggested that they state that accomplice liability requires the defendant to have "aided or abetted another in committing the" offense. *Id.* at PageID#2193. The defense responded that the "complicity section" of the model instructions "says that you need to insert the culpable mental state and then go into the aided or abetted language and definitions, and I presume that will be done when we revise." *Id.* The prosecution agreed that "a mental state needs to be in there" and that it would be "purposely" for the murder counts and "knowingly" for the lesser-included offense of involuntary manslaughter. *Id.*; Pet. App. 31a-32a. The parties then debated instructions about when presence at the scene can prove this necessary purpose. Doc.12-6, Tr., PageID#2194-2204.

The next day of trial, the parties reviewed revised instructions. Pet. App. 32a. The complicity instructions largely matched the ones given to the jury. They noted that Langford could be found guilty for

complicity if he "aided or abetted another in purposely committing the offenses of Aggravated Murder or Murder or aided and abetted another and knowingly committed the offense of Involuntary Manslaughter." Doc.12-7, Tr., PageID#2337; Pet. App. 32a-33a. With respect to the draft instructions, Langford's counsel objected to a typo—the instructions said "knowingly committing" rather than "knowingly committed." Doc.12-7, Tr., PageID#2223; Pet. App. 32a-33a.

After closing arguments, the trial court instructed the jury on the substantive law. Doc.12-7, Tr., PageID2327-38. The "murder" instructions indicated that murder required the jury to find that Langford "purposely caused the death of Marlon Jones." Doc.12-7, Tr., PageID#2335. They incorporated the definition of "purpose" given for aggravated murder. *Id.* Those instructions defined "purposely" as requiring a "specific intention to cause a certain result," adding that "[t]o do an act purposely is to do it intentionally and not accidentally" and that "[p]urpose and intent mean the same thing." *Id.* at PageID#2327.

The complicity instructions noted that Langford "may be convicted as a principal offender or as a complicitor or an aider and abettor to any or all counts." *Id.* at PageID#2336. For murder, the instructions explained that the jury must find that Langford "aided or abetted another in purposely committing the offense[] of . . . Murder." *Id.* at PageID#2337. The instructions further noted that a "common purpose among two or more people to commit a crime need not be shown by direct evidence but may be inferred from circumstances surrounding the act and from defendant's subsequent conduct." *Id.* at PageID#2337-38. They added that "[c]riminal intent may be inferred from presence, companionship and

conduct before and after the offense is committed," and that "mere presence can be enough if it is intended to and does aid the primary offender." *Id.* at PageID#2338. But they clarified that "absent evidence that a person, assisted, incited, or encouraged the principal offender to comit [sic] the offense, a person may not be convicted of aiding and abetting a principal offender in the commission of an offense." *Id.*

The jury returned a split verdict. It acquitted Langford of aggravated murder and of the firearm specifications. Pet. App. 5a. But it convicted him of murder. Pet. App. 5a, 95a. The court sentenced Langford to an indeterminate sentence of fifteen years to life imprisonment. Pet. App. 5a.

2. On appeal, Langford argued that: (1) the trial court violated due process when failing to dismiss the case because of the delay before the second indictment; (2) the trial court's complicity instructions violated due process because they failed to indicate that Langford had to act purposely; (3) the trial court erred in the admission of evidence; (4) the trial court erred in finding sufficient evidence; and (5) the trial court erred in not crediting him sufficiently with jail time. Pet. App. 95a-97a.

The state appellate court affirmed the conviction, but remanded with instructions to award Langford more jail-time credit. Pet. App. 109a-110a. As relevant here, the court rejected Langford's argument that the trial court improperly instructed the jury about complicity's *purpose* element. Pet. App. 104a-06a. Langford argued that the placement of "purposely" in the instruction did not match the model instruction. Unlike the instruction given, Ohio's model instruction placed "purposely" before "aided or

abetted," so it stated that an accomplice can be found liable if he purposely aided or abetted another in committing the offense. *See* Pet. App. 19a. Langford asserted that, by moving "purposely" to modify "committing," the instruction, "[g]rammatically speaking," "told the jury that to find [Langford] guilty as a complicitor or aider and abettor they must find that [he] aided or abetted *another*, who *purposely* committed the offense of Murder." Doc.7-1, Exs., PageID#182. Langford thus argued that the jury could have convicted him without finding that he had an intent to kill. *Id.* He did concede that "all but 'plain error' [was] waived" because trial counsel did not object to the placement of "purposely" in the final instruction. *Id.* at PageID#183.

The appellate court rejected this argument. It initially noted that Langford did not object to the final charge. Pet. App. 105a. It then concluded that "[t]he jury, by its verdict, found that Langford had a specific intention to cause the death of Marlon Jones," holding that "[t]he jury could not have been misled by the charge given, nor could it have found Langford guilty based upon an error in the jury charge." Pet. App. 105a-06a. The Ohio Supreme Court declined jurisdiction. Pet. App. 94a.

II. THE FEDERAL PROCEEDINGS

A. Langford filed a habeas petition in the District Court for the Southern District of Ohio, arguing that he was entitled to relief based on the claims raised in the state appellate court (and in a later application asserting ineffective assistance of appellate counsel). Pet. App. 47a-51a. A magistrate and the district court determined that Langford was entitled to a conditional writ of habeas corpus on his jury-

instruction claim, but rejected all other claims. Pet. App. 44a-45a, 80a-81a, 92a.

The magistrate's Report found the jury instructions flawed because, given the misplaced "purposely," they did not clarify that the intent required for accomplice liability is the same as the intent required for murder. Pet. App. 74a-75a. The Report added that the error was not harmless. Pet. App. 76a-81a. The jury "may well have" found Langford guilty because of his complicity in Jones's death rather than as the principle offender. Pet. App. 80a.

The district court overruled the Warden's objections. Pet. App. 41a-44a. The court said that "[t]he record indicates that the jury was never advised that in order to find [Langford] guilty as a complicitor or on aiding and abetting the crimes of murder or aggravated murder, it must conclude, beyond a reasonable doubt, that he acted with the required intent—*i.e.*, purpose to kill." Pet. App. 44a. The district court also incorporated the magistrate's harmless-error reasoning. *Id.*

B. A divided Sixth Circuit affirmed, upholding the grant of habeas relief on the jury-instruction claim and the denial of Langford's other claims. Pet. App. 29a. On the jury-instruction claim, the majority identified several undisputed points. A defendant has the right to have the jury resolve every element beyond a reasonable doubt. Pet. App. 7a (citing *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995)). And, under Ohio law, an aider and abettor must have the same intent as the principal offender. *Id.* (citing Ohio Rev. Code § 2923.03(A)). Finally, while the state court's reasoning was "terse," it was entitled to AEDPA deference. Pet. App. 8a-10a.

Applying AEDPA, the majority rejected the Warden's reasoning why the instructions "as a whole were not ambiguous." Pet. App. 10a. Nowhere, the majority suggested, did the instructions tell the jury that it had to find that Langford acted purposely to convict him, and the state court had engaged in an "unreasonable application of Supreme Court law" in holding otherwise. Pet. App. 10a-11a. The misplaced "purposely," the majority found, could not "reasonably be read to accurately convey that Langford must act with the kind of complicity required for the underlying offense." Pet. App. 12a. The majority also distinguished *Henderson v. Kibbe*, 431 U.S. 145 (1977), which held that a jury-instruction claim generally must fail when the instruction mirrored the statutory language. Pet. App. 12a-13a. And it rejected the contention that closing arguments would have confirmed that the jury must find that Langford acted purposely. Pet. 13a-14a.

The majority next found this error harmful. Pet. App. 15a-17a. It conceded that a trial court's failure to explain an element is subject to harmless-error review, but noted that such failure is harmful if a court has "'grave doubt'" about whether the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'" Pet. App. 15a (citation omitted). The jury-instruction error had "a substantial influence" on the verdict, the majority said, because the jury may have found Langford guilty as an accomplice. Pet. App. 17a.

Judge Boggs dissented. The dissent concluded that "the misplacement of the word 'purposely' by five words" did not warrant relief. Pet. App. 30a. It noted that Langford's counsel corrected a typo in the same sentence but did not object to the placement of

the word "purposely." Pet. App. 33a. If neither the attorneys nor the judge "noticed the displacement of one word," the jury instruction was not so unreasonable as to violate due process. Pet. App. 35a.

The dissent also took a different approach on harmless error. Pet. App. 33a-34a. It noted that the only evidence presented showed that Langford was purposely involved in Jones's death. *Id.* at 34a. And while the "jury certainly was entitled to disbelieve this testimony," "there was no evidence at all to support conviction under a theory of accomplice liability where Langford, say, performed in a production of *Hamlet* and, thereby, unwittingly motivated Jones's shooter to take purposeful action and to avenge immediately the attack on Langford." *Id.* In other words, "there was simply no evidence that would have allowed the jury to convict Langford under a strict-liability conception of complicity." *Id.*

REASONS FOR GRANTING THE WRIT

The Court should grant this petition and summarily reverse the Sixth Circuit's decision. *First*, the decision conflicts both with this Court's cases reviewing jury instructions under due process and with this Court's cases applying AEDPA. *Second*, compelling reasons exist for the Court to exercise its certiorari discretion to correct the Sixth Circuit's error. *Third*, at the least, this case presents questions about harmless-error review that could be affected by the Court's decision in *Chappell v. Ayala*, No. 13-1428.

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

This Court has long given great deference to state courts when resolving claims that their jury instructions misapplied state law, and its deference has only grown after AEDPA. The misplaced adverb here would not have authorized relief even absent AEDPA, and AEDPA now affirmatively bars that relief.

A. Due Process And AEDPA Each Establish Deferential Rules For Jury-Instruction Claims

1. The Court has long held that petitioners carry a heavy burden when seeking relief based on a claim that jury instructions miscommunicate state law. After all, "such state-law violations provide no basis for federal habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 68 n.2 (1991). Accordingly, the flawed state-law instructions must have "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973).

This happens rarely. "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). It is not even enough for federal courts to find that an instruction is "undesirable, erroneous, or even 'universally condemned.'" *Cupp*, 414 U.S. at 146.

Instead, when a petitioner claims that an instruction miscommunicated *state* law, the instruction will violate *federal* due process only if "it fails to give effect to [the] requirement" that "the State must prove every element of the offense" beyond a reasonable doubt. *Middleton*, 541 U.S. at 437. In the most common case of potentially ambiguous jury instructions, such a due-process showing contains two elements. *See Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009); *Estelle*, 502 U.S. at 72; *Boyde v. California*, 494 U.S. 370, 380 (1990).

First, a court must find that the instructions are, in fact, ambiguous on the state-law issue. *Id.* In that respect, "'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Boyde*, 494 U.S. at 378 (quoting *Cupp*, 414 U.S. at 146-47). Even if a sentence is ambiguous, its meaning might be clarified by reviewing the whole charge. If the charge unambiguously conveys state law, federal courts may not grant relief. "[T]he charge as a whole [must be] ambiguous." *Middleton*, 541 U.S. at 437.

Second, the petitioner must show that the ambiguity created "'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington*, 555 U.S. at 191 (quoting *Estelle*, 502 U.S. at 72). This test demands more than "some 'slight *possibility*' that the jury misapplied the instruction." *Id.* (quoting *Weeks v. Angelone*, 528 U.S. 225, 236 (2000)). It examines such things as the evidence presented at trial, *Boyde*, 494 U.S. at 383, the closing arguments, *Middleton*, 541 U.S. at 438, and whether the attorneys or court noticed the issue, *Henderson*, 431 U.S.

at 155. These factors recognize that "the process of instruction itself is but one of several components of the trial," which also "includes testimony of witnesses, argument of counsel, [and] receipt of exhibits in evidence." *Cupp*, 414 U.S. at 147.

2. AEDPA stacks a deferential standard on top of the deferential jury-instruction test. Under its familiar framework, a federal court may not grant relief unless a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). The state decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011).

In the jury-instruction context, AEDPA's deferential standard applies to *both* elements for proving that a state-law instruction violated due process. A federal court must find that a state court acted unreasonably when holding that the jury charge as a whole unambiguously and accurately conveyed state law. *Waddington*, 555 U.S. at 190-92. And a federal court must conclude that, even if the instructions were ambiguous, the state court acted unreasonably in finding no reasonable likelihood that the jury applied the instructions in an unconstitutional manner. *Middleton*, 541 U.S. at 437-38.

These standards are exemplified by a strikingly similar case. In *Waddington*, the petitioner drove the car in which a passenger shot and killed a student at a school. 555 U.S. at 182-83. The petitioner defended against murder charges on the ground that he believed that his gang planned on merely getting into a fistfight, not on firing shots. *Id.* at 184. Yet

the accomplice-liability instruction, he argued, allowed the jury to convict him if it found that he intended to commit *a crime*, even if he did not intend to commit *the murder*. *Id.* at 187-88. While the state courts rejected this argument, the Ninth Circuit granted relief. *Id.* at 188-90. This Court reversed. The state courts "reasonably concluded that the trial court's instruction to the jury was not ambiguous." *Id.* at 191. Alternatively, those courts "reasonably applied this Court's precedent when they determined that there was no 'reasonable likelihood' that the prosecutor's closing argument caused [the petitioner's] jury to apply the instruction in a way that relieved the State of its burden to prove every element of the crime beyond a reasonable doubt." *Id.* at 193.

B. The Sixth Circuit's Grant Of Relief Based On A Misplaced Word Conflicts With This Court's Due-Process And AEDPA Cases

The state court found that "[t]he jury could not have been misled by the charge given, nor could it have found Langford guilty based upon an error in the jury charge." Pet. App. 105a-06a. This holding mirrors the Court's two due-process factors (whether the instruction was ambiguous and whether a reasonable likelihood existed that the jury applied it unconstitutionally). *Waddington*, 555 U.S. at 190-91. The state court's conclusion *correctly* followed this Court's cases. So the Sixth Circuit was mistaken when holding that the state court's decision was *objectively unreasonable*. *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010). That is shown by examining both due-process factors.

1. The state courts could reasonably conclude that the instructions as a whole were unambiguous

a. The state courts could reasonably conclude that the instructions unambiguously conveyed that Langford had to act purposely when aiding or abetting Jones's murder. Start with the sentence that Langford criticizes: It says the jury could find Langford guilty of complicity if it found that Langford "aided or abetted another in purposely committing the offense[] of . . . Murder . . . ." Doc.12-7, Tr., PageID#2337. It was at least a reasonable reading to interpret this "purposely" as establishing an intent element for the *aider or abettor*. After all, the jury had *already* been told that the "offense of murder" contains its *own* purpose element. *Id.* at PageID#2331 (defining "murder" as "purposely causing the death of another"). The instruction thus asked whether Langford ""aided or abetted another in purposely committing the offense of . . . [purposely causing the death of another] . . . ." *Id.* at PageID#2337; *cf. Waddington*, 555 U.S. at 191 (placing specific offense in general instruction to determine that instruction was unambiguous). If the sentence's "purposely" did not relate to the aider or abettor, it would have been superfluous. The Sixth Circuit thus read the instruction in a manner that, if applied to a statute, conflicts with a cardinal rule of construction. *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014).

To be sure, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380-81. The jurors here likely did not debate whether "committing" was a gerund act-

ing as the object of the preposition "in" or was a present participle. They also likely did not debate whether "in purposely committing" was an adjectival phrase modifying the principal-offender "another" or an adverbial phrase modifying the accomplice's "aid[ing] and abett[ing]." But the surrounding complicity instructions would have left no doubt that an accomplice must act purposely.

For one, instructions *three paragraphs* later explained when the jury could find that an accomplice harbored the necessary *purpose*. They indicated that a "common *purpose* among two or more people to commit a crime need not be shown by direct evidence but may be inferred from circumstances surrounding the act and from defendant's subsequent conduct." Doc.12-7, Tr., PageID#2337-38 (emphasis added). They also said that "[c]riminal *intent* may be inferred from presence, companionship and conduct before and after the offense is committed," and that "mere presence can be enough if it is *intended* to and does aid the primary offender." *Id.* at PageID#2338 (emphases added). And the definition of "purposely" had made clear that "[p]urpose and intent mean the same thing." *Id.* at PageID#2327. These instructions left a clear impression that an aider and abettor had to purposely commit the crime.

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

"encouragement" or "incitement." While it might be theoretically possible for an aider and abettor to accidentally incite a murder, it is unlikely a lay jury would read this language that way.

More generally, the instructions' explanation of accomplice liability confirmed that such liability requires purpose. The instructions did not tell the jury that aiding-and-abetting liability and principal-offender liability were *different* crimes. They explained that the two were different ways to commit the *same* crime. *Id.* at PageID#2336 (noting that a defendant "may be convicted as a principal offender or as a complicitor or an aider and abettor to any or all counts"). The instructions thus would lead the jury to believe that the general definition for "murder"—"[b]efore you can find the defendant guilty of Murder, you must find that the State has proved beyond a reasonable doubt that . . . the defendant purposely caused the death of Marlon Jones," *id.* at PageID#2335—*applied* whether the defendant was the main culprit or the accomplice.

b. The Sixth Circuit mistakenly said the Warden did "not dispute that the trial court failed to instruct on the mens rea of complicity." Pet. App. 10a. The Warden noted that "the jury was advised that a defendant convicted of complicity to murder had to have acted purposely, that is, with an intent to kill." Br. of Appellant at 24, *Langford v. Warden*, Nos. 13-3855, 13-3857 (6th Cir. Dec. 20, 2013).

The Sixth Circuit next relied on the misplaced "purposely" for its view that the instructions did not convey that an aider and abettor must act with that intent. Pet. App. 10a-12a. It noted that the relevant sentence conflicted with Ohio's model instruction, and that the instruction's "purposely committing"

language unambiguously indicated that only the principal offender had to act with the required intent. This was wrong. For starters, that "the trial court deviated in part from [the] standard jury instruction" "is not a basis for habeas relief." *Estelle*, 502 U.S. at 71-72. In addition, for the reasons already noted, it is not at all clear that the "purposely" in the challenged sentence covered only the principal offender, rather than the aider or abettor. Finally, the Sixth Circuit made no effort to consider its technical reading of this sentence with "the charge as a whole," which repeatedly said that an accomplice had to act purposely or intentionally and *nowhere* hinted that aiding and abetting was a separate strict-liability crime. *Middleton*, 541 U.S. at 437.

2. The state courts could reasonably find no likelihood that the jury unconstitutionally applied the instructions

a. Even if some ambiguity remained in the charge, no "reasonable likelihood" exists that the jury read the challenged instruction in a manner that relieved the State of its burden to prove Langford's intent. *Boyde*, 494 U.S. at 380-81. As an initial matter, the parties and court *agreed* that accomplice liability required the accomplice to have the intent associated with the crime. Doc.12-6, Tr., PageID#2193. Yet nobody suggested that "purposely" in the challenged sentence failed to convey that intent—even though, as the dissent noted, defense counsel fixed a typo in that sentence. Pet. App. 31a-33a. An appellate attorney noticed this issue, but even he conceded it should be reviewed for plain error. Doc.7-1, Exs., PageID#182-83. Because the grammar debate "escaped notice on the record" until appeal, "the proba-

bility that it substantially affected the jury deliberations seems remote." *Henderson*, 431 U.S. at 155.

In addition, the parties' arguments would have confirmed that an accomplice must act purposely. As defense counsel suggested, the fact that Langford "may have learned" that others "had a beef does not make [him] guilty of aggravated murder or complicity." Doc.12-7, Tr., PageID#2274. He even suggested that knowledge was not enough: "Knowing what they were going to do is insufficient in the absence of some act to aid or abet them." *Id.* Similarly, when the prosecutor noted that Langford might have been "there to help his buddies" by acting as a lookout, he added that "criminal intent may be inferred from presence, companionship, and conduct, before and after the offense is committed." *Id.* at PageID#2306. He even directed the jury to that intent "instruction when you have it." *Id.* The prosecutor's suggestion that accomplice liability required "intent" clarified the meaning of any allegedly ambiguous instructions. This conclusion "is particularly apt when it is the *prosecutor's* argument that resolves an ambiguity in favor of the *defendant*." *Middleton*, 541 U.S. at 438.

Finally, neither the Sixth Circuit nor the district court identified any evidence suggesting that the jury could find that even though Langford provided affirmative assistance in the murder, he did so only *accidentally*. As the dissent noted, "there was no evidence at all to support conviction under a theory of accomplice liability where Langford, say, performed in a production of *Hamlet* and, thereby, unwittingly motivated Jones's shooter to take purposeful action and to avenge immediately the attack on Langford." Pet. App. 34a. Either Langford purposely participated in the murder or he did not—there was no support

for a middle position where he aided and abetted the murder but did so only accidentally.

b. The Sixth Circuit did not address this second due-process factor—whether the allegedly erroneous instruction created a "reasonable likelihood" that the jury applied the instructions unconstitutionally. *Boyde*, 494 U.S. at 380-81. Indeed, the Sixth Circuit did not identify the reasonable-likelihood test as the proper framework or cite *Boyde*. *Cf. Estelle*, 502 U.S. at 72 n.4 ("In *Boyde*, . . . we made it a point to settle on a single standard of review for jury instructions—the 'reasonable likelihood' standard—after considering the many different phrasings that had previously been used by this Court."). Instead, the Sixth Circuit immediately proceeded to the harmless-error question after concluding that the challenged sentence did not convey that an accomplice had to act purposely. Pet. App. 10a-17a. That, too, was error.

II. COMPELLING REASONS EXIST FOR THE COURT TO EXERCISE ITS CERTIORARI JURISDICTION AND CORRECT THE SIXTH CIRCUIT'S ERROR

For numerous reasons, the Court should exercise its discretionary jurisdiction to summarily reverse the Sixth Circuit's decision—or, at the least, grant certiorari and set the case for argument.

First, the Sixth Circuit's error equals—if not exceeds—errors that have led this Court to review decisions in similar cases. In recent years, the Court has summarily reversed a circuit court's grant of habeas relief that was based on: a state court's refusal to allow a defendant to put on alternative defenses, *Glebe v. Frost*, 135 S. Ct. 429 (2014); a state court's refusal to appoint counsel for post-trial proceedings, *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013); a prose-

cutor's belated request for an aiding-and-abetting instruction, *Lopez v. Smith*, 135 S. Ct. 1 (2014); a state court's refusal to allow evidence of a rape victim's prior accusations, *Nevada v. Jackson*, 133 S. Ct. 1990 (2013); and a prosecutor's improper arguments, *Parker v. Matthews*, 132 S. Ct. 2148 (2012). The state court's alleged error here—an adverb misplaced by five words—is not as substantial as the alleged constitutional errors in these other cases.

The Sixth Circuit's AEDPA error, by contrast, is more substantial. In many cases, for example, the Court has instructed circuit courts that they should *not* rely on their own precedent to identify the legal principles qualifying as "'clearly established Federal law, as determined by the Supreme Court.'" *Parker*, 132 S. Ct. at 2155 (quoting 28 U.S.C. § 2254(d)(1)); *Lopez*, 135 S. Ct. at 4; *Marshall*, 133 S. Ct. at 1450. Here, by contrast, the Sixth Circuit did not even have circuit precedent to fall back on. It had to *distinguish* that precedent—which had held that federal courts "may grant the writ based on errors in state jury instructions only in extraordinary cases." *Daniels v. Lafler*, 501 F.3d 735, 741 (6th Cir. 2007); Pet. App. 18a-19a (distinguishing *Daniels*). The Sixth Circuit failed to cite a single case granting federal habeas relief based on a state-law instructional error. This case thus involves a worse kind of error—granting relief not even supported by circuit cases.

In addition, many cases have "cautioned the lower courts . . . against 'framing [the Court's] precedents at . . . a high level of generality'" to make them appear like they "clearly establish" specific principles that they do not address. *Lopez*, 135 S. Ct. at 4 (quoting *Jackson*, 133 S. Ct. at 1994). Here, the Sixth Circuit said that "the state court decision is an

unreasonable application of Supreme Court law, even when viewing the jury instructions in their entirety, given the instructions' failure to include any language informing the jury about the required mens rea of complicity." Pet. App. 11a. But it cited the magistrate's Report, not a decision from this Court, for the point. *Id.* It did not clearly identify the specific case that barred a state court from reading a misplaced adverb to adequately convey state law. At most, the circuit identified the rule that a defendant has the right to have the jury decide every element of the crime. Pet. App. 7a (citing *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995)). But that rule is far too general to decide whether the instructions adequately identified all elements. *Cf. Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."). Indeed, although the Sixth Circuit cites AEDPA, Pet. App. 6a-7a., "it is not apparent how the Court of Appeals' analysis would have been any different without [it]," *Harrington,* 131 S. Ct. at 786.

Second, review would serve a significant purpose. In other contexts, the Court has taken cases to hold that a deferential direct-review standard becomes *doubly* deferential under AEDPA. Defendants, for example, face a difficult task when attempting to demonstrate ineffective assistance. *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). When conducted under AEDPA, review of an ineffective-assistance claim becomes "doubly" deferential. *Harrington*, 131 S. Ct. at 788. Defendants likewise face a difficult task to show that the evidence was constitutionally insufficient. *Cavazos v. Smith*, 132 S. Ct. 2, 3-4

(2011). When AEDPA applies, that standard becomes "twice-deferential." *Parker*, 132 S. Ct. at 2152.

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

Third, decisions from other circuits properly applying AEDPA's standards to similar jury-instruction claims illustrate that the Sixth Circuit's decision conflicts with the Court's precedent. The Second Circuit in *Jean v. Greene*, 523 F. App'x 744 (2nd Cir. 2013), for example, deferred to a state court's rejection of a jury-instruction claim in a way that the Sixth Circuit did not. The court there expressed doubt about whether it would have reached the same conclusion as the state court. *Id.* at 749. But it set those doubts aside because the state court's rejection of the claim was not unreasonable. *See id.* at 748-50. In doing so, it noted that "[t]he Supreme Court has consistently chastised the federal courts of appeal for failing to give proper deference to state court adjudications of habeas petitioners' claims." *Id.* at 749.

Similarly, the Third Circuit, relying on *Waddington*, rejected an ineffective-assistance claim tied to a jury instruction that may have miscommunicated the accomplice intent. *See Murry v. Diguglielmo*, ___ F. App'x ___, 2014 WL 5802108, *4 (3rd Cir. Nov. 10,

2014). It emphasized the need to defer to the state-court decision. *Id.* at *5-6. And it found that even though the petitioner's argument in support of his jury-instruction claim had "surface appeal," relief was unwarranted because the state court's decision was reasonable. *Id.* at *4-6.

The Seventh Circuit likewise deferred to a state-court decision when it rejected a claim that the trial court did not properly instruct a jury regarding accomplice intent. In *Garth v. Davis*, 470 F.3d 702 (7th Cir. 2006), it found that while the challenged jury instructions were "far from perfect," a state court was not "objectively unreasonable" in rejecting the petitioner's due-process claim. *Id.* at 712.

Fourth, the Sixth Circuit's decision does not simply overturn a minor offense. It overturns the most serious of offenses—murder. Pet. App. 2a. Harms to federalism, finality, and comity reach their apex when federal courts overturn such convictions. Particularly with respect to them, federal review "'disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington*, 131 S. Ct. at 787 (citation omitted). It should come as no surprise, then, that many of the Court's AEDPA reversals involved murder convictions. *See, e.g.*, *Lopez*, 135 S. Ct. at 2; *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013); *Metrish v. Lancaster*, 133 S. Ct. 1781, 1785 (2013); *Johnson v. Williams*, 133 S. Ct. 1088, 1092 (2013); *Parker*, 132 S. Ct. at 2149. The same respect for the State's sovereign interest to punish the worst of offenses is needed here.

Indeed, the State might be prejudiced by the retrial order. As this case's history shows, problems locating witnesses made it difficult to prosecute Langford the first time. Those same problems could make a retrial more difficult than in the average case. Nicole Smith has already proven hard to locate; her failure to appear led to the dismissal of Langford's first indictment. Pet. App. 2a. And locating the two other witnesses may be just as difficult. Both Isaac Jackson and Jason Arnold were in federal custody when they testified against Langford. At the time, Jackson had only 18 months remaining on his sentence. Doc.12-5, Tr., PageID#1938. He may be no longer in prison. Arnold also may be difficult to locate if he is no longer in federal custody.

III. THE PETITION AT LEAST SHOULD BE HELD FOR A PENDING HARMLESS-ERROR CASE

The Court should at least grant review of the Sixth Circuit's harmless-error analysis. The Sixth Circuit's decision implicates a question on which the Court has already granted review. Even when a constitutional error occurs, habeas relief is unwarranted unless the error had a "'substantial and injurious effect'" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (citation omitted). In *Ayala v. Wong*, 756 F.3d 656 (9th Cir. 2014), the Ninth Circuit found this *Brecht* standard met. *Id.* at 675-78. A dissent suggested that the court's *Brecht* analysis qualified as an "exceptionally non-deferential standard." *Id.* at 722 (Ikuta, J., dissenting from denial of rehearing en banc). When granting certiorari, the Court added the question "'[w]hether the court of appeals properly applied the standard articulated in

Brecht.'" *Chappell v. Ayala*, 135 S. Ct. 401 (2014). If *Chappell* clarifies *Brecht*, it would impact this case.

That is particularly so because the Sixth Circuit's harmless-error analysis was questionable. It initially asked the wrong question. When a charge omits an element, the harmless-error inquiry asks "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder v. United States*, 527 U.S. 1, 19 (1999). If so, the error is harmful. If not, the error is harmless.

Here, the Sixth Circuit did *not* consider that question—i.e., whether the evidence could support a finding that Langford assisted in the murder but did do so only negligently without intent to kill. Instead, it asked a different question—i.e., whether the jury likely found Langford guilty as the principal offender. Pet. App. 17a. Because the Sixth Circuit found that "the evidence was not great" that Langford was the principal offender, it found the error harmful. *Id.* This focus on the evidence supporting the alternative theory was improper; the focus should have been on whether the jury could conclude that Langford acted only accidentally in assisting with Jones's murder.

If, by contrast, the Sixth Circuit asked the correct question, it would have found the error harmless. As noted by the dissent—which did consider the right question—"there was simply no evidence that would have allowed the jury to convict Langford under a strict-liability conception of complicity." Pet. App. 34a. The jury would have concluded either (1) that Langford purposely assisted in the murder or (2) that Langford provided no assistance. It would not have reached a middle position that Langford helped, but only negligently. *Cf. California v. Roy*, 519 U.S. 2, 3

(1996) (noting that the district court had found an accomplice-intent instruction harmless because "no rational juror could have found that [the defendant] knew the confederate's purpose and helped him but also found that [the defendant] did not *intend* to help him.").

CONCLUSION

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

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
Deputy Solicitor
M. SCOTT CRISS
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@
ohioattorneygeneral.gov
Counsel for Petitioner
Mark Hooks, Warden

FEBRUARY 2015