No. 14-983

In the Supreme Court of the United States

MARK HOOKS, Warden,
Ross Correctional Institution,

Petitioner,

v.

MARK LANGFORD,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

During Mark Langford's murder trial, the complicity instruction stated that, to convict Langford, the jury must find that he "aided or abetted another in purposely committing the offense[] of . . . Murder." Doc.12-7, Tr., PageID#2337. Over a dissent, the Sixth Circuit granted habeas relief to Langford based on the most technical of state-law errors in this instruction—that it misplaced the adverb "purposely" by five words as compared to Ohio's model instruction and so allegedly failed to adequately communicate that Langford must have aided and abetted the murder with intent to kill. Pet. App. 12a. The Warden's petition showed that this Court should summarily reverse the Sixth Circuit's decision because the instructions and evidence as a whole unambiguously conveyed that Langford must have this intent.

The petition illustrated, among other things, that: (1) the Sixth Circuit's reading of "purposely" (that it applied only to the principal offender, not the accomplice) made the word superfluous because the instruction's "offense of murder" language *already* indicated that the principal offender had to act purposely; (2) instructions three paragraphs later detailed when an aider and abettor can have the criminal purpose, confirming that such a purpose was required; (3) Langford's trial counsel did not notice the misplaced adverb despite correcting a typo in the same sentence, which shows its lack of significance; and (4) the evidence suggested either that Langford *intentionally* participated in the murder or was not involved, with no room for the Sixth Circuit's middle position that Langford *accidentally* helped commit it.

Langford's opposition ignores these reasons why the Sixth Circuit erred. It instead simply assumes a negative answer to the critical question: Whether

the instructions, arguments, and evidence adequately conveyed that Langford must have harbored an intent to kill. The opposition thus does nothing to undermine the petition's two reasons why this Court should review (or summarily reverse) the Sixth Circuit's decision. *First*, the Sixth Circuit's decision conflicts *both* with this Court's cases detailing when a flawed state-law instruction violates federal due process *and* with its cases interpreting the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pet. 14-23. *Second*, additional factors confirm that the Court should exercise its discretion to reverse the decision below. Pet. 23-28.

I. LANGFORD CANNOT RECONCILE THE DECISION BELOW WITH THIS COURT'S CASES

The decision below conflicts with this Court's jury-instruction cases and with its AEDPA cases. The state court's denial of Langford's jury-instruction claim was a *correct*—not just a *reasonable*—application of the two-factor test for those claims. *See Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009); *Boyde v. California*, 494 U.S. 370, 380 (1990). As the petition noted, (1) the instructions *as a whole* unambiguously conveyed that Langford needed to purposely assist the murder, and (2) even if some ambiguity remained, the trial as a whole shows that no *reasonable likelihood* exists that the jury would have believed it could convict Langford without finding that necessary intent. Pet. 14-23. Langford's response both misstates the relevant legal principles and misapplies those principles to the facts here.

A. Langford's Efforts To Rejuvenate The Sixth Circuit's Legal Analysis Lack Merit

Langford's attempts to reconcile the Sixth Circuit's decision with this Court's cases fall flat. *First*, he notes that the Sixth Circuit recited "'the high bar that a petitioner must clear." Opp. 7 (quoting Pet. App. 17a-18a). But what matters is what the Sixth Circuit *did*, not what it *said*. *Harrington v. Richter*, 131 S. Ct. 770 (2011), for example, criticized the Ninth Circuit because, while that court had recited AEDPA's deferential test, it was unclear how the court's "analysis would have been any different without" that test. *Id.* at 786. It is likewise hard to imagine how the Sixth Circuit's analysis here would have been any different under direct review rather than AEDPA review. The Sixth Circuit considered whether the instructions were ambiguous without at all deferring to the state court's conclusion that, read as whole, they conveyed that intent. Pet. App. 10a-15a.

Second, Langford asserts that the Sixth Circuit's decision comports with the governing test for jury-instruction claims. Opp. 7. That test requires a petitioner to "'show that the instruction was ambiguous and that there was 'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Id.* (quoting *Sarausad*, 555 U.S. at 191). Yet the Sixth Circuit overlooked the second factor. Its decision nowhere even uses the words "reasonable likelihood." After finding the instruction ambiguous, Pet. App. 11a-15a, it immediately jumped to the harmless-error question, Pet. App. 15a-17a. That approach is irreconcilable with the Court's cases, which have adopted

"a single standard of review for jury instructions—the 'reasonable likelihood' standard." *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991).

Third, Langford raises the level of generality to prove this Court's "clearly established" law. He notes that the Court "requires a jury to find a defendant guilty of every element of the crime charged." Opp. 7 (citing *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995)). But that overly broad standard runs afoul of this Court's warning "against 'framing [the Court's] precedents at . . . a high level of generality'" to make them appear like they "clearly establish" specific principles they do not address. *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013)). And it begs the *relevant* question: Did the jury decide every element of the crime in this case? As shown below, no reasonably likelihood exists that the jury failed to do so.

B. In Applying This Court's Two-Factor Test, Langford Ignores All Evidence Against His Position

Langford repeatedly makes statements like "nowhere did the instruction state that the jury had to find that Langford *had to personally act with the purpose* to cause the death of another." Opp. 8; *id.* at 11, 13. Yet it was at least reasonable for the state courts to find that the instructions, when viewed as a whole, unambiguously conveyed that Langford had to purposely assist the murder. And, even if the instructions left some ambiguity, there is no reasonable likelihood that the jury applied them in a manner that relieved the State of its burden to prove his intent. *Boyde*, 494 U.S. at 380-81.

Ambiguity. Langford argues that the misplaced purposely told "the jury that to find Langford guilty as a complicitor or aider and abettor, they had to find Langford aided or abetted another, who purposely committed the offense of Murder." Opp. 8. But this reading—that the purposely applies only to the principal offender—makes the word superfluous. Pet. 18. Because "the offense of Murder" was *already* defined as requiring an offender to "purposely caus[e] the death of another," Doc.12-7, Tr., Page-ID#2331, the purposely in this accomplice instruction served no purpose if it applied only to the principal offender.

Regardless, no matter how the relevant aiding-and-abetting sentence should be grammatically diagramed, Langford discusses a single sentence and ignores the remaining instructions. Opp. 8-10. This is error. "'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 instructions three paragraphs later detailed when the jury could find that an accomplice harbored the criminal purpose. They indicated, among other things, 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). Langford has no response to these instructions, which also would have served no purpose if complicity were a strict-liability crime.

Langford also ignores other instructions reinforcing the requirement that the State prove accomplice intent. The instructions, for example, said that accomplice and principal-offender liability were two

ways of committing the *same* crime. *Id.* at PageID#2336 (A defendant "may be convicted as a principal offender or as a complicitor or an aider and abettor to any or all counts."). In light of that instruction, the jury would have understood that under *either* theory the State needed to prove that Langford "purposely caused the death of Marlon Jones." *Id.* at PageID#2335. The instructions also informed the jury that "[a]n aider or abettor is one who aids, assists, supports, encourages, cooperates with, advises, or incites another to comit [sic] a crime, and participates in the commission of the offense by some act, word, or gesture." *Id.* at PageID#2337. That instruction would have made clear that Langford could not be found guilty unless he was an *active* (not an *accidental*) participant.

All told, Langford's only response to the instructions as a whole is to repeatedly state—in the face of overwhelming contrary evidence—that the State was "relieved of its burden to prove each and every element beyond a reasonable doubt." Opp. 7. Saying so does not make it so. The entire instructions unambiguously conveyed that Langford must purposely commit the crime. At the least, the state courts could reasonably so find. AEDPA thus bars relief.

Reasonable Likelihood. Even if some ambiguity remained, Langford makes only a token attempt to excuse the Sixth Circuit's failure to cite the reasonable-likelihood test. According to him, it was sufficient that the Sixth Circuit noted its agreement with the magistrate, whose analysis cited that test. Opp. 11. Yet, even if an appellate court could outsource its responsibility to identify the specific cases from this Court that a state court unreasonably applied, the magistrate's analysis was mistaken. Like

Langford's opposition, that analysis ignores most of the factors showing that the trial as a whole would have led the jury to believe that it must find that Langford acted with an intent to kill. Pet. 21-23.

To begin with, if the misplaced adverb "so infected the entire trial that the resulting conviction violates due process," *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973), the lawyers or the trial court (all of whom agreed that intent was required) would have caught the error. But defense counsel never objected to the adverb's placement within the sentence, even though he corrected a typo in that sentence. Pet. App. 31a-33a. Because the adverb's placement "escaped notice on the record" until appeal, the likelihood it "substantially affected the jury deliberations seems remote." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

In addition, the evidence would have led the jury to a guilty verdict only if it found that Langford possessed the requisite intent. As the dissent said, "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. Langford's own statements to police show as much. He told the police that he helped the shooters obtain the guns, Doc.12-6, Tr., PageID#2083, and that he accompanied them while they shot at the victim and disposed of the guns, *id.* at PageID#2084-90. No evidence suggests that Langford accidentally assisted the murder.

Langford offers no responses to these failure-to-object and evidentiary points. Pet. 21-23. Instead,

he responds only to the petition's contention that the closing arguments also helped clear up any ambiguity. Opp. 10-11. Langford points out that the jury instructions came *after* the closing arguments, but fails to explain why that matters. *Middleton* placed no emphasis on (indeed, did not even identify) the sequencing of arguments and instructions when relying on the arguments to clarify the instructions. 541 U.S. at 438. Langford also notes that the prosecutor's arguments did not specifically say that he needed an intent to kill. Opp. 10. But those arguments *did* specifically highlight the very instructions discussing when an accomplice can have the necessary "criminal intent." Doc.12-7, Tr., PageID#2306.

II. Compelling Reasons Exist For The Court To Correct The Sixth Circuit's Error

The petition also showed that the conflict between the decision below and this Court's cases calls for the Court's intervention because (1) the error here rivals or exceeds errors in other cases that the Court has summarily reversed; (2) a reversal would make clear that a doubly deferential standard applies to jury-instruction claims like the one applicable to ineffective-assistance claims; (3) the Sixth Circuit's decision sits uncomfortably with out-of-circuit cases; and (4) Langford's conviction involved a serious crime (murder) and so AEDPA's concerns with comity and finality reach their apex. Pet. 23-28. Langford's responses on each point are mistaken.

First, Langford argues that the many cases in which this Court has summarily reversed a circuit court for failing to properly apply AEDPA are distinguishable on their facts. Opp. 11. Fair enough. But these cases show that the Court has been diligent

about intervening when federal courts overstep their bounds on collateral review. Indeed, the Court did so just weeks ago. *Woods v. Donald*, 135 S. Ct. 1372, 1378 (2015). These cases rebut Langford's claim that the petition is "hardly worthy of consideration by this Court" because it presents a fact-specific issue. Opp. 6. This case is no more fact-specific than those.

If anything, intervention is more appropriate here. The Sixth Circuit did not cite a single case from this Court granting relief on similar facts. Pet. App. 7a-19a. Further, unlike in other cases where the Sixth Circuit (improperly) relied on its own cases to fill this gap, the decision below was forced to *distinguish* its prior circuit cases, which had already limited relief for jury-instruction claims to "extraordinary cases." *Daniels v. Lafler*, 501 F.3d 735, 741 (6th Cir. 2007); Pet. App. 18a-19a. Instead, the Sixth Circuit relied on the *magistrate*'s decision for the claim that the state courts "violated Supreme Court law." Pet. App. 9a-10a. Langford says this was acceptable because the magistrate referenced this Court's cases noting that it is error for instructions to omit a required element. Opp. 12 (citing, among others, *Sandstrom v. Montana*, 442 U.S. 510 (1979)). But these citations "framed the issue at too high a level of generality." *Woods*, 135 S. Ct. at 1377.

Second, Langford argues that the Court should not "break new ground" by holding that courts should review jury-instruction claims rejected by state courts under a *doubly* deferential standard (as the Court has said for AEDPA review of ineffective-assistance and sufficiency-of-the-evidence claims). Opp. 12-13. The only reason he gives—that the trial court did in fact fail to instruct the jury on the purpose element, *id.*—again assumes the conclusion to

the question presented. Indeed, that Langford so cavalierly dismisses the state court's contrary decision reinforces the need for the Court to make this point: A federal court's review of a state court's decision rejecting a petitioner's jury-instruction claim must be "doubly" deferential under AEDPA. *Cf. Harrington*, 131 S. Ct. at 788.

Third, Langford distinguishes the petition's cited circuit cases denying relief for similar jury-instruction claims on the same ground—that none involved instructions omitting a necessary element. Opp. 13. But these cases all reiterate that federal courts should deny relief where, as here, the conclusion on that question is debatable. *See Garth v. Davis*, 470 F.3d 702, 712 (7th Cir. 2006) (denying relief despite instructions suggesting that a knowingly mens rea sufficed when specific intent was required); *Murray v. Diguglielmo*, 591 F. App'x 142, 147 (3d Cir. 2014) (denying relief despite instructions suggesting that the defendant could be committed of murder based on another person's intent); *Jean v. Greene*, 523 F. App'x 744, 749 (2d Cir. 2013) (denying relief despite erroneous instruction on beyond-a-reasonable-doubt standard).

Fourth, with respect to the serious nature of his conviction, Langford suggests that the petition engages in "utter speculation" about the potential difficulties of retrying him. Opp. 13-14. Yet there is no dispute that one witness, Nicole Smith, failed to appear at the first trial. Pet. App. 2a. And a federal inmate who testified, Isaac Jackson, indicated that he had only 18 months remaining in 2009. Doc.12-5, Tr., PageID#1938. So AEDPA's concerns for finality and comity are certainly relevant for whether the

Court should exercise its discretion to fix the Sixth Circuit's error in this case.

III. THE PETITION SHOULD AT LEAST BE HELD FOR THE DECISION IN *DAVIS V. AYALA*

The petition lastly explained that it should at least be held for a pending harmless-error case (*Davis v. Ayala*, No. 13-1428) because the Sixth Circuit engaged in questionable harmless-error analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Pet. 28-30. In response, Langford says the case need not be held for *Ayala* because the Sixth Circuit undertook a fact-bound application of the Court's harmless-error decisions. Opp. 14-15. He is mistaken.

The Sixth Circuit's decision was anything but "the exact analysis [it] was required to conduct." Opp. 14. When instructions omit 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). Langford identifies no evidence that could lead a rational jury to conclude that, while he aided and abetted the murder, he did so only accidentally. As the dissent noted, "there was simply no evidence that would have allowed the jury to convict Langford under a strict-liability conception of complicity." Pet. App. 34a. Yet the Sixth Circuit did not engage in this analysis. Langford admits this. He notes that it found the error harmful merely because he could have been convicted as an accomplice rather than as the principal offender. Opp. 14. It did not consider the evidence concerning the allegedly omitted element.

Regardless, the pending *Ayala* case asks how to properly apply this Court's harmless-error decisions

in the federal habeas context. The Court's answer will affect how lower courts apply its harmless-error precedent here and everywhere else. Thus, this case should at least be held for that one.

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

APRIL 2015