No. 14-983

IN THE SUPREME COURT OF THE UNITED STATES

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MARK HOOKS, WARDEN,

Petitioner,

v.

MARK LANGFORD,

Respondent.

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

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**PETITION FOR REHEARING**

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Respondent Mark Langford respectfully requests rehearing of the Court's order dated June 29, 2015, granting the petition for a writ of certiorari, vacating the judgment below, and remanding to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Davis v. Ayala*, 576 U.S. ___, 135 S. Ct. 2187 (2015). As explained below, *Ayala* does not invalidate the reasoning on which the Sixth Circuit based its holding in this case – namely, that the failure to instruct on an element of the offense was reversible error and the error was not harmless. Accordingly, this Court should grant the petition for rehearing, vacate the order granting certiorari, and enter an order denying the petition for certiorari.

**PROCEDURAL SUMMARY**

On July 18, 1995, Marlon Jones was shot and killed in Columbus, Ohio. Pet. App. 97a. A bullet fired from a .357 revolver caused Jones' death after striking him in the lower right back.

Doc. 12-5, Tr., PageID #2011–14, 2045. Crime scene detectives also located two rifle casings and a .25 auto shell casing from the scene. Doc. 12-4, Tr., PageID #1741–42, 1748–49.

On August 4, 1995, Respondent Mark Langford was charged in a multiple-count homicide indictment in the Franklin County, Ohio, Common Pleas Court in connection with Jones' death. Pet. App. 97a. On November 22, 1995, the case was dismissed because the State of Ohio claimed it was unable to locate Nichole Smith, an essential witness, and could not proceed without her. *Id.* More than thirteen years later, in October 2008, Langford was indicted for one count of aggravated murder with a firearm specification, and one count of murder with a firearm specification, again in connection with Jones' death. Pet. App. 98a.

This remarkably long delay from incident to indictment presented obvious difficulties for Langford's right to present a complete defense, as guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments, the Confrontation Clause, and Compulsory Process Clause of the Sixth Amendment. However, because his motion to dismiss due to pre-indictment delay was denied, Langford was forced to proceed to trial. *Id.*

At trial, the State presented Nichole Smith as a witness, and she indicated on direct examination that she recalled Langford possessing and shooting a handgun toward Jones and others who were standing on a porch located at 773 Fairwood Avenue. Pet. App. 103a; Doc. 12-4, Tr., PageID #1783–84, 1787–91. Smith also testified about two other individuals, Dontay Ellenwool and Curtis Stokes, shooting toward Jones, including one with a rifle. Doc. 12-4, Tr., PageID #1789–91. On cross-examination, however, Smith admitted to being interviewed by the Columbus Police Department detectives several times about this incident, and to sometimes giving them conflicting and false accounts of what really happened that night, even while under oath. Doc. 12-4, Tr., PageID #1805–30.

Two more witnesses for the State were Jason Arnold and Isaac Jackson, federal inmates who received sentence reductions for their cooperation and willingness to testify for the State. They testified that Langford confessed to them (while all three were serving federal time together) that he shot at Marlon Jones. Pet. App. 103a, 109a; Doc. 12-5, Tr., PageID #1848–1972.

Langford was acquitted on both firearm specifications and the aggravated murder charge, but convicted of two counts of murder. Doc. 12-8, Tr., PageID #2355–56. This conclusion indicates the jury believed Langford was guilty as a complicitor, rather than the principal offender who shot and actually killed Jones. After all, "no testimony establishe[d] that Langford fired the fatal shot." Pet. App. 104a. Accordingly, the trial court's jury instruction on complicity – which was given erroneously – is of paramount importance in this matter.

As a result of Langford's conviction, he is now serving a sentence of fifteen years to life imprisonment. Doc. 7-1, PageID #147–48. Langford unsuccessfully appealed his conviction to both the Ohio Court of Appeals for the Tenth District and the Ohio Supreme Court. Pet. App. 94a–110a.

After exhausting his remedies in the Ohio courts, on February 3, 2012, Langford filed a timely petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio, Eastern Division. The petition asserted five grounds for relief. Doc. 3, PageID #38–59. Relevant here is Langford's second ground for relief, which related to an erroneous jury instruction regarding complicity. Langford asserted relief was warranted because the trial court failed to instruct that an aider or abettor must have the same intent as the person who committed the crime.

On February 7, 2013, Magistrate Judge Terence P. Kemp's Report and Recommendation recommended granting relief on Langford's second ground for relief, and issuing a conditional writ of habeas corpus, directing the State of Ohio to retry Langford within 180 days, or release him from custody. Pet. App. 70a–81a.[1] The Magistrate acknowledged that language was omitted from the instructions requiring an aider or abettor to have the same intent as the person committing the crime. Pet. App. 74a. As a result, the jury instructions "did not make it clear to the jury that [Langford] could be convicted as an aider and abettor only if he acted with purposeful intent when he committed whatever act the jury might have concluded was done to aid and abet the murder of Marlon Jones." Pet. App. 74a–75a. The Magistrate found that the State court's decision was "not reasonable given the absence of any language in the jury instructions, even when viewed in their entirety, telling the jurors either that intent was an element of the aiding and abetting theory, or what that intent element was." Pet. App. 75a. Further, the Magistrate concluded, based on the facts of the case, that "[w]ithout the flawed instruction . . . there is a reasonable probability that [Langford] would not have been convicted." Pet. App. 79a–80a. The Magistrate also rejected any contention that the error was harmless because "the jury may well have convicted [Langford] of complicity, and if it did so, it could have, under the jury instructions given, found him guilty without concluding that the State had proved an element of that crime – purposeful intent – beyond a reasonable doubt." Pet. App. 80a.

[1] The Magistrate also found ground three and four to be procedurally defaulted, and found grounds one and five to be without merit. Pet. App. 53a–70a, 81a–92a. The District Court, and later the Sixth Circuit, agreed with the Magistrate regarding grounds one and five. Pet. App. 19a–29a, 37a–40a.

On June 25, 2013, District Court Judge Gregory Frost issued an Opinion and Order adopting the Magistrate's Report and Recommendation. Pet. App. 36a–45a. Regarding the second ground for relief, the District Court held:

> The 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. Further, in view of the facts of this case, and for the reasons detailed in the Magistrate Judge's *Report and Recommendation*, this Court cannot conclude that the error was harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Pet. App. 44a.

The Warden appealed to the United States Court of Appeals for the Sixth Circuit. On November 12, 2014, the Sixth Circuit affirmed the District Court in all respects. The Sixth Circuit held that the second ground warranted relief because "the trial court did not instruct the jury that conviction as an accomplice, under Ohio law, requires that the defendant have the same intent as the principal. As the magistrate judge correctly reasoned, this violated Supreme Court law." Pet. App. 9a.

Regarding the Warden's argument that the jury instructions, in their entirety, sufficiently instructed the jury on the mens rea element, the Sixth Circuit thoroughly examined the instructions and found "that there was nothing in the jury instructions to convey the principle that an accomplice need act with the same mens rea as the principal offender in order to be found guilty as a complicitor." Pet. App. 10a. This led the Sixth Circuit to agree with the Magistrate: "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.

The Sixth Circuit also rejected that the error was harmless. The Sixth Circuit noted how the Magistrate concluded that "'it is at least as likely, if not more so, that [the jury] convicted [Langford] as an aider and abettor.'" Pet. App. 17a (quoting Pet. App. 79a). Because the evidence was not "great" or "overwhelming" that Langford was the principal offender, the Sixth Circuit concluded that the failure to instruct on the mens rea of complicity "had a substantial influence in determining the jury's verdict." Pet. App. 17a.

On February 10, 2015, the Warden filed a petition for a writ of certiorari with this Court. After this Court requested a response, on April 3, 2015, Langford filed a brief in opposition, to which the Warden filed a reply on April 16, 2015. On June 29, 2015, this Court granted the petition for a writ of certiorari, vacated the judgment below, and remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Davis v. Ayala*, 576 U.S. ___, 135 S. Ct. 2187 (2015). Langford submits this timely petition for rehearing of the Court's decision.

## ARGUMENT

### THIS COURT'S DECISION IN *DAVIS V. AYALA* DOES NOT AFFECT THE HARMLESS ERROR ANALYSIS CONDUCTED BY THE SIXTH CIRCUIT.

In this case, this Court issued what is known as a GVR order, where the Court grants the certiorari petition, vacates the judgment below, and remands to the lower court in light of *Davis v. Ayala*, 576 U.S. ___, 135 S. Ct. 2187 (2015). The benefits of a GVR order are that it:

> [C]onserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the "[p]otential for unequal treatment" that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

*Lawrence v. Chater*, 516 U.S. 163, 167, 116 S. Ct. 604, 133 L.Ed.2d 545 (1996) (quoting *United States v. Johnson*, 457 U.S. 537, 556 n.16, 102 S. Ct. 2579, 73 L.Ed.2d 202 (1982)). Further, a GVR order is appropriate:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation . . . .

*Id.* However, a GVR order may be inappropriate "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court." *Id.* at 168.

In this case, Langford submits this matter should fall into the category where a GVR order is inappropriate because it will result in further delay and cost. The District Court granted Langford habeas relief more than two years ago in June, 2013. Remanding to the Sixth Circuit for consideration of *Ayala* will add perhaps another year because, no matter how the Sixth Circuit rules, either the Warden or Langford will undoubtedly petition for certiorari again with this Court.

Further, the Sixth Circuit fully considered whether the error here constituted harmless error, and the *Ayala* case did not strike new ground in the harmless error jurisprudence. A review of both *Ayala* and the Sixth Circuit's opinion below reveals that there is no reasonable probability that the Sixth Circuit rested its decision upon a premise that it would now reject in light of *Ayala*.

In *Ayala*, a trial judge allowed a prosecutor to explain, outside the presence of the defense, the basis for using peremptory strikes on prospective jurors in response to the defense *Batson* challenges. *Ayala*, 135 S. Ct. at 2193. On direct appeal, the California Supreme Court concluded that it was error for the trial court to bar the defense from the hearing, but that the

error was harmless under both state law and as a matter of federal law. *Id.* at 2195. During habeas proceedings, the District Court found that the California Supreme Court's finding of harmlessness could not be overturned under AEDPA. *Id.* at 2196. However, the Ninth Circuit granted habeas relief, and stated that it would apply the test set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L.Ed.2d 353 (1993), but without regard for the state court's harmlessness determination. *Ayala*, 135 S. Ct. at 2196. The Ninth Circuit concluded "that the absence of Ayala and his counsel had interfered with the trial court's ability to evaluate the prosecution's proffered justifications for those strikes and had impeded appellate review, and that the loss of the questionnaires had compounded this impairment." *Id.* at 2197.

After granting certiorari, this Court began by stating that habeas "relief is proper only if the federal court has 'grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 2197–98 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L.Ed.2d 947 (1995)). This Court found incorrect the Ninth Circuit's determination that a state court's harmlessness determination had no significance under *Brecht*. *Id.* at 2198 (citing *Fry v. Pliler*, 551 U.S. 112, 127 S. Ct. 2321, 168 L.Ed.2d 16 (2007)). This Court stated "that the *Brecht* standard 'subsumes' the requirements that § 2254(d) imposes when a federal habeas petitioner contests a state court's determination that a constitutional error was harmless under [*Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)]." In other words, "a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA." *Ayala*, 135 S. Ct. at 2199.

This Court required Ayala "to show that he was actually prejudiced . . . , a standard that he necessarily cannot satisfy if a fairminded jurist could agree with the California Supreme

Court's decision that this procedure met the *Chapman* standard of harmlessness." *Ayala*, 135 S. Ct. at 2199. This Court ultimately concluded that Ayala could not meet this burden, finding that "five justices of the California Supreme Court carefully evaluated the record and found no basis to reverse," and that "[t]he exclusion of Ayala's attorney from part of the *Batson* hearing was harmless error." *Id.* at 2208.

In *Ayala*, this Court did not change the harmless-error standard for habeas cases. Instead, this Court merely found the Ninth Circuit erred because "[t]here [was] no basis for finding that Ayala suffered actual prejudice, and the decision of the California Supreme Court represented an entirely reasonable application of controlling precedent." *Id.* at 2208.

Similarly, the Sixth Circuit's opinion in this case represented an entirely reasonable application of controlling precedent. Procedurally, Langford's case is different than *Ayala* because the state court **found no error; thus, the state court never addressed harmlessness**. Accordingly, the Sixth Circuit did not have to consider the state court's harmless error analysis as there was none. Instead, the Sixth Circuit began its analysis of harmless error by citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999), *California v. Roy*, 519 U.S. 2, 117 S. Ct. 337, 136 L.Ed.2d 266 (1996), and *O'Neal v. McAninch*, 513 U.S. 432, 115 S. Ct. 992, 130 L.Ed.2d 947 (1995). Pet. App. 15a. The Sixth Circuit also indicated that the omission of an element in a jury instruction is not harmless error, and relief is warranted, where grave doubt exists regarding whether the error had a substantial and injurious effect or influence in determining the jury's verdict. *Id.* (citing *O'Neal*, 513 U.S. at 436 (quoting *Brecht*, 507 U.S. at 637)). The Sixth Circuit then distinguished *Neder* because, unlike in *Neder*, in this case, the omitted instruction on complicity "is neither uncontested nor supported by overwhelming evidence." Pet. App. 16a. The Sixth Circuit continued that, because "[t]he evidence at trial, if

anything, [was] more consistent with a theory of accomplice liability than principal liability," "[t]he failure to instruct on mens rea of complicity . . . had a substantial influence in determining the jury's verdict." Pet. App. 17a. This is the exact analysis the Sixth Circuit was required to conduct. *Ayala*, 135 S. Ct. at 2197–98 ("[R]elief is proper only if the federal court has 'grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict.'" (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L.Ed.2d 947 (1995))).

In this case, the jury clearly rejected that Langford was a principal offender. The State's theory was that he was one of three shooters. The jury, however, rejected that theory because they acquitted Langford of the firearm specification. The State's alternate theory was that Langford aided and abetted the principals. Since the jury was never told if Langford was an aider and abettor, he had to have the same intent as the principals, the error was the reason Langford was convicted. Because complicity was the heart of the State's case, and the instruction on complicity was defective, the error cannot be considered harmless.

The Sixth Circuit's analysis set forth the correct standard, and applied that standard to the facts of the case. Nothing from *Ayala* changes this because the state courts never applied the harmless error analysis. Accordingly, it would be a waste of time and resources to remand this case to the Sixth Circuit. Instead, certiorari should have been denied under the unique facts of this case.

## CONCLUSION

The Court should grant the petition for rehearing, vacate the order granting certiorari, and enter an order denying the petition for certiorari.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

The undersigned hereby certified that this Petition for Rehearing is presented in good faith and not for delay.

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