

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID MATHIAS,
PETITIONER,

- VS. -

KATHY BRITTAIN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION,
FRACKVILLE, ET AL.,
RESPONDENTS.

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

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QUESTION PRESENTED

Whether lower courts may decline to treat precedent of this Court as “clearly established Federal law” under 28 U.S.C. § 2254(d) if, without citing that precedent, this Court has reached a different result in a subsequent *per curiam* opinion.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

David Mathias;

Superintendent, State Correctional Institution Frackville;

Attorney General of Pennsylvania.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David Mathias respectfully asks that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, *Mathias v. Superintendent Frackville SCI*, 876 F.3d 462 (3d Cir. 2017), is appended as Appendix A. The opinion of the United States District Court for the Eastern District of Pennsylvania, *Mathias v. Collins*, No. 13-2002, 2014 WL 5780834 (E.D. Pa. Nov. 5, 2014), is appended as Appendix B. The state appellate court opinion, *Commonwealth v. Mathias*, No. 2297 EDA 2011 (Pa. Super. Ct. Oct. 25, 2012), is appended as Appendix C.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(a). The Third Circuit issued its opinion on November 20, 2017. App. A1. On February 12, 2018, this Court extended the time for filing a petition for a writ of certiorari to March 20, 2018. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and the Fourteenth Amendments to the United States Constitution. The Sixth Amendment provides, in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the assistance of counsel for his defense.” The due process clause of the Fourteenth Amendment provides, in relevant part, “No State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT OF THE CASE

Mr. Mathias was convicted of first degree murder and received a mandatory sentence of life imprisonment without parole for a homicide in which his co-defendant fired the fatal shots. At the time of the offense he had no criminal record. The prosecution’s theory of the first degree murder charge was accomplice liability. At the trial, the jury heard an erroneous accomplice liability instruction fourteen times. The court instructed the jurors eight times that they could find specific intent for first degree murder based upon the mental state of Mr. Mathias “or his alleged accomplice.” During the instructions for the lesser-included offenses—second degree and third degree murder and aggravated assault—the court instructed the jury six more times that it could convict Mr. Mathias as an accomplice based on his mental state or that of his accomplice. The district court granted habeas relief, holding that the errors violated due process and appellate counsel was ineffective for failing to raise the issue. The Third Circuit vacated the grant of relief.

There is no dispute that the instructions misstated Pennsylvania law, which requires a jury finding of the defendant's specific intent in order to find him guilty of first degree murder on an accomplice liability theory.¹ The errors pervaded the charge as a whole: the error occurred eight times in the instruction for first degree murder, five times in the instruction for second degree and third degree murder, and one time in the instruction for aggravated assault. In the instruction for conspiracy to commit first degree murder, the trial court referred back to its prior first degree murder instruction, thus re-incorporating the error. Although the trial court twice gave a correct description of accomplice liability in its "plain English" preface to the formal instruction, during that introduction the trial court also repeatedly told the jury, "This is still not my formal charge." In addition, the "plain English" introduction occurred before the jury heard the fourteen erroneous statements of accomplice liability.

Defense counsel objected, but the trial court denied making the errors, and overruled the objections. Appellate counsel failed to raise this issue on direct appeal.

After appointed post-conviction counsel filed a no-merit letter, Mr. Mathias filed a *pro se* amendment to his state post-conviction petition. He raised this issue as a due process claim and as a claim of ineffective assistance of appellate counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The Pennsylvania Superior Court addressed the claim of ineffective assistance of appellate counsel for failing to challenge the accomplice liability instruction for first degree murder. App. C, 15-17. The court gave two reasons for affirming the denial of relief. First, the jury was twice instructed that it was required to find that Mr. Mathias had specific intent to kill.² Second, the jury found him guilty of conspiracy to commit first degree murder, which required a

¹ Likewise, a jury finding of the defendant's individual *mens rea* is required for an accomplice liability conviction for second degree and third degree murder and aggravated assault.

² The two instances of putatively correct instruction both occurred during the "plain English" preface to the jury charge.

finding of specific intent to kill. App. C, 16-17. Thus, the court concluded, Mr. Mathias cannot show prejudice, because he “cannot establish that the jury convicted him of first degree murder without finding that he had the requisite specific intent to kill.” App. C, 17. The Superior Court did not address the due process issue.³

In his *pro se* habeas corpus petition, Mr. Mathias raised the instructional errors as a claim of ineffective assistance of appellate counsel and as a due process claim. The district court granted relief on both grounds, holding that appellate counsel was ineffective for failing to raise the preserved issue, the state court decision was an unreasonable application of clearly established federal law, and the instructions violated due process. App. B, 24, 26.

The Third Circuit reversed the district court’s grant of relief. On the ineffective assistance of counsel issue, the Third Circuit concluded that the state court’s adjudication of the *Strickland* prejudice prong was not an unreasonable application of clearly established federal law. App. A, 26-28. The Third Circuit reasoned that *Francis v. Franklin*, 471 U.S. 307 (1985), a case relied upon by Mr. Mathias, is rendered “less than clearly established” by a subsequent Supreme Court case, *Middleton v. McNeil*, 541 U.S. 433 (2004), and therefore the holding of *Francis* is no longer “clearly established federal law” for the purposes of the Section 2254(d) analysis. App. A, 27-28. On the due process claim, the Third Circuit held that the district court erred in granting relief for the same reason as above, reasoning that *Francis* is not “clearly established federal law,” and because the due process violation was harmless. App. A, 29-32.

Mr. Mathias petitioned for panel and *en banc* rehearing. Both were denied, but the Third Circuit issued an amended precedential opinion, correcting two errors raised in the rehearing

³ The Third Circuit held that the Superior Court addressed the due process issue “within its discussion of the ineffective-assistance-of-counsel claim,” and thus it was adjudicated on the merits. App. A, 30.

petition. Those errors did not affect the outcome and are not related to the question presented here. Likewise, the question presented does not implicate the Third Circuit's disposition of Mr. Mathias's cross-appeal.

REASONS FOR GRANTING THE PETITION

- I. The lower courts may not decline to treat precedent of this Court as “clearly established Federal law” under 28 U.S.C. § 2254(d) if, without citing that precedent, this Court has reached a different result in a subsequent *per curiam* opinion.**

In this case, the Third Circuit hinged its reversal of relief on the conclusion that a subsequent Supreme Court decision, *Middleton v. McNeil*, rendered a prior Supreme Court decision, *Francis v. Franklin*, “less than ‘clearly established.’” App. A, 27 (describing the “divergence” between the cases as “outcome determinative”).⁴ Because only the Supreme Court can overrule its precedent and in any event *Middleton* does not call *Francis* into question, because permitting lower federal courts to thus define “clearly established federal law” would inject uncertainty into myriad proceedings, and because the state court decision in this case is an unreasonable application of *Francis* and the long line of due process precedent addressing jury instruction errors, certiorari should be granted.

- A. This Court alone has the prerogative to overrule its precedent; in the habeas context, permitting lower courts to read an earlier opinion as implicitly overruled or qualified would create confusion in the state courts.**

- 1. This Court alone may overrule its precedent.**

“[I]t is this Court’s prerogative alone to overrule one of its precedents.” *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997))) (internal quotation marks omitted). In *Bosse*, a habeas case, the state appellate court had concluded that *Payne v. Tennessee*, 501 U.S. 808 (1991), “implicitly overruled” part of the holding of *Booth v. Maryland*, 482 U.S. 496 (1987). Although *Payne* did abrogate *Booth* in part, the decision “specifically acknowledged its

⁴ The opinion acknowledged that the Third Circuit had relied upon *Francis* in a precedential opinion just a few months earlier. See *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 240-41 (3d Cir. 2017).

holding did not address” the aspect of *Booth* at stake in the Oklahoma case. *Bosse*, 137 S. Ct. at 2. Thus, as this Court made clear, the state appellate court “was wrong to go further and conclude that *Payne* implicitly overruled *Booth* in its entirety.” *Id.*

This Court specifically cautions against lower courts determining that its precedent has been overruled by implication:

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”

Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). One year later, this Court again reminded the lower federal courts: “Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.” *Hohn v. United States*, 524 U.S. 236, 252-53 (1998).

2. Habeas relief is limited to unreasonable or contrary applications of clearly established federal law.

The statutory scheme governing habeas corpus, enacted in the Anti-Terrorism and Effective Death Penalty Act (AEDPA), “recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights.” *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013). Respect for state courts and their adjudication of constitutional issues in state criminal proceedings is the core principle of 28 U.S.C. § 2254(d). Under the statute, a federal court may grant habeas relief on a claim that was adjudicated on the merits in state court only if the state decision 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).

“Clearly established Federal law . . . refers to the holdings, as opposed to the dicta, of this Court’s decisions.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). The statutory requirement “reflect[s] a ‘presumption that state courts know and follow the law.’” *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). The clause “requires federal courts . . . to measure state-court decisions against th[e Supreme] Court’s precedents as of the time the state court renders its decision.” *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)).⁵

3. Permitting lower courts to read Supreme Court precedent as overruled or qualified and no longer “clearly established,” when this Court has not done so itself, would create confusion in the state courts.

A federal habeas court may not extend clearly established federal law beyond the holdings of Supreme Court precedent. *See, e.g., Metrish v. Lancaster*, 133 S. Ct. 1781, 1784-85 (2013) (reversing grant of habeas relief where it relied on Supreme Court precedent that “bears scant resemblance to this case”); *Renico v. Lett*, 559 U.S. 766, 779 (2010) (reversing grant of habeas relief, because it was based on a principle “nowhere established” in the relevant Supreme Court precedent). Similarly, a federal habeas court may not eliminate from consideration a holding of this Court that has not been overruled. In addition, state courts necessarily remain bound by this Court’s holdings, even where this Court has overruled other aspects of a case. *Bosse*, 137 S. Ct. at 2 (the state appellate court “was wrong to go further and conclude that *Payne* [*v. Tennessee*] overruled *Booth* [*v. Maryland*] in its entirety”).

⁵ One of the reasons Congress enacted AEDPA was to limit federal habeas review to legal precepts that were binding on the state courts at the time they ruled. *See* 139 Cong. Rec. S15813 (Nov. 17, 1993) (Sen. Hatch) (“it is not fair to the States to change the rules of the game via habeas review when the state correctly applied the law as it existed at the time of trial”).

Here, the Third Circuit held that a precedent of this Court had been implicitly overruled or qualified, although this Court has not held as much, and that the precedent no longer qualifies as clearly established federal law. Such a rule undermines the purpose of the Section 2254(d)(1) requirement. As set forth above, the habeas statute presumes that state courts ably apply this Court's precedent, and that relief is required only in the unusual case where that presumption fails. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (describing habeas as “a guard against extreme malfunctions in the state criminal justice systems”). But under the rule set out by the Third Circuit, state courts would not know which undisturbed Supreme Court holdings remain clearly established, and which holdings may have been implicitly “called into question.” In the AEDPA framework, which places the primary responsibility for adjudicating constitutional claims upon state courts, and focuses “review under Section 2254(d)(1) on what a state court knew and did,” *Pinholster*, 563 U.S. at 182, injecting uncertainty into the question of what constitutes clearly established federal law would be unfair to the state courts, and lead to inconsistent outcomes. Federal courts, in turn, would face a foggy landscape of Supreme Court precedent—some clearly established, some not—against which to analyze state court decisions.

B. Because the repeated instructional errors at Petitioner's trial implicate due process and because the state court decision was an unreasonable application of this Court's due process precedent, the decision of the court below was wrong.

The Third Circuit wrongly decided that *Middleton* calls *Francis* into question, and that as a result of this “tension,” the Pennsylvania Superior Court decision was not an unreasonable application of clearly established federal law.

1. This Court's due process precedent for jury instruction errors.

This Court's line of precedent addressing when errors in jury instructions violate due process extends from *Stromberg v. California*, 283 U.S. 359 (1931), through *In re Winship*, 397

U.S. 359 (1970), to *Waddington v. Sarausad*, 555 U.S. 179 (2009). *Francis* falls squarely within that line of precedent, which clearly establishes the following principles for reviewing jury instruction errors:

- 1) “[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged,” *In re Winship*, 397 U.S. at 364; *see also Francis*, 471 U.S. at 309 (due process requires “that the State prove every element of a criminal offense beyond a reasonable doubt”);
- 2) To determine whether an erroneous intent instruction violates due process by relieving the state of the burden of proof, it “must be considered in the context of the charge as a whole,” *Francis*, 471 U.S. at 309, 315; *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *Estelle v. McGuire*, 502 U.S. 62, 72-73 (1991);
- 3) The charge as a whole is reviewed for a reasonable likelihood that the jury applied the challenged instruction in such a manner so as to relieve the state of the burden of proof. *Estelle*, 502 U.S. at 72-73; *Boyde v. California*, 494 U.S. 370, 380 (1990).

2. *Francis* is a straightforward application of due process precedent.

As this Court has explained, *Francis v. Franklin* “was merely an application of the principle that governed our decision in *Sandstrom v. Montana*. ” *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988) (holding that *Francis* is not retroactive, because it does not establish a new rule of constitutional law). That conclusion was based on the explicit reliance in *Francis* on the earlier precedent:

“*Sandstrom v. Montana* made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution. Today we reaffirm the rule of *Sandstrom* and the wellspring due process principle from which it was drawn.”

Yates, 484 U.S. at 217 (quoting *Francis*, 471 U.S. at 326-27) (internal citations omitted).

In *Francis*, this Court held that the contradictory instructions regarding intent in that case, which were not corrected or explained to the jury, created a reasonable likelihood of an unconstitutional conviction:

The Court today holds that contradictory instructions as to intent -- one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion -- create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility.

Francis, 471 U.S. at 322 n. 8 (relying upon *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979), and *Stromberg v. California*). That is the holding of *Francis* relevant to this case, and it is consistent with this Court’s long line of due process precedent holding that jury instruction errors in the prosecution’s burden of proof violate due process when there is a reasonable likelihood the jury understood the instruction in a way that reduces the prosecution’s burden.

3. *Boyde* does not affect the key holding of *Francis*.

A later Supreme Court decision, *Boyde v. California*, 494 U.S. 370 (1990), arguably overruled one aspect of *Francis*: its language that due process is violated when a reasonable jury “could have understood” the errors to relieve the state of the burden of proof. Importantly, though, the question before this Court in *Boyde* was how to define the standard, consistently articulated in longstanding precedent and expressly applied in *Francis*, that due process is violated when instructional errors “create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner.” *Francis*, 471 U.S. at 322, n.8. *Boyde* did not revisit that question. Instead, it asked how courts define “reasonable likelihood.” As this Court explained:

In this case we are presented with a single jury instruction. The instruction is not concededly erroneous, nor found so by a court, as was the case in *Stromberg v. California*, 283 U.S. 359 (1931). The claim is that the

instruction is ambiguous and therefore subject to an erroneous interpretation. We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. . . . This “reasonable likelihood” standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical “reasonable” juror could or might have interpreted the instruction.

Boyde, 494 U.S. at 378-380 (distinguishing *Francis*, which asked the question “what a reasonable juror could have understood”). Thus, the Supreme Court in *Boyde* expressly rejected defining reasonable likelihood as whether a juror “could have understood” the instruction incorrectly. Instead, courts must examine, in the context of the charge as a whole, whether there is a reasonable likelihood the jury applied the erroneous instruction(s) in an unconstitutional way. *Boyde*, 494 U.S. at 380.

Boyde does not disturb *Francis*’s core holding that “contradictory instructions as to intent -- one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion -- create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility.” *Francis*, 471 U.S. at 322 n.8 (emphasis in original). The continued reliance of the lower courts on *Francis* for this proposition shows that it remains good law. See, e.g., *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 241 (3d Cir. 2017) (erroneous instruction violated due process despite correct general instruction, because the correct instruction “merely contradicts and does not explain the defective language,” relying upon *Francis*); *Owens v. McLaughlin*, 733 F.3d 320, 326 (11th Cir. 2013) (erroneous instruction violated due process, despite other correct instruction, because an instruction that “does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity,” quoting *Francis*); *Hanna v. Ishee*, 694 F.3d 596, 622 (6th Cir. 2012) (instructional error distinguished

from *Francis*, because the error at Hanna’s trial was not as to intent, and the overall instructions were curative, again distinguishing *Francis*); *Cotts v. Osafo*, 692 F.3d 564, 568 (7th Cir. 2012) (erroneous burden of proof instruction not cured by another correct instruction, because the error was repeated and the “more general instruction did not ‘dissipate the error in the challenged . . . instruction’”) (quoting *Francis*); *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1159–60 (10th Cir. 2012) (erroneous burden of proof instruction was prejudicial, despite trial court’s correct statements “both before and after the challenged instruction,” because in context, “the correct portions of the instructions simply conflict with the erroneous portion without shedding further light upon it,” citing *Francis*); *Torres v. Dubois*, 174 F.3d 43, 46 (1st Cir. 1999) (*Francis* is clearly established federal law, but petitioner not entitled to relief, because challenged instruction did not relieve the prosecution of the burden of proof).

4. This Court’s *per curiam* decision in *Middleton* does not implicate *Francis*.

Middleton v. McNeil, a short *per curiam* opinion, does not mention *Francis* at all and does not overrule *Francis* expressly or by implication. The legal issue in *Middleton* was a single error in the instruction for imminent peril, part of the imperfect self-defense instruction. That error did not relieve the state of the burden to prove an element of the offense, in contrast to the error in both *Francis* and in Mr. Mathias’s trial. The Ninth Circuit had held in *Middleton* that a single error in the imminent peril instruction, despite multiple correct statements of the same instruction in the charge, violated due process and that the state court was unreasonable to conclude otherwise. *Middleton*, 541 U.S. at 436-37. This Court explained that the legal standard is “whether there is a ‘reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” *Id.* (quoting *Estelle*). Holding that the state court did not unreasonably apply that standard in concluding there was no due process violation, this Court

summarily reversed. *Id.* at 437-48 (“Given three correct instructions and one contrary one, the state court did not unreasonably apply federal law when it found that there was no reasonable likelihood the jury was misled.”).

The outcome in *Middleton* is best explained that in the context of the charge as a whole, the single error in the imperfect self-defense instruction, which did not implicate the prosecution’s burden of proof, did not raise a reasonable likelihood that the jury applied the instructions in an unconstitutional manner.

After *Middleton*, lower courts have continued to rely expressly upon *Francis* in adjudicating instructional errors in the context of other correct instructions. This also shows that *Middleton* did not overrule *Francis*. Since *Middleton* was decided, at least six courts of appeals have relied upon *Francis* in adjudicating instructional errors in the context of other correct instructions. *See, e.g., Hall v. Haws*, 861 F.3d 977, 990 (9th Cir. 2017); *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 241 (3d Cir. 2017); *Owens v. McLaughlin*, 733 F.3d 320, 326 (11th Cir. 2013); *Hanna v. Ishee*, 694 F.3d 596, 620 622 (6th Cir. 2012) (relying upon *Middleton*); *Cotts v. Osafo*, 692 F.3d 564, 568 (7th Cir. 2012); *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1159–60 (10th Cir. 2012). Only one of these decisions, *Hanna*, mentions *Middleton*; it is cited for the uncontroversial proposition that a jury instruction violates due process if it fails to give effect to the state’s burden to prove every element of the offense.

For all of these reasons, *Middleton* does not change the due process standard.

5. In this case, there is a reasonable likelihood the jury applied the instruction unconstitutionally.

Mr. Mathias’s jury heard eight errors as to accomplice intent in the first degree murder instruction, six additional errors regarding the standard for accomplice intent in the instructions for the lesser-included offenses, and only two correct statements in the trial court’s introduction

to the charge, which the judge described as “not my formal charge.” Here, the number of errors—more errors than in any case counsel has encountered, the repetition throughout the charge, and the fact that the errors reduced the prosecution’s burden of proof for the defendant’s intent create a reasonable likelihood the jury applied the instructions unconstitutionally.

6. The Pennsylvania Superior Court’s decision was an unreasonable application of clearly established federal law.

The Superior Court’s decision in this case was an unreasonable application of this Court’s due process precedent. Here, in the context of the jury charge as a whole, there is a reasonable likelihood that the jury convicted Mr. Mathias of first degree murder without finding that he had the specific intent to kill. The accomplice liability instructions were erroneous, inviting the jury to convict on the basis of Mr. Mathias’s intent or that of his accomplice, and the error’s incessant repetition pervaded the charge on the first degree murder count and on the other offenses. The Superior Court’s conclusion that the two correct statements of accomplice liability in the trial court’s “preface” to its formal instructions outweigh the subsequent fourteen instances when the jury was told a conviction could be based on the intent of Mr. Mathias “or” his accomplice is an unreasonable application of this Court’s due process precedent. Here, there is a reasonable likelihood the jury misunderstood the charge. The Superior Court’s conclusion otherwise is an unreasonable application of *Estelle v. McGuire*, *Francis*, and *Sandstrom v. Montana*.

In addition, the Superior Court applied *Strickland* and the due process precedent in its analysis of the appellate ineffectiveness claim, requiring Mr. Mathias to show “actual prejudice” by “establish[ing] that the jury convicted him of first degree murder without finding that he had the requisite specific intent to kill.” App. C, 16-17. The *Strickland* prejudice standard requires only a reasonable probability of a different outcome; here, it requires a reasonable probability

that raising the due process issue on direct appeal would result in a different outcome. The due process standard, as discussed at length above, does not require a petitioner to “establish” that the jury convicted without finding specific intent. App. C, 16-17. Instead, it requires a reasonable likelihood that the jury applied the erroneous instructions unconstitutionally. For these reasons as well, the state court decision was an unreasonable application of clearly established federal law, and the Third Circuit was wrong to conclude otherwise.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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