No. 18-5079

In the Supreme Court of the United States

MICHELLE LYN MICHAUD,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether a jury instruction used in this case to define aider-and-abettor liability, stating that all persons who are involved in committing or attempting to commit a crime are "equally guilty," violated the Fifth, Sixth, and Fourteenth Amendments by removing the prosecution's burden of proving all elements of the charged offenses beyond a reasonable doubt.

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STATEMENT

1. Over the course of several months in 1997, petitioner, Michelle Michaud, and James Daveggio together planned and committed sexual assaults targeting six young female victims. Their sexually predatory activities culminated in the kidnapping, rape by instrument, and murder of Vanessa Samson. These crimes are briefly summarized here, but are recounted in more detail in the California Supreme Court's decision. *See* Pet. App. B6-B23.

In September 1997, Michaud brought home Christina Doe, a 13-year-old friend of Michaud's daughter, Rachel. Pet. App. B6. Michaud drugged Christina, forced her to undress, and led her to a bedroom where Daveggio orally and digitally copulated her. *Id.* at B7. Michaud attempted to force Christina to orally copulate Daveggio. *Id.* Daveggio then raped Christina. *Id.*

A few weeks later, Michaud and Daveggio abducted and sexually assaulted Aleda Doe, a 20-year-old student, while she was walking home from night school. Pet. App. B8-B9. Daveggio emerged from a van that stopped alongside Aleda and pulled her inside. *Id.* at B8. Daveggio groped and sexually assaulted Aleda. *Id.* Daveggio asked Michaud, who was driving, if they should continue with their "plan." *Id.* at B8-B9. Michaud exited the freeway and told Aleda to get out. *Id.* at B9.

The duo next sexually assaulted Michaud's 13-year-old daughter, Rachel, during a road trip. Pet. App. B9. Michaud digitally copulated Rachel

while Daveggio held her down, then Daveggio orally copulated her. *Id.* at B9-B11. At a motel, they duct-taped Rachel's mouth and hands and Daveggio orally copulated Rachel a second time. *Id.* at B11.

In early November 1997, Michaud and Daveggio sexually assaulted Amy Doe. Pet. App. B12-B13. Michaud drove Amy to a motel under the guise of wanting to talk about her relationship woes. *Id.* at B12. At the motel, Amy was hit in the head with what she believed was a gun. *Id.* Daveggio then handcuffed one of her hands and punched her in the face. *Id.* After someone cuffed her other wrist, Amy felt a gun to her head, heard a click, and heard Daveggio say, "Damn, it jammed." *Id.* Michaud blindfolded Amy, cut off her shirt and bra, pulled off the rest of her clothing, and orally copulated Amy. *Id.*

On November 3, 1997, Michaud and Daveggio sexually assaulted Sharona Doe, a friend of Daveggio's daughters. Pet. App. B13. Michaud and Daveggio arrived at Sharona's workplace and lured Sharona inside their van to take drugs. *Id.* As soon as Sharona got into the van, Michaud pushed her down. *Id.* Daveggio hit and handcuffed her. *Id.* at B13-B14. While Michaud drove the van to a new location, Daveggio ordered Sharona to orally copulate him and she complied, crying. *Id.* at B14. Michaud eventually drove the van to a residential area, parked, and moved to the back seat. *Id.* She removed Sharona's pants and orally copulated her. *Id.* At some point during the incident, both Michaud and Daveggio had threatened to kill Sharona. *Id.* Before releasing Sharona at a gas station, Daveggio flashed his firearm. *Id.*

Around Thanksgiving of that year, Michaud and Daveggio sexually assaulted Daveggio's daughter, April, who was then 16 years old. Pet. App. B17-B18. April went to a motel with Michaud and Daveggio because they were supposed to drive her to the DMV the following day. *Id.* at B17. At the motel, Daveggio spoke about committing crimes and specifically asked April to go "hunting" with them, which Daveggio described as "where you stalk someone to kill." *Id.* at B17, B19. While Daveggio was taking a shower, Michaud sat next to April on a bed and told her that Daveggio was going to have oral sex with her. *Id.* at B18. After his shower, Daveggio orally copulated April for an hour. *Id.* Michaud later discussed "hunting" with April and appeared angry when April stated that she did not wish to participate. *Id.* at B18-B19.

On the morning of December 2, 1997, Michaud and Daveggio kidnapped Vanessa Samson in Pleasanton while she was walking to work. Pet. App. B19-B20. Daveggio grabbed Samson from the street and forced her into their van which was driven by Michaud. *Id.* at B20. Over the course of the next day, Samson was gagged, raped with curling irons, and strangled to death. *Id.* at B20-B24. Michaud and Daveggio ultimately dumped Samson's body on the side of the road. *Id.* at B22. After Michaud and Daveggio's arrest, law enforcement recovered evidence from the van including a ball and gag and two curling irons. *Id.* at B22-B23. Samson's DNA was on the ball and gag and one of the curling irons. *Id.* at B23. Michaud's fingerprints were on one of the curling irons. *Id.*

2. Michaud was brought to trial for the sexual assaults against Sharona and April, and for the murder of Samson. Pet. App. B5. Daveggio was joined as a codefendant, but he was only tried for the murder; he had pleaded guilty to the crimes against Sharona and April. *Id.* The trial court permitted evidence from the sexual assaults against Christina, Aleda, Rachel, and Amy to prove certain issues including intent, motive, and common scheme. *Id*. at B32-B33.

The trial court instructed the jurors with regard to California's aiding and abetting law as then expressed in the standard California Jury Instructions – Criminal (CALJIC). Pet. App. B61. The instruction to the jury stated:

> Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. Principals include: [¶] 1. Those who directly and actively commit or attempt to commit the act constituting the crime; or [¶] 2. Those who aid and abet the commission or attempted commission of the crime.

Id. (former CALJIC No 3.00). The jury was also given former CALJIC 3.01, which provided:

> A person aids and abets the commission or attempted commission of a crime when he or she: [¶] 1. With knowledge of the unlawful purpose of the perpetrator; and [¶] 2. With the intent or purpose of committing or encouraging or facilitating the commission of the crime; and [¶] 3. By act or device, aids, promotes, encourages or instigates the commission of a crime. Mere presence at the scene of a crime which does not itself assist the commission of a crime does not amount to aiding and abetting. Mere knowledge that a crime is being committed and failure to prevent it does not amount to aiding and abetting.

Id. at B61-B62 (former CALJIC 3.01).

There was no direct evidence of whether Michaud, Daveggio, or both committed the physical acts that killed Samson. Pet. App. B61. The prosecutor argued that Michaud and Daveggio were both guilty of first-degree murder in any event because each was liable for aiding and abetting the actual killer. *Id*. The prosecution advanced a similar aider and abettor theory to argue for Michaud's criminal responsibility for the oral copulation offense involving Daveggio's daughter, April. *Id*.

In closing argument, Daveggio conceded that the jury could find him guilty of first degree murder; his defense was that the jury could not find true that he committed the murder in the course of a kidnapping—a special circumstance that would make him eligible for the death penalty. Pet. App. B65. Michaud, for her part, did not contest her involvement in the crimes, but argued that she was controlled by Daveggio to commit them. *Id*.

At the conclusion of the guilt phase, the jury found Michaud and Daveggio guilty of the first-degree murder of Samson (Cal. Penal Code § 187(a)). Pet. App. B5. The jury found Michaud guilty of two counts of oral copulation in concert by force (Cal. Penal Code § 288a(d)) for the sexual assault on Sharona Doe and one count of oral copulation of a person under 18 years of age (*id*. § 288a(b)(1)) for the sexual assault on April. Pet. App. B5. Relative to the murder charge, the jury also found true two special circumstances—murder in the course of a kidnapping and rape by instrument (Cal. Penal Code

§ 190.2(a)(17)(B),(K))—and returned verdicts of death for both Michaud and Daveggio. Pet. App. B5.

3. On automatic appeal, the California Supreme Court unanimously affirmed Michaud's conviction and death sentence. Pet. App. B90. The court rejected Michaud's contention that the trial court erred by instructing the jury using the former CALJIC 3.00 language stating that "[e]ach principal, regardless of the extent or manner of participation, is equally guilty." *Id.* at B61-B67. Michaud's specific claim was that "the instruction incorrectly permitted the jury to convict [her] on the basis of the culpability of the direct perpetrator of the charged crimes, without considering whether [she] shared the perpetrator's wrongful intent." *Id.* at B62.

To determine whether the instruction was erroneous, the court considered whether there was a "reasonable likelihood" that the instructions misled the jury in this particular case. Pet. App. B64. With regard to the first-degree-murder count, the court held that the "equally guilty" language was not reasonably likely to have misled the jury because the instructions as a whole and the evidence presented made it "exceedingly unlikely" that the jury convicted Michaud of first-degree murder without finding that she acted with the required premeditation and deliberation. *Id.* at B64-B67. In addition, the court held that the "equally guilty" language could not have prejudiced Michaud because the jury found true a special circumstance that the murder was committed in the course of a kidnapping, a finding that established guilt

for first-degree murder under California's felony-murder rule, irrespective of Michaud's mental state. *Id.* at B66.

With regard to the charge of oral copulation of a person under 18 years old, the California Supreme Court held that the trial court's use of the "equally guilty" language of former CALJIC 3.00 was not erroneous. Pet. App. B67. The court observed that the jury was also instructed with CALJIC 3.01, under which "Michaud could be convicted as an aider and abettor only if she intended to commit, encourage, or facilitate Daveggio's criminal acts." *Id.* And since "there are no differing degrees of the crime of oral copulation based on different mental states" under California law, there was "no possibility" that the jury might have found the two defendants "guilty of different crimes" but for CALJIC's 3.00 "equally guilty" language. *Id.* In any event, the court held that any error in using the "equally guilty" language would not have prejudiced Michaud with regard to the oral copulation count because there was "ample evidence" that Michaud intended to aid and abet the crime. Pet. App. B67.

ARGUMENT

Michaud contends that the trial court erred in instructing the jury that "[a]ll principals to a crime are equally guilty." Pet. 9. She asserts that the "equally guilty" language allowed the jury to impute the mental state of one principal to that of another without assessing each principal's own mental state, improperly lightening the prosecution's burden of proof. *Id.* at 9-10. But the California Supreme Court properly applied settled legal principles to the

facts of Michaud's case, and there is no conflict of authority. Moreover, even assuming the instruction was erroneous, on the facts of this case any error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Finally, CALJIC 3.00 has been modified to specifically address situations where principals of a criminal act could be found guilty of different offenses based on differing mental states, thereby avoiding any potential for confusion in future cases. There is no reason for further review.[1]

In assessing a claim of instructional error, a reviewing court must "inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). In conducting this inquiry, "'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 v. Naughten*, 414 U.S. 141, 146-147 (1973)). Courts recognize that "not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction," including "testimony of witnesses, argument of counsel, [and] receipt of exhibits in evidence." *Naughten*, 414 U.S. at 147.

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[1] This Court recently denied a petition for certiorari in a case raising a similar issue, albeit in the context of a federal habeas claim. *See Varner v. Davey*, No. 17-8492, *cert. denied*, 138 S. Ct. 2035 (2018).

The California Supreme Court correctly applied these settled principles in rejecting Michaud's claim. As an initial matter, the challenged instruction "generally stated a correct rule of law. All principals, including aiders and abettors, are 'equally guilty' in the sense that they are all criminally liable." *People v. Bryant*, 60 Cal. 4th 335, 433 (2014). The instruction does not mandate that the jury find a defendant guilty of exactly the same crime as any other principal. Moreover, CALJIC 3.00 was read to the jury together with CALJIC 3.01, which supplies the substantive elements of aider and abettor liability. Pet. App. B61-B62. CALJIC 3.01 instructed the jury that Michaud could only be found guilty as an aider and abettor if she aided the commission of a crime with "knowledge of the unlawful purpose of the perpetrator" and "with the intent or purpose of committing or encouraging the commission of the crime." *Id.*

As applied to the first-degree murder charge, the California Supreme Court correctly held that there was no reasonable likelihood that the jury was misled by former CALJIC 3.00 given the instructions as a whole. As the court observed, "it would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation," which is all that is required to establish the mental element for first-degree murder. *Id.* at B65 (quoting *People v. Samaniego*, 172 Cal.App.4th 1148, 1166 (2009)). Thus, the jury was not misled by the instructions to find Michaud guilty based on a mental state

that was anything short of the mental state required for first-degree murder.

The California Supreme Court also properly concluded that the circumstances of the case made it "exceedingly unlikely" that the jury would have reached a different result even without the "equally guilty" language in the instruction. Pet. App. B65. Michaud's closing argument did not advance a viable defense to undermine the evidence of premeditation and deliberation. Michaud adopted a defense similar to Daveggio's in which she challenged the kidnapping special circumstance on the ground that the kidnapping was only incidental to the murder. *Id.* at B65. Although she did not concede liability for first-degree murder, her primary defense was that her culpability was diminished by posttraumatic stress, which rendered her susceptible to control by Daveggio. *Id.* at B26, B65. But even if accepted by the jury, these defenses would not have negated that she acted with deliberation and premeditation. *Id.* at B65. Moreover, Michaud's premeditation and deliberation were established by "unusually direct" evidence in the form of an admission that she wanted April to join her and Daveggio when they went "hunting" for victims. *Id.*

Further, the jury was instructed that it was required to determine guilt for each defendant separately and to apply the beyond-a-reasonable-doubt standard to each defendant for each element of the murder count and the special circumstances. 34RT 7315-7316, 7372. The jury was therefore required to evaluate Michaud's mental state individually to determine whether

it satisfied the mental element for first-degree murder beyond a reasonable doubt. Michaud's claim that it was reasonably likely the jury was misled by the "equally guilty" language, thereby lightening the prosecution's burden of proof, is without merit.

With regard to the count of oral copulation of April, the California Supreme Court correctly held that the "equally guilty" language did not create a reasonable likelihood the jury was misled because CALJIC 3.01 required the jury to find that Michaud personally intended to commit, encourage, or facilitate Daveggio's oral copulation. Pet. App. B67. Under California law there are no differing degrees of the crime of oral copulation based on different mental states. *Id.* Based on these premises, the court correctly concluded that there was "no possibility that the jury might have found the two defendants 'guilty of different crimes' based on their different mental states, but for potential misinterpretation of former CALJIC No. 3.00's 'equally guilty' language." *Id.*

Moreover, whatever the merits of Michaud's claim, any instructional error was harmless beyond a reasonable doubt. Regarding the first-degree murder charge, the California Supreme Court correctly held that the "equally guilty" language did not prejudice Michaud because the jury found true a special circumstance that the murder was committed in the course of a kidnapping, a finding that established guilt for first-degree murder under California's felony-murder rule, irrespective of Michaud's mental state. Pet.

App. B66.[2] The instruction also did not prejudice Michaud with regard to the oral copulation count. There was "ample evidence" that Michaud intended to aid and abet the crime based on her statements to April that Daveggio was going to orally copulate her and Michaud's own actions during the assault. *Id.* at B67.

Finally, there is no reason for review here because the "equally guilty" language of former CALJIC 3.00 has been changed to address any potential confusion. As noted by the California Supreme Court, the instruction has been amended to address cases where principals in an offense may have different levels of criminal liability. Pet. App. B64 n.14. A note to the new version states that "in cases presenting the issue whether the aider and abettor's mens rea suggests his or her guilt may be greater or lesser than that of the actual perpetrator," the court should instruct that each principal is "'guilty of a crime,'" instead of "'equally guilty.'" *Id.*; *see also Bryant*, 60 Cal. 4th at 433. Accordingly, any potential confusion from the "equally guilty" language is not likely to recur.

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[2] In order to be sentenced to death for felony-murder, a defendant must have been a "major participant" in the felony and have acted with "reckless indifference to human life." *Tison v. Arizona*, 481 U.S. 137, 158 (1987). California's death penalty statute and the instructions provided to the jury in this case comply with this requirement. *See People v. Clark*, 63 Cal.4th 522, 609 (2016); 34 RT 7365-7366.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: July 27, 2018

Respectfully submitted

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