"like it or not" closing argument. The prosecutor told the jurors that although the evidence showed Deck intended to engage in lewd conduct that night, they could convict Deck *even if they agreed with the defense that the evidence raised reasonable doubt about when Deck would have followed through*:

> But even if his intent was just to meet her, get to know her, break the ice and follow up the next day, the next week, maybe two weekends when mom's gone, again, as long as he took a direct, but ineffectual step towards that goal, that is all I need.
>
> I don't need to prove to you that he was going to commit a lewd act on that day, just some point in the future [sic] direct and ineffectual step that day. So the best case scenario for the defense is baloney. . . . Even if you buy this baloney[,] just see her that day, not touching her, stay five feet away from her, follow up the next day if they got along, then commit the lewd act, that is sufficient under the law for the defendant to be guilty.

The prosecutor's repetition of the phrase "even if" unquestionably shows that he presented alternative theories of the case on which the jury could rely to convict Deck, rather than making a passing incorrect statement of his primary argument. The prosecutor's unequivocal assertions—"that is all I need" and "that is sufficient under the law for the defendant to be guilty"—leave no doubt he was arguing, incorrectly, that the jury could still convict Deck

even if it had doubt about whether Deck intended to engage in a lewd act on the night of the meeting.

The unequivocal manner in which the prosecutor presented his alternative theory, using statements like "sufficient under the law," created a significant likelihood that the comments would be "viewed as definitive and binding statements of the law," rather than merely as argument. *See Boyde*, 494 U.S. at 384. We need not engage in speculative Monday morning quarterbacking to know the rebuttal argument may have seriously misled the jury; the jury's note to the trial court after the start of deliberations went straight to this contested point of law. It asked the court to "[c]larify law as it relates to whether defendant did not have to do anything that day only attempt to put it into play." In other words, the jury asked whether it needed to find that Deck would have committed a lewd act on the night of the meeting. But as explained in the next section, the trial court never clarified this point of California law.

2. The trial court never correctly instructed the jury that, in order to convict, it had to find Deck had moved beyond preparation and intended to engage in a lewd act on the night of the meeting.

"Arguments of counsel which misstate the law are subject to objection and to correction by the court," *id.*, but here the trial court did not correct the prosecutor's misstatements; the written instructions said nothing about the temporal component of the State's burden. Nor did the court answer the question posed in the jury's note, because the jury was subsequently told to start deliberations over after a juror became sick and had to be excused. Notably, even the trial

court did not expect the jury to find the answer to its question in the written set of jury instructions. The record shows the judge anticipated the jury would ask the same question, and the court was diligently reviewing the applicable California case law and working with counsel to draft a response when the jury reached a verdict. That the trial court did not issue a correction before the verdict was returned weighs in favor of finding a constitutional violation, because, as we have recognized, improper prosecutorial statements cannot be neutralized by instructions that do not in any way address "the specific statements of the prosecutor." *United States v. Weatherspoon*, 410 F.3d 1142, 1151 (9th Cir. 2005) (quoting *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992)).

The CCA emphasized that "the trial court properly instructed the jury on the relevant principles" of the law of attempt. *Deck*, 2011 WL 2001825, at *12. The written instructions made it clear that the State needed to prove Deck: (1) "took a direct but ineffective step toward committing" the crime; and (2) "intended to commit" the crime. The instructions explained that a direct step "is a direct movement towards the commission of the crime *after preparations are made*" (emphasis added). The CCA held that this instruction correctly stated the law, and we do not review this holding.[6]

[6] The instructions elaborated in full:

> A direct step requires more than merely planning or preparing to commit [the offense] or obtaining or arranging for something needed to commit [the offense]. A direct step is one that goes beyond planning or preparation and shows that a person is putting his plan into action. A direct step indicates a definite and unambiguous intent to commit [the offense]. It is a direct movement towards the

See Bradshaw, 546 U.S. at 76.

But the CCA went on to conclude, based on the written instructions alone, that "the jury knew it was not enough to plan or prepare to commit a lewd act at a potential *later* rendezvous." *Deck*, 2011 WL 2001825, at *12. Reasonable jurists could not disagree that this conclusion does not comport with the record. The instructions entirely failed to address the specific misstatements made by the prosecutor. Counsel made diametrically opposing statements to the jury about whether the law required the State to show that Deck intended to commit a lewd act on the night of the meeting, and the instructions were silent on this point. The jury could have concluded that the instructions were perfectly compatible with the prosecutor's repeated assertions that Deck could be found guilty even if the meeting was merely a step in a plan to commit a lewd act "the next day, the next week, maybe [in] two weekends" because the prosecutor told the jury that, under the State's alternative theory, it was sufficient if the jury found the purpose of the initial meeting was to confirm Amy's identity before arranging a future sexual encounter.

The CCA's conclusion that the jury correctly understood the law of attempt is further undermined by the differing interpretations of the law adhered to by the trial court and counsel. The prosecutor believed the instructions permitted his view of the law, but the CCA later held that the prosecutor

> commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted the attempt.

was wrong. Defense counsel insisted the law required more. Tellingly, the trial judge sided with the prosecutor and not the defense. After going round and round on the issue with counsel outside the presence of the jury, the judge stated:

> [M]y analysis of it after reading [California] cases is that the People are correct in their analysis of the law. *I do not think it has to be, the ultimate step, intend to commit it that day*. He had to have the specific intent to commit the lewd act at or about the time he took the direct step. That doesn't mean he had to have the intent to commit child abuse that day, on that particular day. I think that is accurate. But it's very, very difficult to phrase that in an instruction format that it's clean and that's understandable. *I mean if the lawyers can't even agree, how do we expect jurors or layperson to grasp it*[?]

(emphases added). The italicized sentences in this statement encapsulate a separate problem with the CCA's analysis. The CCA decided "the jury knew it was not enough to plan or prepare to commit a lewd act at a potential *later* rendezvous," *id.*, but it is difficult to imagine "the jury knew" something from the jury instructions that even the trial judge who gave the instructions did not know.

The trial judge and counsel plainly agreed that the jury's question was not addressed by the court's written instructions, and they expected the jury to come back with another version of its initial question after it restarted deliberations with the new juror. Working to craft an answer to the question when the bailiff announced there was a

verdict, the court seemed surprised that the jury could have reached a verdict without having its earlier question answered:

> The Bailiff: There's a verdict, your Honor.
>
> The Court: There is a verdict?
>
> The Bailiff: Yes.
>
> The Court: Well, that solves that issue.

The dissent relies on the presumption that a jury understands and follows the court's instructions. We recognize the existence of this well-established presumption, but it is not dispositive here for a simple reason the dissent fails to acknowledge: the jury instructions on attempt did not address the temporal issue that was the gravamen of the prosecutor's misstatements. The instructions did say that to be convicted of attempt, the defendant must put his "plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted the attempt." But this provided no guidance as to whether, in order to convict Deck, his plan would have to be completed that night, or, as the prosecutor incorrectly told the jury, Deck merely had to put in motion a plan to complete the act "the next day, the next week, maybe two weekends [later]." The trial judge's interpretation of the instructions in a manner inconsistent with the CCA's determination of California law vividly illustrates that, even if the jury read the instructions carefully and made their best effort to follow them, they could no more than guess at the correct rule of California law. To be clear, we do not believe the jury failed to follow the trial court's directions in the sense that it *disregarded* the

court's instructions. Rather, the record shows that the most diligent of juries would have had no way of divining whether the prosecutor's interpretation of the law of attempt was incorrect from the instructions given to them.[7]

3. The evidence concerning the temporal aspect of Deck's intent was not overwhelming.

In *Darden*, the Supreme Court reasoned that overwhelming evidence "reduced the likelihood that the jury's decision was influenced by" the prosecutor's improper argument in that case. 477 U.S. at 196. The weight of the evidence against Deck is an important consideration, but it does not change the outcome on the facts presented here. Because fairminded jurists could not disagree that the prosecutor's misstatements went to the heart of Deck's defense, and the trial court never correctly instructed the jury that—contrary to the prosecutor's misstatements—in order to convict it had to find beyond a reasonable doubt that Deck had moved beyond preparation and intended to engage in a lewd act with Amy on the night of the meeting, fairminded jurists could reach no conclusion other than that the CCA's finding of no constitutional violation was unreasonable. *See Harrington*, 562 U.S. at 102.

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[7] Deck's case is analogous to cases where the jury has been "instructed on multiple theories of guilt, one of which is improper." *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008). Here, the prosecutor and defense counsel gave contradictory interpretations of the law of attempt, and the instructions themselves did not resolve the contradiction. Under these circumstances, we agree with what our dissenting colleague wrote in a previous decision: "While we presume jurors follow the instructions they are given, we cannot equally assume they can sort out legal contradictions." *Doe v. Busby*, 661 F.3d 1001, 1023 (9th Cir. 2011) (M. Smith, authoring judge).

The jury could have found Deck intended to engage in lewd touching with Amy on the night of the meeting: he had previously discussed performing sexual acts with her in graphic detail, he knew that her mother was not at home, and he had condoms in his car. As the CCA observed, "A rational juror reasonably could conclude Deck's comments [about feeling sick, wanting to meet in public, and cautioning 'no kissing or nothing' at the meeting] served merely as a ploy to convince 'Amy' to meet him or as a prudent precaution Deck took to verify 'Amy's' age and identity." *Deck*, 2011 WL 2001825, at *9. By bringing a piece of pie with him, Deck could argue that his earlier message was not intended to convey a sexual overtone. Deck's background as a lieutenant with the California Highway Patrol made it more likely that he was playing it safe in his communications with Amy to avoid exactly this type of sting. The prosecutor argued along these lines in closing rebuttal that Deck "knew what the defense was" to the charge and "tried to create his own defense."

The CCA also emphasized that only minimal physical contact was required to support a conviction for committing a lewd act. The intended touching need not have been overtly sexualized to an outside observer. *Id.* at *10 ("[T]he jury need only have found Deck intended to touch 'Amy' with the intent to arouse himself or her."). In an earlier chat discussion, Deck conceded that although he wanted to meet in public for their first date and not engage in sexual activity, "I probably won't be able to keep my hands off of you." *Id.* at *2.

On the other hand, the same evidence suggests the jury could have based its verdict on the prosecutor's alternative theory that Deck intended to commit lewd acts with Amy not

on the night of the meeting, but on some unspecified future date. The jury may have believed Deck wanted to avoid contact with Amy on the night he was arrested because he was grooming Amy for future contacts and wanted to exercise caution by having a more limited first meeting, in public, to assess the situation and avoid a sting. The jury might even have believed that Deck did not intend contact or touching on that particular night because he was ill, as he claimed. That Deck was carrying a camera and had condoms in his car shows preparation, but these facts do not establish when he planned to follow through. The prosecutor's assurance that the jury could convict "even if" it believed the prosecution's alternative theory of the case may have influenced the jury to find "attempt" based on an anticipated future rendezvous with Amy. The jury's note suggests at least some jurors were on the fence about this question. And as explained, the trial court never instructed the jury with respect to this issue.

Based on the foregoing, we hold that fairminded jurists could reach only one conclusion: the prosecutor's uncorrected misstatements of the law rendered Deck's trial fundamentally unfair, in violation of his clearly established constitutional rights.

II. The constitutional violation was prejudicial.

Our inquiry does not end with the conclusion that the CCA's finding of no constitutional error was unreasonable. As explained, even on direct review a constitutional trial error will not warrant reversal if it was harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24. In a collateral proceeding, the test is more forgiving to the prosecution. Habeas petitioners are not entitled to relief

based on trial error unless the error resulted in "actual prejudice." *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). "Under th[e] [*Brecht*] test, 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 (1995)); *see also O'Neal*, 513 U.S. at 437 (defining "grave doubt" as being in "virtual equipoise as to the harmlessness of the error").

Because it is more stringent, the *Brecht* test "subsumes" the AEDPA/*Chapman* standard for review of a state court determination of the harmlessness of a constitutional violation. *Fry v. Pliler*, 551 U.S. 112, 120 (2007). A federal habeas court therefore need not formally apply both the *Brecht* test and the AEDPA standard; it is sufficient to apply *Brecht* alone. *Id.* A determination that the error resulted in "actual prejudice," *Brecht*, 507 U.S. at 637, necessarily means that the state court's harmlessness determination was not merely incorrect, but objectively unreasonable, *Davis*, 135 S. Ct. at 2198–99. A separate AEDPA/*Chapman* determination is not required.

As explained, under clearly established Supreme Court law, the constitutional dimension of the prosecutor's misstatements turns entirely on the issue of prejudice: the error rises to the level of *Darden* error only if there is a reasonable probability that it rendered the trial fundamentally unfair. Our analysis of prejudice therefore overlaps completely with our analysis of the CCA's constitutional determination. We conclude no fairminded jurist could agree with the CCA's harmlessness determination, and that the

prosecutor's misstatements resulted in "actual prejudice." *See id.* at 2203.

The CCA's decision established that the prosecutor gave incorrect direction to the jury about an element of California law under which Deck was convicted. The record establishes that the comments were not inadvertent or isolated, and it cannot be questioned they went to the heart of Deck's defense. The lawyers' diametrically opposed statements of the law in closing arguments clearly confused the jury, as evidenced by the jury's request for clarification. The jury's note asked the trial court to "clarify [the] law as it relates to whether defendant did not have to do anything that day[,] only attempt to put it into play."[8] Even the State concedes on appeal that "on some level, [the prosecutor's] statements resonated with the jury in that they provoked a question from the jury."

Rather than disputing that the prosecutor's closing rebuttal argument perplexed the jury, the State contends the jury's failure to resubmit its question to the trial court after restarting its deliberations suggests "the jury was satisfied with the original, correct instructions on the crime of attempt when it rendered its verdict." The judge orally directed the jury:

> I know that there was a previous question sent out by the foreperson, Juror # 9. In light of the fact I have just given you this instruction

[8] The jury's request for clarification on the law of attempt also included the following language, which was crossed out near the top of the blank space: "In closing arguments, Prosecutor . . . [illegible] . . . we need it read back."

> that you have to start all over again, disregard past deliberations, you need to follow that instruction. If you have any further questions that you want answered once you start deliberating with the jury, send that out in the question format and we will answer it for you.

Deck, 2011 WL 2001825, at *13. The CCA accepted that the jury satisfied itself about what Deck needed to have intended to do the night he met Amy by looking at the trial court's written instructions. *Id.* But when the jury resumed its deliberations, it worked from the same written instructions the original jury had, and they provided no guidance on the pivotal question.

Without the benefit of a correct statement of the law, the jury may have arrived at the same erroneous legal conclusion that the trial judge reached: that Deck could be convicted even if the jury was not sure whether he intended to commit a lewd act on the night he met Amy. After all, that is precisely what the prosecutor told the jury in rebuttal. Under these circumstances, a fairminded jurist could not conclude that the jury found beyond a reasonable doubt that Deck moved beyond preparation to commit a lewd act with Amy on the night of the meeting. Further, we are left with "grave doubt" as to the harmlessness of the constitutional trial error that occurred in Deck's case. *See O'Neal*, 513 U.S. at 437–38.

CONCLUSION

The prosecutor's misstatements regarding an element of the crime amounted to constitutional trial error under clearly established federal law as determined by the Supreme Court.

See Darden, 477 U.S. at 181. The misstatements lowered the prosecution's burden of proof, and therefore resulted in "actual prejudice." *See Davis*, 135 S. Ct. at 2197. In view of these conclusions, we **REVERSE** the judgment of the district court and **REMAND** with instructions to grant the petition unless the State agrees to grant Deck a new trial within a reasonable period of time. *See Stark v. Hickman*, 455 F.3d 1070, 1080 (9th Cir. 2006).

REVERSE AND REMAND.

M. SMITH, Circuit Judge, dissenting:

I respectfully dissent.

The Supreme Court has repeatedly—and often unanimously—reversed our circuit's decisions granting § 2254 relief. For example, in its four most recent terms, the Supreme Court has reversed us fourteen times in cases involving our application of AEDPA, 28 U.S.C. § 2254, ten of which reversals have been unanimous. Most recently, the Supreme Court reversed us in *Davis v. Ayala*, 135 S. Ct. 2187 (2015), reminding us of the difficult hurdle that petitioners must surmount in order for a federal court to reverse a state court's determination that a trial error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). In my view, this case is yet another candidate for reversal because the majority flouts clear Supreme Court AEDPA precedent in order to justify its holding that a state court's decision is incorrect. In so doing, the majority commits the same error the Supreme Court has criticized our court for making time after time by "collapsing the distinction between 'an *unreasonable*

application of federal law' and what [the majority] believes to be 'an *incorrect* or *erroneous* application of federal law.'" *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)) (unanimously reversing our grant of habeas relief).[1]

[1] *See also Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam) (unanimously reversing our grant of habeas relief and criticizing our court for "[our] mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced"); *Cavazos v. Smith*, 132 S. Ct. 2, 6–8 (2011) (per curiam) (reversing our grant of habeas relief and stating: "This Court vacated and remanded this judgment twice before, calling the panel's attention to this Court's opinions highlighting the necessity of deference to state courts in § 2254(d) habeas cases. Each time the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention . . . . Its refusal to do so necessitates this Court's action today."); *Swarthout v. Cooke*, 562 U.S. 216, 222 (2011) (per curiam) (unanimously reversing our grant of habeas relief and stating: "The short of the matter is that the responsibility for assuring that the constitutionally adequate procedures governing California's parole system are properly applied rests with California courts, and is no part of the Ninth Circuit's business."); *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (unanimously reversing our grant of habeas relief and criticizing us for "treat[ing] the unreasonableness question as a test of [our] confidence in the result [we] would reach under *de novo* review"); *Premo v. Moore*, 562 U.S. 115, 127 (2011) (unanimously reversing our grant of habeas relief and criticizing us for "transpos[ing]" Supreme Court precedent "into a novel context"); *Knowles v. Mirzayance*, 556 U.S. 111, 121–23 (2009) (unanimously reversing our grant of habeas relief and reminding us that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court" (internal quotation marks omitted)); *Brown v. Payton*, 544 U.S. 133, 147 (2005) (reversing our grant of habeas relief and commenting that we had "no basis for . . . concluding that the [state court's] application of [the Supreme Court's] precedents was objectively unreasonable" (internal quotation marks omitted)).

I. Background

As the majority explains, Deck engaged in online conversations with a fictitious thirteen-year-old named Amy. The trial record shows that Deck and Amy exchanged sexually suggestive messages and that they planned to meet in person to "date" and to engage in sexual acts. Deck indicated that he would not feel safe meeting for the first time at Amy's home, so they arranged to meet initially at a nearby park.

The day of their planned meeting, Deck told Amy that he was sick, and said: "so no kissing or nothing. [I'm] [j]ust bringing you . . . pie." During their prior online conversations, Deck had repeatedly used the term "pie" as a euphemism for performing oral sex on Amy. Moreover, although Deck stated that he and Amy would not engage in sexual conduct at their first meeting, he also told Amy "I probably won't be able to keep my hands off of you."

On February 18, 2006, Deck drove forty-five minutes to meet Amy at the park near her home. Deck arrived around 8:35 p.m., and when he identified himself to a teenage girl, the police arrested him. A subsequent search of Deck's car revealed, among other things, MapQuest directions to Amy's apartment, six packaged condoms, and a digital camera. Deck was charged with one count of an attempted lewd act on a child under the age of fourteen and tried before a jury.

During his closing argument, the prosecutor argued that Deck was guilty of an attempted lewd act on a child because: (1) if Amy had been a real thirteen-year-old, Deck would have touched her on February 18, 2006, and (2) in light of Deck's express intent to engage in sexual conduct with Amy,

"any touching" would have constituted a lewd act under California law.

Throughout his closing argument, the prosecutor discussed his understanding of attempt under California law. The prosecutor's explanation was not a model of clarity, nor was it entirely accurate. The prosecutor first stated,

> I need to prove to you that [Deck] took a direct, but ineffectual step . . . . First of all, his intent was to commit a lewd act. Definitely going down there to engage in a lewd act, lewd contact with Amy. But for that sting operation and Amy being fictitious . . . he would have [engaged in a lewd act].

The prosecutor also stated: "But even if [Deck's] intent was to just meet her, get to know her, break the ice and follow up the next day, the next week, maybe two weekends when mom's gone, again, as long as he took a direct, but ineffectual step towards that goal, that is all I need."

Defense counsel did not object to the prosecutor's closing argument, but instead offered his own explanation of attempt during his closing remarks. Before the jury started its deliberations, the presiding judge correctly instructed the jury concerning the law of attempt, as follows:

> A direct step requires more than merely planning or preparing to commit [the offense] or obtaining or arranging for something needed to commit [the offense]. A direct step is one that goes beyond planning and preparation and shows that a person is putting

> his plan into action. A direct step indicates a definite and unambiguous intent to commit [the offense]. It is a direct movement towards the commission of the crime after preparations are made. *It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted the attempt*.

(emphasis added).

On direct appeal, Deck argued, among other things, that his conviction should be reversed because the prosecutor misstated the law of attempt in his closing argument. The California Court of Appeal for the Fourth District (Court of Appeal) agreed that the prosecutor was incorrect when he stated: "[E]ven if [Deck's] intent was to just meet [Amy], get to know her, break the ice and follow up the next day, the next week, maybe two weekends when mom's gone, again, as long as he took a direct, but ineffectual step towards that goal, that is all I need." The Court of Appeal further explained that to be guilty of attempt under California law, "the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances."

While the Court of Appeal held that the prosecutor misstated the law of attempt, the Court nevertheless affirmed Deck's conviction. In so doing, the Court of Appeal held that the prosecutor's legal error did not require reversal because the judge correctly instructed the jury. The Court explained: "[W]e presume the jury followed [the trial judge's] instructions . . . . [Thus], the jury knew it was not enough to

plan or prepare to commit a lewd act at a potential *later* rendezvous[, and that] the attempt must consist of 'an immediate step that puts the plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted the attempt.'" According to the majority, the Court of Appeal's holding is an unreasonable application of clearly established federal law. I respectfully disagree.

II. Clearly Established Law

The majority contends that Deck is entitled to habeas relief, because (1) the prosecutor inadvertently misstated California law in his closing argument, and (2) the majority has "grave doubt" as to whether this misstatement affected the outcome of Deck's trial. But whether the majority has "grave doubt" about whether a trial error was harmless is only relevant if that error amounts to a constitutional violation. *See O'Neal v. McAninch*, 513 U.S. 432, 435–36 (1995). When a state court has previously determined that no such constitutional error occurred, a federal court "ha[s] no authority" to disrupt the state court's holding unless the state court's holding is "'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Parker v. Mathews*, 132 S. Ct. 2148, 2151 (2012) (per curiam) (quoting 28 U.S.C. § 2254(d)).

The Supreme Court has also emphasized that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *See, e.g.*, *Harrington*, 562 U.S. at 101 (quoting *Williams*, 529 U.S. at 410). "The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so

obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *White v. Woodall*, 134 S. Ct. 1697, 1706–07 (2014) (quoting *Harrington*, 562 U.S. at 102).

Importantly, even if a federal court would grant relief to a § 2254 petitioner under a *de novo* review, a state court's denial of relief is not necessarily unreasonable. *Harrington*, 562 U.S. at 101–02. This is so, because "[u]nder § 2254(d), a habeas court must [first] determine what arguments or theories supported or . . . could have supported, the state court's decision," and then "'[*t*]*he only question that matters*' . . . [is] whether it is possible [that] fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id*. at 102 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)) (emphasis added).

The majority's opinion rests on its conclusion that a defendant's right to due process of law is violated when the prosecutor misstates the law in his closing argument, even when the judge correctly instructs the jury on the relevant legal principles. While the majority may believe that federal law *should* protect a criminal defendant from prosecutorial errors of this nature, the Supreme Court has never announced such a rule.

The majority correctly observes that the Supreme Court has stated that prosecutorial misconduct *may* deny a criminal defendant due process of law. But the only Supreme Court decisions the majority cites for this proposition are *Parker*, 132 S. Ct. at 2154–55 (holding that § 2254 relief was not proper because the alleged prosecutorial error was not a clearly established constitutional violation), *Darden v.*

Wainwright, 477 U.S. 168, 179–83 (1986) (same), and *Caldwell v. Mississippi*, 472 U.S. 320, 339–40 (1985) (holding that the Eighth Amendment is violated when the prosecutor *and the court* erroneously instruct the jury that the responsibility for determining whether a death sentence is appropriate lies with the court of appeals and not with the jury).

While *Parker*, *Darden*, and *Caldwell* all state that prosecutorial misconduct could render a trial so unfair as to deny a defendant due process of law, in none of these cases did the Supreme Court actually hold that a prosecutor's error denied a criminal defendant due process, nor did the Court establish what type of misconduct would cause a trial error of constitutional magnitude.

Critically, the Supreme Court has never held, nor even suggested, that a defendant's constitutional rights are violated where a prosecutor misstates the law in closing argument, but the trial judge correctly instructs the jury. In fact, the Supreme Court has indicated just the opposite.

The Supreme Court has long held that "[a] jury is presumed to follow" a judge's instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). This is true even when a party provides contrary instructions. For example, in *Brown v. Payton*, 544 U.S. 133 (2005), the prosecutor repeatedly and incorrectly argued to the jury that it could not consider certain mitigating evidence in the penalty phase of the defendant's trial for capital murder. The court failed to provide a corrective instruction, but correctly instructed the jury on the applicable law before deliberations began. *Id.* at 146–47. In so doing, the trial court did not instruct the jury that the prosecutor's statements were incorrect. *Id*. It merely provided

a correct explanation of the law, which was inconsistent with the prosecutor's erroneous statements. *Id*.

The *Brown* Court (reversing our court, sitting en banc) held that the petitioner was not entitled to relief under § 2254. Although the Supreme Court acknowledged that the trial court "should have [explicitly] advised the jury that it could consider [the mitigating] evidence," it was not unreasonable for the state court to conclude that the jury relied on the judge's correct instructions, rather than on the prosecutor's misstatements. *Id.* at 146–47. As in *Brown*, the state trial court here did not explicitly instruct the jury that the prosecutor was incorrect when he stated that the jury could convict Deck even if it concluded that Deck did not intend to touch Amy for several days or weeks after their initial meeting. Nonetheless, the court offered an instruction that directly contradicted the prosecutor's erroneous explanation, when it explained that a defendant is only guilty of attempt if he "[makes a] direct movement towards the commission of the crime after preparations are made[, by] putt[ing his] plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted the attempt."

Despite *Brown*, the majority concludes that the Supreme Court's broad statements that a prosecutor's comments can render a trial constitutionally infirm grant this court authority to set aside the Court of Appeal's holding that no such error occurred in this case. This conclusion flouts AEDPA's deferential standard.

The majority is correct that under § 2254 even a general rule can be applied in an unreasonable manner. This is so, because "[c]ertain principles are fundamental enough that

when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *White*, 134 S. Ct. at 1706 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)). But, even where a general rule is at issue, "relief is available under § 2254(d)[] . . . if, and only if, it is so obvious that [the] clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *White*, 134 S. Ct. at 1706–07 (quoting *Harrington*, 562 U.S. at 102). "'[I]f a habeas court must extend a rationale before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state court decision.'" *White*, 134 S. Ct. at 1706 (quoting *Yarborough*, 541 U.S. at 666).

Under the Supreme Court's case law, it will rarely be "so obvious" that a prosecutorial error violated a defendant's due process rights that there could be no "'fairminded disagreement' on the question." *White*, 134 S. Ct. at 1706–07 (quoting *Harrington*, 562 U.S. at 102). In *Parker*, the Supreme Court specifically addressed this issue and warned that because the standard for determining whether prosecutorial error amounts to a constitutional error "is a very general one . . . [we must give state] courts more leeway . . . in reaching outcomes in case-by-case determinations [concerning prosecutorial conduct]." 132 S. Ct. at 2155 (internal quotation marks omitted); *see also Harrington*, 562 U.S. at 101 ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.").

Here, there is simply no Supreme Court precedent establishing "beyond fairminded disagreement" that Deck's due process rights were violated. The Supreme Court has generally acknowledged that prosecutorial misconduct may,

under some circumstances, amount to a due process violation. But the Court has never suggested that a prosecutor's inadvertent misstatement of state law creates such a circumstance, particularly where the judge later provides the jury with a correct explanation of the law. For this reason, the Court of Appeal's holding that the prosecutor's erroneous statements of law did not violate Deck's constitutional rights is not "an unreasonable application of . . . clearly established law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d).

III. Prejudice

Not only does the majority grant habeas relief based on a new constitutional rule that it announces today, but it compounds its error by rejecting the Court of Appeal's reasonable conclusion that any prosecutorial error was not prejudicial. This holding relies on an interpretation of the facts that is tenuous at best.

It is well-settled law that "[a] jury is presumed to follow . . . [and] is [also] presumed to understand" a judge's instructions. *Weeks*, 528 U.S. at 234. Here, it is undisputed that the presiding judge correctly instructed the jury that a defendant is only guilty of attempt if he "[makes a] direct movement towards the commission of the crime after preparations are made[, by] putt[ing his] plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted the attempt." In order to overcome the presumption that the jury understood and followed this instruction, and to show that the prosecutor's statements were prejudicial, the majority adopts a strained interpretation of the record. With respect, the

majority's interpretation is neither persuasive nor consistent with the scope of AEDPA review.

The majority notes that during its deliberations, the jury asked the court to "clarify [the] law as it relates to whether defendant did not have to do anything that day only attempt to put it in play." After the jury submitted this question, the jury adjourned for the day. When the jury reconvened, an alternate juror was substituted for a sick juror. The judge properly instructed the jury to begin its deliberations anew, and to submit any outstanding questions to the court. The new jury did not resubmit the original jury's question, and it was never answered.

According to the majority, the jury's unanswered question proves that (1) despite the judge's correct instruction, the jury believed the prosecutor's conflicting statement that it could convict Deck even if it found that Deck did not intend to touch Amy for several days or weeks after their initial meeting, and (2) the jury convicted Deck on these grounds. In my view, the majority's reading is unfounded and does nothing to overcome the presumption that a jury understands and follows a judge's instructions. *Id.*

Inchoate offenses are undoubtedly confusing to a lay jury. Recognizing this potential for confusion, the fairest interpretation of the jury's question is a simple request for confirmation that a defendant may be guilty under the law of attempt even if he does not complete a substantive offensive—"only attempt[s] to put it in play." Contrary to the majority's reading, nothing about the jury's note indicates that the jury believed that Deck could be guilty of attempt even if he did not intend to touch Amy for several days or weeks following their initial meeting. Rather, the note focuses

on what *actions* one must take (i.e., what he must "do") to be guilty of attempt.

The majority points to no other record evidence indicating that the jury relied on the prosecutor's erroneous statements, rather than on the judge's correct explanation of the law. Thus, I find no reason to believe that these statements were prejudicial. Moreover, the record certainly does not show that in reaching this same conclusion, the Court of Appeal acted unreasonably or even erroneously. As the Supreme Court's recent decision in *Davis* reminds us, and as the majority acknowledges, "a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." 135 S. Ct. at 2199 (2015) (quoting *Fry v. Pliler*, 551 U.S. 112, 119 (2007) (emphasis in original)). Deck "must show that the state court's decision to reject his claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.'" *Id*. (quoting *Harrington*, 562 U.S. at 103). The majority's conclusion that "the [prosecutor's] rebuttal argument may have seriously misled the jury" does not support a determination that the state court's decision to reject Deck's claim was so lacking in justification that no fair-minded jurist could have adopted the state court's assessment that it did not.

IV. Conclusion

Relief under § 2254(d) is appropriate only where the state court's holding is "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). The Supreme Court has specifically warned our court that, "[b]y framing [Supreme Court] precedents at [too]

high [a] level of generality, [we] could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court' . . .[, which] would defeat the substantial deference that AEDPA requires [to state courts]." *Jackson*, 133 S. Ct. at 1994. The majority flouts the Supreme Court's clear directive, and in the absence of clearly applicable Supreme Court precedent, concludes that Deck is entitled to § 2254 relief, merely because the majority believes that the Court of Appeal's decision is incorrect.[2] For these reasons, I

[2] With regard to our treatment of petitions under § 2254, Justice Scalia recently observed:

> It is a regrettable reality that some federal judges *like* to second-guess state courts. The only way this Court can ensure observance of Congress's abridgement of their habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law. We have often not shrunk from that task, which we have found particularly needful with regard to decisions of the Ninth Circuit. *See, e.g.*, *Cavazos v. Smith*, 565 U.S. 1, 132 S. Ct. 2, — L.Ed.2d — (2011) (per curiam) (reinstating California conviction for assault on a child resulting in death); *Felkner v. Jackson*, 562 U.S. —, 131 S. Ct. 1305, 179 L.Ed.2d 374 (2011) (per curiam) (reinstating California conviction for sexual attack on a 72–year–old woman); *Premo v. Moore*, 562 U.S. —, 131 S. Ct. 733, 178 L.Ed.2d 649 (2011) (reinstating Oregon conviction for murder of a kidnapped victim); *Knowles v. Mirzayance*, 556 U.S. 111, 129 S. Ct. 1411, 173 L.Ed.2d 251 (2009) (reinstating California first-degree murder conviction); *Rice v. Collins*, 546 U.S. 333, 126 S. Ct. 969, 163 L.Ed.2d 824 (2006) (reinstating California conviction for cocaine possession); *Kane v. Garcia Espitia*, 546 U.S. 9, 126 S. Ct. 407, 163 L.Ed.2d 10 (2005) (per curiam) (reinstating California conviction for

respectfully dissent.

carjacking and other offenses); *Yarborough v. Gentry*, 540 U.S. 1, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam) (reinstating California conviction for assault with a deadly weapon); *Woodford v. Visciotti*, 537 U.S. 19, 123 S. Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam) (reinstating capital sentence for California prisoner convicted of first-degree murder, attempted murder, and armed robbery).

Cash v. Maxwell, 132 S. Ct. 611, 616–17 (2012) (Scalia, J., dissenting from the denial of certiorari).