

NO. 07-772

IN THE SUPREME COURT OF
THE UNITED STATES

DOUG WADDINGTON,

Petitioner,

v.

CESAR SARAUSAD,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. The Ninth Circuit Was Required To Accept That The Instructions Were Correct Under State Law

The first question upon which this Court granted certiorari is:

“In reviewing a due process challenge to jury instructions brought under 28 U.S.C. § 2254, must the federal courts accept the state court determination that the instructions fully and correctly set out state law governing accomplice liability?” Br. Pet’r i.

Petitioner’s opening brief explained that the Ninth Circuit erred because it refused to accept the accomplice liability instruction given in this case as a correct statement of Washington law. Br. Pet’r 26–32. Sarausad does not defend the Ninth Circuit’s decision on this point. Br. Resp’t at 31.¹

This is a very important point. It means that Sarausad’s jury was correctly instructed. And, since Washington’s accomplice liability instruction is not unconstitutional on its face, Sarausad can show constitutional error only by establishing that the

¹ Sarausad apparently misunderstands the state’s position in this respect. According to Sarausad: “Petitioner also claims federal courts cannot ‘conduct[] an independent examination’ of whether a jury could have misread a jury instruction. Br. at 26–28. This is incorrect.” Br. Resp’t 30. The state’s opening brief argues that “the Ninth Circuit erroneously disregarded the state court interpretations of state law by conducting an independent examination of whether the instructions accurately reflect state law.” Br. Pet’r at 26–27.

correct instructions were so egregious that they violated his constitutional right to a fair trial.

Sarausad claims the accomplice liability instruction is so ambiguous that it permitted the jury to convict him without proving every element beyond a reasonable doubt. The state's opening brief explained that the test for such a claim is "'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))." Br. Pet'r at 32. This is a high burden. Sarausad must establish more than the mere possibility that the jury misapplied the instruction. *Boyde v. California*, 494 U.S. 370, 380 (1990). Moreover, this case comes to the Court under the deferential standard of review of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. AEDPA prohibits relief on a claim adjudicated on the merits in state court where the state court decision was not contrary to or an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

2. It Is Not Reasonably Likely That The Jury Applied The Instructions To Relieve The State Of Its Burden To Prove Sarausad's Knowledge

To convict Sarausad as an accomplice to second degree murder and second degree attempted murder, the state was required to prove Sarausad knew that his actions promoted or facilitated such crimes. Sarausad claims that there is a reasonable

likelihood that the jury misapplied the accomplice liability instruction and convicted him as an accomplice on the basis of knowledge that any crime would be committed—such as engaging in a fistfight with a rival gang—rather than knowledge that a shooting would take place. Br. Resp’t 32–33.

To determine whether there is a reasonable likelihood that the jury misapplied the accomplice liability instruction, it “is well established that the instruction ‘may not be judged in artificial isolation,’ but must be considered in the context of the instructions as a whole and the trial record.” *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The instructions and the trial record demonstrate there is no reasonable likelihood that the jury misapplied the accomplice liability instruction.

a. Taken Together, The Instructions Support The State Court’s Conclusion That It Was Not Reasonably Likely That The Jury Relieved The State Of Its Burden Of Proof

The instructions to the jury, taken together, refute the claim that there is a reasonable likelihood that the jury misapplied the accomplice liability instruction to relieve the state of proving that Sarausad knew he was facilitating a shooting. The accomplice liability instruction, No. 46, states:

“A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

“A person is an accomplice in the commission of a crime if, *with knowledge* that it will *promote or facilitate the commission of the crime*, he or she either:

- “(1) *solicits, commands, encourages, or requests another person to commit* the crime or
- “(2) *aids or agrees to aid* another person in planning or committing the crime.

“The word ‘aid’ means *all assistance whether given by words, acts, encouragement, support or presence*. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. *However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.*” Pet. App. 271a (emphasis added).

The instruction requires “knowledge that [the accomplice] will promote or facilitate the commission of the crime”. It requires proof of action. The instruction further makes it explicit that “more than *mere presence and knowledge of the criminal activity of another* must be shown to establish that a person present is an accomplice.” Pet. App. 271a (emphasis added). Instruction No. 46 expressly informed the jury that, if knowledge of the crime, or action on the part of the accomplice to aid in the crime, is absent, there can be no accomplice liability.

Instruction No. 48, defines knowing and knowledge in this context. It states:

“A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime.

“If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

“Acting knowingly or with knowledge also is established if a person acts intentionally.” Pet. App. 272a.

Under Instruction No. 48, to have knowledge, one must be “aware of a fact, facts or circumstances or result described by law as being a crime.” Pet. App. 272a.

Taken together, these instructions inform the jury that an accomplice must take action to accomplish the crime, with knowledge that the action promotes or facilitates the crime.

Sarausad now argues that Instruction Nos. 47 and 48 make it reasonably likely that the jury misapplied the accomplice liability instruction because these instructions use the words “a crime”.² Br.

² Instruction No. 47 deals with intent and states: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.” Pet. App. 271a.

Resp't 38–39. This argument proceeds as though jury instructions are given and applied in a vacuum. When these instructions are considered in the context of all of the instructions—including Instruction No. 46—and the crimes charged, it is apparent that the reference in them to “a crime” is to the crime charged that the jury is considering. Sarausad’s argument ignores the fact that the jury was instructed to consider specific crimes including, murder in the first degree or second degree, attempted murder in the first degree, and assault with a deadly weapon—a handgun—in the second degree. JA 3–6. The jury was specifically instructed that, to convict Sarausad of any of these crimes, it must find all the elements of the crime. JA 7–16. Nothing on the face of the instructions makes it reasonably likely a jury would require only that Sarausad act with knowledge he was promoting “any crime.”

b. The Closing Arguments Also Make It Evident That There Was No Reasonable Likelihood The Jury Convicted Sarausad Without Proof Of The Requisite Knowledge Element

The closing arguments also rebut Sarausad’s claim that there is a reasonable likelihood the jury misapplied the accomplice liability instruction. The prosecutor consistently argued that both Sarausad and Reyes met the definition of accomplice, because they either encouraged or aided in the crimes of

murder and attempted murder, and that both defendants returned to Ballard High School knowing there would be a shooting. No one argued that they could be convicted if they intended some other crime, like having a fistfight. Sarausad's contrary argument focuses on isolated parts of the prosecutor's closing argument—the reference to “you're in for a dime, you're in for a dollar” and the prosecutor's hypothetical. This ignores the requirement that the Court consider the trial as a whole, including the prosecutor's argument as a whole, and arguments by defense counsel.

The prosecutor consistently argued that both Sarausad and Reyes acted with knowledge they were facilitating a shooting. The prosecutor argued that witnesses “acknowledged the discussion about capping, the discussion about shooting. Ladies and Gentlemen, it was discussed. They all knew what was going on.” JA 47. The prosecutor told the jury that shooting was necessary because “[s]hooting wasn't going to regain their respect, a gun was. And that's why they went back for a second trip.” JA 45. The prosecutor repeated this argument stating: “People have to go down so that the 23rd's can be respected, so be it. ‘We've gotta shoot a gun to regain our power,’ to be perceived as being tough, and Melissa Fernandes has to die, so be it. Brent Mason has to take a shot in the leg, so be it.” JA 49.

Consistent with arguing that Sarausad knew a shooting would occur, the prosecutor argued that Sarausad “slowed down on the dime, slowed down before the shots were fired, stayed slowed down until the shots were over and immediately sped up.” JA 39. The prosecutor explained that “Sarausad drove

slow enough for [Ronquillo] to fire not one shot, not two shots, but to essentially empty this magazine.” JA 46. The “witnesses heard ten [shots].” JA 46. Sarausad “was driving the car in a manner which allowed [Ronquillo] to do it.” JA 117.

The arguments by the defense counsel were consistent: Reyes’ counsel argued that he did not encourage the shooting, and Sarausad’s counsel argued that Sarausad had no knowledge about the shooting. For example, Sarausad’s counsel also addressed the knowledge element: “With respect to every charged crime, Counts I through V, and the lesser included crime that you will be considering, it’s the same question for you, did Cesar Sarausad *have knowledge that his assistance in driving the car would promote or facilitate the charged crime* or a lesser crime being charged.” JA 83–84 (emphasis added). He argued there was no evidence that Sarausad knew that there would be a shooting. JA 92 (“Not a single witness testified that he expected a shooting.”).

Sarausad cannot reasonably dispute that the arguments of both the prosecution and the defense, taken as a whole, addressed Sarausad’s knowledge that he was facilitating a shooting. *See* Br. Pet’r 40–49. Sarausad, however, argues the prosecutor’s use of a hypothetical and the phrase “if you’re in for a dime, you’re in for a dollar” did not correctly “limit accomplice liability”. Br. Resp’t 44–45. Neither the hypothetical nor the phrase creates a likelihood that the jury misapplied the instruction when they are viewed as a whole in the context of an overall correct argument. The hypothetical and phrase were used after Sarausad’s counsel incorrectly argued that,

even if Ronquillo had premeditated the shooting, “the big question for you [the jury] as to Cesar is whether he shared those intentions” JA 98. This incorrectly stated the law. An “accomplice need not have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime.” *State v. Roberts*, 142 Wash. 2d 471, 512, 14 P.3d 713 (2000).

The prosecutor used the hypothetical and phrase while explaining how Sarausad’s counsel was incorrect. She stated:

“The defendant, Mr. Sarausad’s lawyer says that an accomplice has to have the same mental state as the person doing the shooting. Cesar Sarausad, Jerome Reyes also had to have premeditated intent. Not true, not true. And that’s not what the instruction says.

“And I’ve told you the old adage, you’re in for a dime, you’re in for a dollar. . . . The example I gave you earlier, ‘I just told my friend to hold the arms down of this person while he hit him, I didn’t tell him to kill him, I’m not guilty of anything.’ If you’re in for a dime, you’re in for a dollar.” JA 123.

After the prosecutor used the phrase “you’re in for a dime, you’re in for a dollar,” she identified what she meant by “the dime”—the shooting. Her next words were:

“When they rode down to Ballard High School that last time, I say they knew what they were up to. They knew they were there to commit a crime, to disrespect the gang, to

fight, to shoot, to get that respect back. A fist didn't work, pushing didn't work. Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar." JA 123–24.

In context, this reminds the jury they did not need to find that Sarausad had the same mental state as the shooter Ronquillo, but they did have to find that Sarausad knew he was going to Ballard High School to assist in a shooting. Even when the prosecutor used the catch phrase “you're in for a dime, you're in for a dollar” to discuss liability, the “dime” was Sarausad's knowledge that he was going to Ballard High School to assist in a shooting.

Finally, Sarausad also criticizes the prosecutor's statement that Reyes “set[] the wheels in motion, by simply calling his friends, getting them together, saying, “Let's go avenge this problem[.]”” Br. Resp't 9 (quoting JA 37). In context, the prosecutor's next words described a person with the proper knowledge, a person who solicits another to “[g]o commit this crime and report back to me”. JA 37. Seconds later, she adds: “You have to be present, you have to be ready to assist, and you have to *know* that your assistance is causing *the crime* to unfold.” JA 38 (emphasis added). She then immediately argues that Reyes returned knowing the rival gang had guns and that it would be “ludicrous” to return with only fists. JA 39. In context, the prosecutor urges only the correct application of the accomplice liability instruction, based on Reyes' knowledge that guns were to be used.

c. The Jury's Questions And The Court's Responses Do Not Establish A Reasonable Likelihood That The Jury Misapplied The Accomplice Liability Instruction

Sarausad argues the fact that the jury asked three questions related to accomplice liability makes it reasonably likely the jury misunderstood that instruction.³ And he argues that the judge erred in responding by advising the jury to reread the accomplice liability and related instructions, and to reread the instructions as a whole. Br. Resp't 40–43.

This claim is not well taken. In the first place, it is highly significant that the accomplice liability instruction was correct as a matter of state law. Sarausad's "burden is especially heavy because no erroneous instruction was given [and an] omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

In *Weeks v. Angelone*, 528 U.S. 225 (2000), the Court rejected the claim that the Constitution requires a judge to give supplemental instructions

³ Sarausad's supplemental appendix to his brief contains declarations by jurors and counsel alleging the jury was confused by the accomplice liability instructions. Br. Resp't Suppl. App. 31–36. Although Sarausad indirectly attempts to rely on this inadmissible evidence by appending the declarations to the brief and discussing them in his statement of the case, both the Ninth Circuit and the district court judge recognized these declarations are inadmissible under Evidence Rule 606(b), and should not be considered. Pet. App. 78a, 128a–29a.

when the “jury was adequately instructed [and] the trial judge responded to the jury’s question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry[.]” *Weeks*, 528 U.S. at 234. “A jury is presumed to follow its instructions [and] understand a judge’s answer to its question.” *Id.* “To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge’s answer.” *Id.* In addition, like the jury in *Weeks*, the jury in *Sarausad* “demonstrated that it was not too shy to ask questions, suggesting that it would have asked another if it felt the judge’s response unsatisfactory.” *Id.* at 235–36.

Sarausad’s efforts to distinguish *Weeks* lack substance. First, *Sarausad* argues that *Weeks* does not stand for the proposition that it is never error for a court, having correctly instructed the jury, to redirect the jury’s attention to the instructions in response to a question from the jury.⁴ According to *Sarausad*, such a proposition would be inconsistent with *Simmons v. South Carolina*, 512 U.S. 154 (1994), *Shafer v. South Carolina*, 532 U.S. 36 (2001), and *Armstrong v. Toler*, 24 U.S. 258 (1826). *Sarausad* apparently cites these cases for the proposition that whenever a jury asks a question about its instructions, it means that the jury does not and *will not* be able to understand and apply the

⁴ *Sarausad* also overstates the state’s argument. It is not that an additional instruction could “never” be required. However, once there is a proper instruction, it is difficult to show an abuse of discretion to refuse an amplifying instruction. *E.g.*, *United States v. Park*, 421 U.S. 658, 675 (1975).

instructions without supplemental instruction from the court. Br. Resp't 40–41. None of the cited cases stand for Sarausad's proposition, and it would be inconsistent with the rule that the jury is presumed to understand the judges answers to its questions and that it will ask additional questions if it does not. Indeed, this Court in *Armstrong* explained, “[h]ad the jury desired further information, they might, and probably would, have signified their desire to the Court.” *Armstrong*, 24 U.S. at 279.

Moreover, *Simmons* and *Shafer* both involved improper instructions where the prosecution argued for death based on the future dangerousness of the defendant. Defense counsel in both cases sought an instruction that a sentence of life in prison meant that the defendant would be ineligible for parole. In *Simmons*, in response to the jury's question, “Does the imposition of a life sentence carry with it the possibility of parole?” (*Simmons*, 512 U.S. at 160), the judge told the jury, “You are instructed not to consider parole or parole eligibility in reaching your verdict. Do not consider parole or parole eligibility. That is not a proper issue for your consideration. The terms life imprisonment and death sentence are to be understood in their plain [sic] and ordinary meaning.” *Id.* (alteration in original). The Court found constitutional error “[b]ecause petitioner's future dangerousness was at issue, he was entitled to inform the jury of his parole ineligibility [so] the instruction issued by the trial court in this case does not satisfy due process.” *Id.* at 171; see also *Shafer*, 532 U.S. at 53 (describing similar error).

Next, Sarausad relies on the fact that defense counsel objected to the judge's response to the jury's questions. However, the objections actually support the conclusion that the jury was not reasonably likely to convict Sarausad on the basis of knowledge of any crime because the objections were not based on any such concern.

On October 25, 1994, the jury inquired: "Request clarification on instructions no. 11 & no. 12 element (3); does the 'intent' apply to (the defendant only) or to (the defendant or his accomplice)?" JA 131. Reyes' defense counsel "suggest[ed] a reply referring the jury to instructions 6, 46, and 47 as well as the instructions as a whole." JA 131-32. The judge adopted this suggestion, except the judge did not refer the jury to Instruction No. 6. All defense counsel took exception to omitting Instruction No. 6. JA 132. (Instruction No. 6 is not at issue in this case.)

Three days later, the jury asked: "Reference: Instruction No. 17 in 'the crime of murder in the second degree (intentional)' Question: Does intentional apply to only the Defendant or only his accomplice?" JA 135. The prosecutor and Ronquillo's and Reyes' counsel had "no objection to the Court giving the same reply it gave to the jury's previous inquiry on Oct. 25, 1994." JA 135-36. Sarausad's counsel "maintain[ed] the same objection it previously made orally and per his brief filed on that date." JA 136. Sarausad did not object to the accomplice liability Instruction No. 46. Rather, he objected to Instructions No. 12, 17, 23, 27, 31, 38, 41, and 44 because he contended that they would permit Sarausad to be convicted "on the basis of his or 'his

accomplice's' actions and intentions.” Br. Resp’t Suppl. App. 15. Sarausad’s counsel expressed no concern that the jury would misapply the instructions to convict him on the basis of knowledge of any crime. The judge told the jury: “Refer to instruction 45 and 46 and consider the instructions as a whole.” JA 136.

Three days later, the jury asked: “We are having difficulty agreeing on the legal definition and concept of ‘accomplice.’ Question: When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?” JA 137 (alteration in original). The judge’s proposed response was: “Reread instructions #45, 46, 47, and 48, and consider your instructions as a whole.” JA 138. Counsel for Ronquillo suggested “‘refer to your instructions’, but has no objection to the court’s proposed reply.” JA 138. Reyes’ counsel suggested “‘see instruction 46 and consider your instructions as a whole’, but has no obligation [sic] to the court’s proposed reply.” JA 138. Sarausad’s counsel suggested either

“(1) ‘no’; or (2) ‘reread instruction #46 (accomplice definition) with the added clarification: to be an accomplice one (1) must promote or facilitate the crime being considered by the actor, (2) the actor must have the mental state required for the crime, and (3) the accomplice must know that the actor had the required mental state.[’]” JA 138.

The court gave its proposed response to the jury over Sarausad's objection. JA 138. And correctly so, because the clarification to Instruction No. 46 proposed by Sarausad's counsel was improper as a matter of Washington law. "[A]n accomplice need not have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime." *Roberts*, 142 Wash. 2d at 512.⁵ Most significant is the point that Sarausad's counsel did not seek to clarify that the state needed to prove that Sarausad had knowledge he was facilitating a shooting at Ballard High School, rather than any crime. The fact is that neither Reyes' nor Sarausad's counsel expressed concern that the jury would apply the accomplice liability instruction in the way Sarausad now argues to this Court.

d. Evidence Outside The Trial Record Is Inherently Weak In Evaluating Whether A Jury Misapplied An Instruction

In determining whether there is a reasonable likelihood that the jury misapplied an instruction in a way that violated the Constitution, the Court considers "the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Sarausad places substantial

⁵ Sarausad's counsel later admitted "that this proposed supplemental instruction overstates the mens rea required of an accomplice as defined in *Roberts*. Supplemental Reply Brief in Support of Personal Restraint Petition at 7, n.4." Pet. App. 208a n.9.

reliance on evidence outside the trial record. Br. Resp't 33–38.

External evidence is of limited value for the reason that the understanding of a jury or an appellate court necessarily depends upon the instructions given and the arguments made—the context of the trial. The Court explained this point in *Boyd v. California*, 494 U.S. 370 (1990). *Boyd* rejected the contention that the arguments of prosecutors in other cases were relevant in determining the validity of a jury instruction in the case before the Court. The Court found “no merit to the contention . . . that arguments of prosecutors in *other* California cases bear on the validity of the factor (k) instruction in this case.” *Boyd*, 494 U.S. at 386 n.6. The Court reasoned that the defendant’s “jury obviously was not influenced by comments made in other California capital trials. Nor do we think the fact that prosecutors in other cases may have pressed a construction of factor (k) that would cause the sentencing proceedings to violate the Eighth Amendment means that reasonable jurors are likely to have arrived at an [sic] such an interpretation.” *Id.* The few decisions cited by Sarausad turn on the context of the criminal trials—including the instructions given to the jury and the arguments of counsel—and the arguments made on appeal. They do not provide any information about whether there was a reasonable likelihood that the jury in this case misapplied the correct accomplice liability instruction in a way that violated the Constitution.

Sarausad relies heavily on the direct appeal in this case. In an unpublished opinion, the

Washington Court of Appeals stated that Sarausad could be convicted without proving that “Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day[.]” Pet. App. 266a; Br. Resp’t 33–34. However, the court’s observation that the state could convict Sarausad without proving that he knew there was a potential for gunplay that day was made in the context of Sarausad’s challenge to the sufficiency of evidence, on the grounds “that he was merely present at the scene, and was therefore insufficient to support his conviction of murder in the second degree based on accomplice liability.” Pet. App. 265a. The court did not focus on how the instructions would be applied by a jury; it addressed Sarausad’s argument that the law requires shared intent. Pet. App. 258a–59a.

The state court decision on direct review, thus, does not support Sarausad’s claim. It is a court’s misstatement regarding accomplice liability where the language at issue in this case was not in dispute. Notably, the state court that considered Sarausad’s personal restraint petition simply acknowledged that “we erred.” Pet. App. 205a. It did not find ambiguity in the instruction. At best, then, the state court decision on direct review indicates that a court may misstate a correct and otherwise straight forward instruction in a context where its relevant language is not directly at issue.

Sarausad next points to other decisions that Sarausad claims reveal a long standing disagreement about the meaning of accomplice liability in Washington. Br. Resp’t 34–36. In *In re the Personal Restraint Petition of Domingo*, 155 Wash. 2d 356, 367, 119 P.3d 816 (2005), the

Washington Supreme Court expressly rejected Sarausad’s view because “a review of the cases relied on by petitioners reveals that the Courts of Appeal, while sometimes using imprecise or overbroad language, *rarely if ever deviated from the holdings of Roberts, Cronin, and Davis* during the 16 years separating those decisions.”⁶ Moreover, *Boyde* teaches that the arguments by counsel in other cases do not inform the Court about what the jury understood in a different case. *Boyde*, 494 U.S. at 386 n.6.

Finally, Sarausad offers, as external evidence, the fact that the jury did not receive an explanation of the accomplice liability instruction like that contained in parties’ briefs or the decision of the court dealing with accomplice liability. Br. Resp’t 36–38. There is no merit to this claim. Jury instructions, the briefs of lawyers, and the decisions of courts serve very different purposes. “The purpose of jury instructions ‘is to inform the jury of its function, which is the independent determination of the facts, and the application of the law, as given by the court, to the facts found by the jury.’ 2A Charles

⁶ Sarausad also overstates the state cases. For example, *State v. Boyd*, 21 Wash. App. 465, 476 n.1, 586 P.2d 878 (1978) (Br. Resp’t 2), examined the correct instruction, rejected a shared intent requirement, and did not misstate accomplice law. *State v. Rice*, 102 Wash. 2d 120, 683 P.2d 199 (1984) (Br. Resp’t 2), also deals with the “shared intent” theory and, contrary to Sarausad’s argument, makes no assumptions about the accomplice liability instruction. *Id.* at 125 (accomplice instruction “was not relevant”). *In re the PRP of Smith*, 117 Wash. App. 486, 73 P.3d 386 (2003) (Br. Resp’t 35), involved the wrong instruction, but, the opinion in *Domingo* specifically rejected the quote from *Smith* cited by Sarausad.

A. Wright, *Federal Practice and Procedure: Criminal* § 485 (3d ed. 2000).” *United States v. Mikutowicz*, 365 F.3d 65, 70 (1st Cir. 2004). The purpose of briefs is to make arguments to the court about how the legal issues in the case should be resolved. The purpose of the decision of the court is to resolve the legal issues in the case, and provide guidance to lower courts, counsel, and the public about the law.

Because they serve different functions, briefs and opinions are necessarily more comprehensive and include greater detail in making and resolving arguments. Instructions are just that—instructions to guide the jury. There is no basis to claim that the jury in this case was misled because the briefs of counsel and the opinions of the court discussed accomplice liability in greater depth than the jury instructions.

3. The Decision Of The State Court Was Not Objectively Unreasonable

The Ninth Circuit also should be reversed because Sarausad fails to meet the deferential standard of review under 28 U.S.C. § 2254(d). To prevail, Sarausad not only must demonstrate that there was a reasonable likelihood that the jury misapplied the accomplice liability instruction to relieve the state of its burden to prove the knowledge element, he also must satisfy the deferential standard of review under § 2254(a)(1).

Sarausad argues that the state court’s adjudication of his claim was an unreasonable application of clearly established federal law. A state court decision is an unreasonable application of clearly established federal law under § 2254(d)(1)

only if the state court unreasonably applies the holdings of this Court to the facts of the prisoner's case. *Holland v. Jackson*, 542 U.S. 649, 652 (2004). The state court decision must be objectively unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003). Whether a decision is objectively unreasonable depends upon the specificity of the rule. Here, the clearly established law is a general rule that, in considering a claim that a jury instruction is ambiguous, the court must determine “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.” *Estelle*, 502 U.S. at 72 (internal quotation marks omitted). This is exactly the type of general rule where state courts have “more leeway . . . in reaching outcomes in case-by-case determinations.” *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

a. The PRP Court Was Not Objectively Unreasonable In Rejecting Sarausad's Claim Of Entitlement To Supplemental Jury Instructions

Sarausad argues that the state court's adjudication was objectively unreasonable because the court, in his personal restraint petition (PRP), framed the constitutional question in an unduly narrow way by failing to address whether the judge should have given a supplemental accomplice liability instruction. Br. Resp't 46–49. Sarausad analogizes this case to *Wiggins v. Smith*, 539 U.S. 510 (2003). Br. Resp't 23, 46. Contrary to this argument, in considering Sarausad's personal restraint petition, the PRP court examined this claim. *Wiggins* is not on point.

Wiggins involved a claim of ineffective assistance of counsel. The defendant’s “claim stem[ed] from counsel’s decision to limit the scope of their investigation into potential mitigating evidence.” *Wiggins*, 539 U.S. at 521. Defense “counsel attempt[ed] to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternative strategy instead.” *Id.* However, under *Strickland v. Washington*, 466 U.S. 668 (1984), “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Wiggins*, 539 U.S. at 521–22 (quoting *Strickland*, 466 U.S. at 690–91). The “state court merely assumed that the investigation was adequate.” *Id.* at 527. The court’s “*assumption that counsel’s investigation was adequate reflected an unreasonable application of Strickland*. In deferring to counsel’s decision not to present every conceivable mitigation defense despite the fact that counsel based their alleged choice on an inadequate investigation, the Maryland Court of Appeals further unreasonably applied *Strickland*.” *Id.* at 512 (emphasis added).

Unlike the state court in *Wiggins*, the PRP court did not assume that the jury was properly instructed or that no supplemental instruction was required. Rather, the PRP court examined the instructions and fully adjudicated Sarausad’s arguments. Thus, the PRP court did not frame the

constitutional question too narrowly. Similarly, because the PRP court adjudicated these questions, there is no merit to Sarausad’s related argument that the PRP court should be reviewed de novo. Br. Resp’t 23 (citing *Rompilla v. Beard*, 545 U.S. 374, 390 (2005)).

First, the PRP court expressly recognized Sarausad’s claim that the judge erred by failing to give supplemental instructions. According to the PRP court:

“Sarausad vigorously argues that under the unique facts of this case, *the trial court’s failure to provide a supplemental instruction in response to the jury’s persistent inquiries relieved the State of its burden to prove its case beyond a reasonable doubt*—notwithstanding that the accomplice liability instructions complied with the requirements of *Roberts*[.]” Pet. App. 208a (emphasis added).

Similarly, the PRP court specifically considered Sarausad’s claim that the prosecutor’s argument resulted in an improper conviction “because of the way that the prosecutor argued the case to the jury.” Pet. App. 208a. The PRP court stated:

“[Sarausad] contends that because his trial took place before *Roberts* was handed down, the *prosecutor erroneously assumed, and argued, that the jury could find Sarausad guilty as an accomplice to murder if he had the purpose to facilitate an offense of any kind whatsoever, even a shoving match or fist fight.*” Pet. App. 208a–09a (emphasis added).

Contrary to Sarausad's claim, the PRP court explained that it rejected his argument

“because the court properly instructed the jury as to the law of accomplice liability and because the prosecutor made it crystal clear to the jury that the State wanted Sarausad found guilty of first degree murder, first degree attempted murder and second degree assault because he knowingly facilitated the drive-by shooting and for no other reason.” Pet. App. 214a (footnote omitted).

Based on all of this, the PRP court held that “the accomplice liability instructions were sufficient, and *nothing that the prosecutor argued to the jury required a remedial or supplemental instruction from the trial court.*” Pet. App. 215a (emphasis added). “[W]e adhere to our ruling in the direct appeal that the trial court properly exercised its discretion in denying Sarausad's request for clarifying instructions.” Pet. App. 215a.

Thus, contrary to the assertions of Sarausad and amici, the PRP court considered and ruled upon Sarausad's claim that the judge was required to do more in response to the jury inquiries than direct the jury to the previous instructions. The PRP court issued a sound and reasoned adjudication of the question.

Finally, the PRP court adjudication must be evaluated in light of the fact that no clearly established case law compels an additional instruction. As this Court held in *Weeks*:

“Given that petitioner’s jury was adequately instructed, and given that the trial judge responded to the jury’s question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry, the question becomes whether the Constitution requires anything more. We hold that it does not.” *Weeks*, 528 U.S. at 234.

b. The PRP Court’s Conclusion With Respect To The Prosecutor’s Argument Was Not Objectively Unreasonable

Sarausad next claims that the state court decision was objectively unreasonable because the PRP court misconstrued the prosecutor’s use of the catch phrase “you’re in for a dime, you’re in for a dollar.” Br. Resp’t 49–52. The PRP court, however, rejected Sarausad’s argument because it found that “[n]ot once did the prosecutor suggest to the jury that it could or should convict Sarausad even if it believed that he returned to Ballard High School for the purpose of facilitating nothing more than another shoving match or a fistfight[.]” Pet. App. 214a–15a. Sarausad argues that the PRP court’s decision was objectively unreasonable in this respect because the prosecutor’s rebuttal conveyed to the jury that it could convict Sarausad if he acted only with knowledge that he was facilitating a fistfight. This is based on Sarausad’s erroneous claim that his defense counsel argued the correct standard of accomplice liability, and the prosecutor disputed it with the adage “you’re in for a dime, you’re in for a dollar.” Br. Resp’t 50–51.

The PRP court's conclusion that the prosecutor never suggested that Sarausad could be convicted if he only had knowledge of a fistfight is sound. When the prosecutor used the phrase "you're in for a dime, you're in for a dollar" to correct Sarausad's misstatement of accomplice liability, she explained what she meant by a "dime". She argued that the defendants knew they were returning to the school for a shooting. She said: "A fist didn't work, pushing didn't work. Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar." JA 123–24. The PRP court's consideration of the context of the prosecutor's argument is not objectively unreasonable. Pet. App. 213a–14a. Nor was it unreasonable for the PRP court to recognize that Sarausad's counsel had wrongly argued the intent element. *Supra* pp. 8–10 (discussing Pet. App. 215a n.11).

Next, Sarausad argues that the PRP court's decision is objectively unreasonable because it is fundamentally inequitable. Sarausad cites *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), for the proposition that "serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings[.]" *Bradshaw*, 545 U.S. at 189 (Souter, J., concurring). From this, Sarausad argues it was objectively unreasonable for the PRP court not to recognize that if the phrase "you're in for a dime, you're in for a dollar" in *State v. Cronin*, 142 Wash. 2d 568, 14 P.3d 752 (2000), could be used to argue the wrong accomplice knowledge, it was reasonably likely that the jury in this case would misapply the phrase.

There are two flaws with this argument. First, the factual underpinnings of Justice Souter's concern in *Bradshaw* are not present. The state in *Bradshaw* inconsistently claimed that a fatal shot was fired by two different defendants when it tried the defendants separately. Justice Souter explained, "Stumpf's argument is simply that a death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant." *Bradshaw*, 545 U.S. at 189. The state made no such inconsistent factual claim here. Instead, this case is governed by *Boyde*, where the Court rejected the argument that a prosecutor's argument in one case was relevant to the jury's understanding of an instruction in another case. *Boyde*, 494 U.S. at 385 n.6.

Second, the consolidated cases in *Cronin*, involve incorrect instructions and prosecutors who explicitly argued to the jury that the defendant could be convicted if he was guilty of any crime. The prosecutor in *Bui* asked: "Does the state have to prove that Linh Bui knew that the person in his car would get out and shoot? No. It's the commission of a crime." *Cronin*, 142 Wash. 2d at 572. The prosecutor asked: "Did Linh Bui know by his actions when he chased after another car, when he pulled across in front of them and blocked them off in an intersection, allowed his passengers to get out, does common sense show us that he knew he was facilitating the commission of a crime? harassment? physical assault? any crime." *Id.* at 572-73. Similarly, in *Cronin*, the prosecutor relied on both an

incorrect instruction and used the catch phrase “in for a dime, in for a dollar.” *Cronin*, 142 Wash. 2d at 577. Then, unlike Sarausad’s case, where the “dime” was a shooting, the prosecutor in *Cronin* identified the “dime” as “the commission of the assaultive behavior that unravels into that fatal stabbing.” *Id.*

Nothing in *Cronin* casts any doubt on the PRP court’s adjudication.

c. Neither *Sandstrom* Nor *Mills* Support Sarausad’s Claim That The PRP Court’s Decision Was Objectively Unreasonable For Lack Of Reliance On Evidence Outside The Record

Finally, Sarausad argues that the decision of the PRP court is objectively unreasonable in light of *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Mills v. Maryland*, 486 U.S. 367 (1988). Sarausad argues that in those cases the Court concluded that there was a reasonable likelihood that the jury would misapply the instruction based on evidence outside the record, and that such evidence is greater in this case. Br. Resp’t 53–54. This claim is not well taken. Evidence from outside the record is of limited value in determining whether it is reasonably likely that a jury misapplied an instruction. *Supra* pp. 16–17. Moreover, Sarausad’s characterization of *Sandstrom* and *Mills* is not accurate.

The Court in *Sandstrom* relied primarily on the language of the instruction. The Court explained that “[p]etitioner’s jury was told that ‘[t]he law presumes that a person intends the ordinary consequences of his voluntary acts’ [and] the common

definition of ‘presume’ [is] ‘to suppose to be true without proof,’ *Webster’s New Collegiate Dictionary* 911 (1974)[.]” *Sandstrom*, 442 U.S. at 517 (second alteration theirs). Because there were no “qualifying instructions as to the legal effect of the presumption, [the court could not] discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways.” *Id.* The Court merely noted in passing that “[n]umerous federal and state courts have warned that instructions of the type given here can be interpreted in just these ways.” *Id.* Unlike *Sandstrom*, in this case, there is substantial evidence from the trial court record that there was no reasonable likelihood that the jury misapplied the accomplice liability instruction.

Sandstrom is not persuasive for a second reason—it involved a presumption. Once it was reasonably likely that the jury would interpret the instruction as a conclusive presumption, the instruction was unconstitutional as a matter of law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). This is not true of the accomplice liability instruction. Even if the trial court had given an incorrect instruction, referring to “a crime” instead of “the crime”, that instruction would not necessarily be unconstitutional. See *Estelle*, 502 U.S. at 74–75.

Sarausad is also incorrect in claiming that *Mills* relied to a significant degree on evidence outside the record. In fact, in *Mills*, the Court carefully analyzed both the instruction and the jury verdict form. *Mills*, 486 U.S. at 378–80. After its analysis, the Court concluded that “[o]ur reading of those parts of the record leads us to conclude that there is at least a substantial risk that the jury was

misinformed.” *Mills*, 486 U.S. at 381. Only then did the Court refer in passing to the dissent in the state court. Accordingly, *Mills* does not support the conclusion that the PRP court’s decision was objectively unreasonable because it did not rely on evidence outside the record.

CONCLUSION

For the reasons stated herein, the Court should reverse the decision of the Ninth Circuit and remand for further proceedings.

Respectfully submitted.

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