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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Washington Supreme Court has repeatedly approved of the pattern accomplice liability jury instructions given in Sarausad's trial, which mirror the statutory language on accomplice liability under state law. The United States Court of Appeals for the Ninth Circuit found a violation of due process based on its independent conclusion that the instructions were ambiguous and that there was a reasonable likelihood a jury could misapply the instructions so as to relieve the prosecution of its burden to prove each element of a crime beyond a reasonable doubt.

1. 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?

2. Where the accomplice liability instructions correctly set forth state law, is it an unreasonable application of clearly established federal law to conclude there was no reasonable likelihood that the jury misapplied the instructions so as to relieve the prosecution of the burden of proving all the elements of the crime?

PARTIES

The petitioner is Doug Waddington, the Superintendent of the Washington Corrections Center. Mr. Waddington is the successor in office to Carol Porter, who was the respondent-appellant in the Ninth Circuit, and he is substituted pursuant to Supreme Court Rule 35.3. The respondent is Cesar Sarausad.

TABLE OF CONTENTS

BRIEF FOR THE PETITIONER

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Sarausad v. Porter*, 479 F.3d 671 (9th Cir. 2007). Pet. App. 31a–124a. The order denying a timely petition for rehearing en banc, and the dissent from the denial of rehearing is reported at 503 F.3d 822 (9th Cir. 2007). Pet. App. 1a–30a. The order of the United States District Court for the Western District of Washington is unpublished. Pet. App. 125a–33a. The report and recommendation of the United States Magistrate Judge is unpublished. Pet. App. 134a–88a. The opinion of the Washington Court of Appeals denying Sarausad's post-conviction collateral challenge is reported at *In re the Personal Restraint of Sarausad*, 109 Wash. App. 824, 39 P.3d 308 (2001). Pet. App. 195a–230a. The state court opinion affirming Sarausad's convictions on direct appeal is unpublished. Pet. App. 233a–67a.

JURISDICTION

The court of appeals first entered its opinion March 7, 2007. Pet. App. 31a. The circuit court denied a timely petition for rehearing en banc September 10, 2007. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution similarly provides, in part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

28 U.S.C. § 2254(d) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

28 U.S.C. § 2254(e)(1) provides:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of

> a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1)

Washington's accomplice liability statute, Wash. Rev. Code § 9A.08.020, provides, in relevant part:

> "(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
>
> "(2) A person is legally accountable for the conduct of another person when:
>
> ". . . .
>
> "(c) He is an accomplice of such other person in the commission of the crime.
>
> "(3) A person is an accomplice of another person in the commission of a crime if:
>
> "(a) With knowledge that it will promote or facilitate the commission of the crime, he
>
> "(i) solicits, commands, encourages, or requests such other person to commit it; or
>
> "(ii) aids or agrees to aid such other person in planning or committing it[.]" Wash. Rev. Code § 9A.08.020.

Washington's second degree murder statute, Wash. Rev. Code § 9A.32.050, provides, in relevant part:

> "(1) A person is guilty of murder in the second degree when:
>
> > "(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person[.]" Wash. Rev. Code § 9A.32.050.

STATEMENT

In 1994, a gang-related drive-by shooting occurred at a Seattle area high school. Respondent Cesar Sarausad drove quickly toward a group of students standing outside the school and then slowed his car in front of the students. As the car slowed, front-seat passenger Brian Ronquillo fired several shots at the students. Sarausad knew that Ronquillo was armed and that he was going to shoot. Melissa Fernandes was shot in the head and killed. Another student was wounded.

A jury convicted Sarausad of second degree intentional murder, second degree attempted murder, and second degree assault. The Washington appellate courts affirmed that the instructions in Sarausad's trial correctly set forth Washington law on accomplice liability. The Ninth Circuit held that the instruction that was given violated the Due Process Clause. The court concluded that the instruction was ambiguous with regard to accomplice liability under Washington law, that an additional clarifying instruction was required, and that there was a reasonable likelihood that the jury misapplied

the instruction in a manner that relieved the prosecution of its burden to prove all the elements of the crime. Sarausad's convictions for murder and attempted murder were vacated. (Sarausad's habeas corpus petition did not challenge the assault conviction.)

1. The Events Of The Shooting

Sarausad was a member of a gang called the *23rd Street Diablos*. Pet. App. 197a. On the day of the drive-by shooting, gang member Jerome Reyes told his fellow Diablos that two days earlier he had been chased away from Ballard High School by a rival gang, the *Bad Side Posse*. Pet. App. 197a. The Diablos considered the chasing of Reyes to be an affront to their gang requiring revenge to regain their lost respect. Pet. App. 216a. With Sarausad driving one of the two cars, Reyes, Ronquillo, and six other Diablos drove to the high school to confront the rival gang. Pet. App. 197a. At the school, the Diablos flashed gang signs, exchanged harsh words, and engaged in a shoving match with the rival gang. Pet. App. 197a, 236a. The Diablos, however, left the school when they heard the police were coming. Pet. App. 197a.

The group of Diablos then went to a friend's home. Pet. App. 197a. Sarausad left to get Michael Vicencio, whom the gang members knew had a gun. Pet. App. 34a, 51a. When Vicencio arrived at the house, he gave the gun to Ronquillo. Pet. App. 34a, 198a, 236a. The Diablos then returned to the high

school to show they were not afraid of the other gang. Pet. App. 236a. Sarausad drove the lead car andVicencio drove the second car. Pet. App. 198a. Ronquillo, armed with the gun, sat next to Sarausad, with three Diablos in the back seat. Pet. App. 198a.

While returning to the school, the Diablos in Sarausad's car discussed the possibility of shooting. Pet. App. 198a. As the two cars neared the school, they moved side by side to hold a brief discussion, where Sarausad said, "Are you ready?" Pet. App. 198a. As he sat next to Sarausad, Ronquillo tied a bandana over his nose and mouth, and pulled the gun out of his pants. Pet. App. 215a–16a. Sarausad drove quickly towards the front of the school and slowed the car in front of a group of students. Ronquillo aimed the gun out the front passenger window and fired between six and ten shots directly at the students. Pet. App. 198a. Two students ducked and avoided the shots, but a bullet hit Melissa Fernandes in the head, killing her. Pet. App. 198a. Another student was injured when he was hit in the leg by a bullet fragment. Pet. App. 198a.

Once the shooting stopped, Sarausad sped away, followed by the other car. Pet. App. 198a. After some distance, Ronquillo transferred the gun to the second car. Pet. App. 198a. Sarausad then drove to a local mall and eventually went home. Pet. App. 198a. The police arrested Sarausad at his home later that day. When arrested, Sarausad denied having even been at the school that day.

2. Trial Court Proceedings

a. The Charges Against Sarausad

In count one, the prosecution charged the driver Sarausad, the shooter Ronquillo, and the instigator Reyes with the first degree premeditated murder of Fernandes. J.A. 1. This charge contained within it the lesser-included offense of second degree intentional murder. Pet. App. 197a. Count two charged the alternative crime of second degree felony murder, but the jury could consider count two only if they did not convict on count one. J.A. 1–2; Pet. App. 196a n.3. The prosecution also charged the three defendants with the attempted murders of two of the students targeted during the shooting, and with the second degree assault of the student injured by bullet fragments. J.A. 2–4.

The three defendants were tried together. The prosecution's theory was that gang mentality required the Diablos to confront the rival gang to regain the respect lost when Reyes was chased from the high school. Pet. App. 199a. When the shoving match on the first trip to the school failed to serve this purpose, several witnesses showed how the defendants returned to the school intending to carry out the drive-by shooting as a certain means of regaining lost respect. Pet. App. 199a. Ronquillo's defense admitted he fired the gun, but denied he had any intent to kill. Pet. App. 199a. Sarausad's and Reyes's defense was that they returned to the school expecting, at most, more shoving or a fistfight. Pet. App. 199a. Sarausad denied knowing that Ronquillo was armed, and he claimed that no one in the car

saw Ronquillo pull out the gun and tie the bandana over his face before the shooting. Pet. App. 199a.

The court instructed the jury on all of the elements of each crime charged against Sarausad. J.A. 7–18. The court instructed that to convict Sarausad of second degree intentional murder, the jury must find each element of the crime beyond a reasonable doubt, including the elements that "Sarausad, or an accomplice discharged a firearm," and that "Sarausad, or an accomplice acted with intent to cause the death of another person." J.A. 10. Similarly, the court instructed that to convict Sarausad of attempted second degree murder, the jury must find beyond a reasonable doubt that Sarausad or his accomplice "did an act which was a substantial step toward the commission of Murder in the Second Degree," and "[t]hat the act was done with the intent to commit Murder in the Second Degree." J.A. 14, 15. The court specifically instructed the jury on the definitions of intent and knowledge. J.A. 17, 18. The instructions did not omit any element of the charged offenses.

The court also instructed the jury that it "must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count or as to any other defendant." J.A. 7. In each charge, the court specifically instructed the jury that to convict, each of the "elements of the crime must be proved beyond a reasonable doubt." J.A. 9–10, 12–16. The court instructed: "On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to

any one of these elements, then it will be your duty to return a verdict of not guilty." J.A. 9–10.

b. The Instructions On Accomplice Liability

The prosecution contended that Sarausad and Reyes were guilty as accomplices of Ronquillo. Under Washington law, an accomplice is guilty to the same extent as the principal in a crime. Wash. Rev. Code § 9A.08.020(1)–(2) (Pet. App. 274a). Washington law defines an accomplice as someone who "aids or agrees to aid such other person in planning or committing" the crime charged. Wash. Rev. Code § 9A.08.020(3) (Pet. App. 274a). Accomplice liability requires proof the person acted "[w]ith knowledge that it will promote or facilitate the commission of the crime" for which the accomplice is charged. Wash. Rev. Code § 9A.08.020(3) (Pet. App. 274a).

Sarausad proffered an instruction that added language to the definition of an accomplice. J.A. 20–21. The court declined to give the proposed instruction and, instead, used the pattern instruction quoting almost verbatim from the accomplice liability statute, Wash. Rev. Code § 9A.08.020. *Compare* Pet. App. 274a–275a (statute) *with* J.A. 16–17 (instructions 45 and 46). Instruction number 45 provided:

> "You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person

> when he is an accomplice of such other person in the commission of the crime." J.A. 16.

The court also gave instruction number 46, providing, in relevant part:

> "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." J.A. 17 (emphasis added.)

Under Washington law, these are the proper jury instructions on the knowledge element of accomplice liability. *See State v. Roberts*, 142 Wash. 2d 471, 512, 14 P.3d 713 (2000). The Washington Supreme Court in *Roberts* held the accomplice statute does not impose strict liability on an alleged accomplice for any crime that might be committed by a principal. *Id*. at 510. The statute imposes a mens

rea requirement that the accused act with knowledge that he is promoting or facilitating "the crime," which means the charged offense. *Roberts*, 142 Wash. 2d at 510. However, the mens rea element of knowledge does not require that the accomplice share the same mental state as the principal. Instead, the "long-standing rule [is] that 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." *Id.* at 512 (citing *State v. Sweet*, 138 Wash. 2d 466, 479, 980 P.2d 1223 (1999); *State v. Hoffman*, 116 Wash. 2d 51, 104, 804 P.2d 577 (1991)). "[W]here criminal liability is predicated on the accomplice liability statute, the State is required to prove only the accomplice's *general knowledge of his coparticipant's substantive crime*." *Roberts*, 142 Wash. 2d at 512 (quoting *State v. Rice*, 102 Wash. 2d 120, 125, 683 P.2d 199 (1984)).

Roberts disapproved of an instruction stating that an accomplice must act with knowledge that he promoted or facilitated the commission of "a crime." *Roberts*, 142 Wash. 2d at 512–13. The "a crime" instruction in *Roberts* improperly departed from the language of the statute. *Id.* at 511. However, the *Roberts* court expressly approved an instruction that required the jury to find "the accomplice acted 'with knowledge that it will promote or facilitate the commission of *the crime*.'" *Id.* at 512 (quoting jury instruction in *State v. Davis,* 101 Wash. 2d 654, 656, 682 P.2d 883 (1984)); *see also State v. Cronin,* 142 Wash. 2d 568, 579, 14 P.3d 752 (2000). *Roberts* held the proper instruction referring to "the crime" would copy "exactly the language from the

accomplice liability statute" found at Wash. Rev. Code § 9A.08.020(3). *Roberts*, 142 Wash. 2d at 512.

c. The Closing Argument

The jury heard closing arguments after receiving the instructions. The prosecution argued that all three defendants were guilty of first degree murder, and attempted first degree murder, because they acted with premeditated intent to kill (J.A. 43–48), and that they had premeditated intent, even if they formed the intent to kill as late as when the two cars were stopped side by side near the school. J.A. 44. The prosecutor repeatedly contended that the defendants intended to shoot and kill because "[s]hoving wasn't going to regain their respect, a gun was. And that's why they went back for a second trip." J.A. 45. According to the prosecutor, Sarausad was a "classic accomplice" because he knowingly facilitated the murder by driving toward the students in a "swooping motion," and "slowed down on the dime, slowed down before the shots were fired, stayed slowed down until the shots were over and immediately sped up." J.A. 39. The prosecutor focused repeatedly on how all three defendants intended or knew that a shooting would occur. J.A. 41 ("They all knew what they were there for.").

Sarausad's counsel argued that Sarausad intended only a fistfight and did not know that Ronquillo was armed and intended to shoot. J.A. 80–82. "There is not a single circumstance, though, that points conclusively to [Sarausad] having any guilty knowledge or intent to assist in a shooting anywhere in the evidence." J.A. 82–83. Citing the

legal definition of an accomplice, counsel argued that Sarausad did not knowingly assist Ronquillo in committing "the crime being charged." According to defense counsel, "if [Sarausad] *didn't know* of any plan to use the gun, he's not guilty since the gun was used in all the crimes and all the lesser crimes. And the burden is on the State to prove that Cesar is an accomplice beyond a reasonable doubt." J.A. 84 (emphasis added).

Reyes's counsel also argued that Reyes was not an accomplice because he did not know Ronquillo was armed and intended to shoot. J.A. 68–72. He argued that Reyes, and Sarausad, and the others in the car were surprised when Ronquillo started shooting. J.A. 68–69. Focusing on knowledge, Reyes's counsel argued "there is no evidence at all that Jerome Reyes was anything other than present at the scene . . . [t]here is no evidence that he even knew that there was a gun." J.A. 74.

In rebuttal, the prosecutor again argued that Sarausad acted as an accomplice by knowingly assisting Ronquillo in the shooting:

> "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." J.A. 123–24 (emphasis added).

d. Inquiries From The Jury

Jury deliberation followed the argument. On the third day of deliberations, the jury submitted an inquiry requesting "clarification on instructions No. 11 & 12 element (3); does the 'intent' apply to (the defendant only) or to (the defendant or his accomplice)?" J.A. 126. The court conferred with all counsel, and Reyes suggested referring the jury to instructions 6, 46, and 47, and the instructions as a whole. J.A. 131–32. The court responded: "Refer to instructions 46 and 47 and consider your instructions as a whole." J.A. 126.

Three days later, the jury submitted another inquiry referencing "[i]nstruction No. 17 in 'the crime of murder in the second degree (intentional).' QUESTION: Does intentional apply to only the defendant or only his accomplice?" J.A. 128. Over Sarausad's objection, the court responded: "Refer to instructions 45 and 46 and consider the instructions as a whole." J.A. 128.

Three days later, the jury submitted another inquiry:

> "We are having difficulty agreeing on the legal definition and concept of 'accomplice.' QUESTION – when a person willing [sic] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?" J.A. 129.

The court conferred with counsel. J.A. 138. Ronquillo and Reyes each suggested language that the jury should refer to their instructions, but neither defendant had an objection to the court's

proposed response. J.A. 138. Sarausad objected and suggested the following response:

> "(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." J.A. 13.

The court rejected Sarausad's proposed language and told the jury: "Reread instructions #45, 46, 47, and 48, and consider your instructions as a whole." J.A. 138.

e. The Verdict

The jury convicted Ronquillo on one count of first degree murder, two counts of attempted first degree murder, and one count of second degree assault while armed with a firearm. Pet. App. 197a. The jury convicted Sarausad of the lesser-included offenses of second degree (intentional) murder, attempted second degree murder, and second degree assault while armed with a firearm. Pet. App. 197a. The jury did not consider whether Sarausad was guilty of second degree felony murder because it convicted him of second degree intentional murder. Pet. App. 196a n.3. Because the jury could not reach a verdict as to Reyes, the court declared a mistrial as to him. Pet. App. 197a.

3. State Appellate Court Proceedings

The Washington Court of Appeals affirmed Sarausad's convictions on direct appeal, rejecting,

inter alia, Sarausad's challenge to the accomplice liability instructions. Pet. App. 233a–67a. The court noted the instructions mirrored the accomplice liability statute. Pet. App. 256a–58a. The court, however, stated an improper standard for accomplice liability. In finding sufficient evidence to support the convictions, the court incorrectly stated that to convict Sarausad, the prosecution need not prove he knew Ronquillo had a gun, or that there was even a potential for gun play. Pet. App. 266a. The Washington Supreme Court denied Sarausad's direct appeal without comment in October 1998. Pet. App. 231a–32a.

Subsequently, the Washington Supreme Court issued *Roberts* and *Cronin*, addressing the mens rea element of accomplice liability and reaffirming the proper instruction for accomplice liability under state law. *Roberts*, 142 Wash. 2d at 509–13; *Cronin*, 142 Wash. 2d at 579. Sarausad then filed a personal restraint petition, contending that while the instructions complied with *Roberts*, the court should have given an additional instruction clarifying the knowledge requirement for accomplice liability. Pet. App. 195a. Recognizing it had not correctly evaluated the issue on direct appeal, the Washington Court of Appeals again reviewed the jury instructions, this time applying *Roberts* and *Cronin*. Pet. App. 195a–230a. The court noted that to convict Sarausad as an accomplice, the jury had to find he acted with knowledge that his conduct would promote or facilitate "the crime" for which he was charged. Pet. App. 201a (citing *Roberts*, 142 Wash. 2d at 513; *Cronin*, 142 Wash. 2d at 579).

Rejecting Sarausad's argument that he must have possessed the same mental state as Ronquillo to act as an accomplice, the court of appeals ruled "an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided that he, the accomplice, has general knowledge of that specific crime." Pet. App. 202a. "'The crime' means the charged crime, but because only general knowledge is required, even if the charged crime is aggravated, premeditated first degree murder as it was in *Roberts*, 'the crime' for purposes of accomplice liability is murder, regardless of degree." Pet. App. 202a–03a. The court of appeals explained that "the law of accomplice liability in Washington requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide[.]" Pet. App. 204a. However, the court of appeals emphasized that an accomplice "need not have known that the principal had the kind of culpability required for any particular degree of murder." Pet. App. 204a.

Accordingly, the Washington Court of Appeals held the instructions given in Sarausad's trial complied with *Roberts* and the accomplice liability statute. Pet. App. 206a–07a. The instructions required the jury to find that Sarausad acted with knowledge that his conduct would promote or facilitate "the crime" of murder.

The court of appeals also rejected Sarausad's argument that the prosecutor's use of the catchphrase "in for a dime, in for a dollar" during the argument had erroneously urged guilt based on

lesser knowledge than required for accomplice liability, such as knowledge that the accused was facilitating a fistfight. Pet. App. 208a–09a. First, the court of appeals concluded that Sarausad's argument misstated the record. Pet. App. 209a. The court found that "the prosecutor did *not* in fact argue that even if Sarausad drove to Ballard High School the second time having the purpose to facilitate only another shoving match or a fist fight, he nevertheless was guilty of murder." Pet. App. 213a. Instead, the prosecutor argued that, in order to restore the gang's respect, Sarausad and the other Diablos went to the high school on the second trip with the knowledge and intent to shoot. Pet. App. 213a. Second, the court of appeals found no prejudice even if the prosecutor's hypothetical scenarios were improper. The court concluded that "Sarausad was not prejudiced . . . *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 [murder and assault] because he knowingly facilitated the drive-by shooting and for no other reason." Pet. App. 215a. The court of appeals stated 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.

The Washington Supreme Court again denied review, affirming the Washington Court of Appeals. Pet. App. 191a.

4. Federal Court Proceedings

Sarausad filed a habeas corpus petition under 28 U.S.C. § 2254, challenging his convictions for murder and attempted murder, but not his conviction for second degree assault. The magistrate judge recommended relief on two grounds: (1) the evidence was insufficient; and (2) the jury instructions relieved the State of its burden of proof. Pet. App. 134a–88a. The district court granted the writ on both grounds. Pet. App. 125a–33a. The State appealed, and Sarausad cross-appealed.

A divided panel of the Ninth Circuit reversed the district court's ruling that the evidence was insufficient to support the convictions. Pet. App. 39a–53a. However, it affirmed the grant of relief on the jury instruction claim, concluding that "ambiguous jury instructions on accomplice liability, in combination with other factors, unconstitutionally relieved the State of its burden of proof of an element of the crimes with which [Sarausad] was charged." Pet. App. 32a. The circuit court concluded that this was inconsistent with clearly established federal law in *In re Winship*, 397 U.S. 358 (1970), *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Estelle v. McGuire,* 502 U.S. 62 (1991). Pet. App. 53a–54a.

The majority concluded that the accomplice liability instruction given in Sarausad's case was similar to the instructions that the Washington Supreme Court invalidated in *Roberts*. Pet. App. 70a. The majority faulted the state court adjudication of Sarausad's personal restraint petition for failure to require an additional "explicit statement" regarding knowledge. Pet. App. 69a. The

majority rejected the state court's reliance on the fact that the instructions track the statutory language exactly, concluding that the statutory language was ambiguous regarding the required showing of accomplice knowledge. Pet. App. 71a–72a. The majority reasoned that this "confusion" in the statute and instructions allowed conviction without proof beyond a reasonable doubt of the requisite knowledge. Pet. App. 74a.

The Ninth Circuit cited three other factors why the state court should have found a reasonable likelihood that the instructions were applied by the jury to shift the burden of proof from the prosecution: (1) the prosecutor argued for the wrong standard of accomplice liability (Pet. App. 76a), (2) the jury had asked questions to the judge that indicated confusion over what the State was required to prove for accomplice liability (Pet. App. 76a), and (3) the evidence of accomplice liability was "thin" (Pet. App. 75a).

Judge Bybee dissented from the panel majority. Pet. App. 99a–101a. The Ninth Circuit denied the State's petition for rehearing en banc. Pet. App. 1a. Judge Callahan wrote for the five judges who dissented from the denial of rehearing. Pet. App. 2a–30a.

SUMMARY OF ARGUMENT

The Antiterrorism and Effective Death Penalty Act (AEDPA) prohibits habeas corpus 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). In reviewing a state court decision under AEDPA, the federal courts must accept state court determinations of state law. The Ninth Circuit erred by rejecting the state court determination that the accomplice liability instructions correctly set forth state law and by concluding the state trial court should have given an additional instruction to further explain the state law on accomplice liability.

Based on its erroneous review of the adequacy of the instructions under state law, the Ninth Circuit held that the accomplice liability instructions violated the Due Process Clause because they were so ambiguous that they permitted the State to convict Sarausad without proving every element of the crime beyond a reasonable doubt. The Ninth Circuit concluded that the State was relieved of the burden to prove beyond a reasonable doubt that Sarausad had knowledge that he was facilitating or promoting a drive-by shooting. For a jury instruction to violate due process, Sarausad must establish not merely that the instruction is undesirable or erroneous, but that it violated some right guaranteed to the defendant by the Fourteenth Amendment. The question in such a collateral proceeding is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. Sarausad did not satisfy his burden of showing a due process violation, and he did not satisfy his burden under AEDPA of showing the state court unreasonably applied clearly established federal law. Under the Court's holdings, the state court could reasonably conclude that the instructions correctly setting forth state law did not violate due

process by relieving the State of the burden of proof. The instructions did not omit an element of the offense, did not create a presumption of fact, and did not shift the burden of proof to the defendant. The instructions correctly informed the jury of Washington law. Nothing in the holdings of this Court put the state courts on notice that the instructions given in Sarausad's trial violated due process by virtue of ambiguity.

The external factors relied on by the Ninth Circuit do not support its conclusion that the accomplice liability instruction was ambiguous or that there was a reasonable likelihood of misapplication by the jury. First, contrary to the Ninth Circuit's conclusion, the prosecutor's closing argument consistently argued that Sarausad was an accomplice because he knew that the gang was returning to the school to perform a drive-by shooting. The prosecutor did not argue for liability based merely on knowledge that the gang was going to engage in a fistfight. The state court conclusion that the prosecutor's argument did not cause the jury to misapply the instruction is also confirmed by the closing arguments of defense counsel, who argued that their clients were not accomplices because they did not know that there would be a shooting. Second, the fact that the jury asked for clarification of the jury instructions does not prove that the jury was confused. The trial judge correctly respond to the jury's questions by referring them to the instructions. One must assume that because it did not seek further clarification, the jury ultimately understood the instructions. Finally, the Ninth Circuit's reliance on its perception that the evidence against Sarausad

was thin is belied by the court's decision reversing the district court, and holding that the state court reasonably concluded that the evidence was sufficient to prove Sarausad's guilt beyond a reasonable doubt.

Sarausad did not show the state courts unreasonably applied clearly established federal law in adjudicating his jury instruction claim. By affirming the grant of habeas relief, the Ninth Circuit failed to give the proper deference required under AEDPA.

ARGUMENT

1. Habeas Relief Is Barred If The State Court Decision Was A Reasonable Application Of Clearly Established Federal Law

The Antiterrorism and Effective Death Penalty Act (AEDPA) limits the power of the federal courts to grant habeas corpus relief to state prisoners. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). 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).

A state court decision is contrary to clearly established federal law under § 2254(d)(1) only if the "state court arrives at a conclusion opposite to that reached by this Court on a question of law," or "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court

precedent and arrives at a result opposite to ours." *Williams*, 529 U.S. at 405. To fall within the "contrary to" clause, the state court decision "must be substantially different from the relevant precedent of this Court." *Id*. "[A] run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Id*. at 406. Where an alleged error is the manner in which the state court applied federal law, the case does not fall within the "contrary to" clause of 28 U.S.C. § 2254(d)(1). *Id*. at 407.

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 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Even "[t]he gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Id*. For a federal court to grant relief, the state court decision must be objectively unreasonable. *Id*. at 75–76. Whether a decision is objectively unreasonable depends upon the specificity of the rule. "The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

AEDPA thus imposes a "'highly deferential standard for evaluating [a] state-court ruling.'" *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam); *see also Brown v. Payton*, 544 U.S. 133, 141–47 (2005); *Bell v. Cone*, 543 U.S. 447, 455 (2005). The statute "demands that state-court decisions be given the benefit of the doubt." *Woodford*, 537 U.S. at 24. "[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Id.*

2. The Ninth Circuit Erred In Failing To Accept The State Court Determination That The Accomplice Liability Instruction Accurately Reflected Washington Law

The Ninth Circuit held that instructions 45 and 46 on accomplice liability were improper because they were "almost identical" to the accomplice liability instruction that the Washington Supreme Court invalidated in *State v. Roberts*, 142 Wash. 2d 471, 512, 14 P.3d 713 (2000). Pet. App. 70a. As a result, the majority ruled that the state must provide an additional instruction for accomplice liability. Pet. App. 69a, 71a. Sarausad abandons this part of the Ninth Circuit holding. In his brief in opposition, Sarausad agrees that his "jury was instructed in the language of Washington's accomplice liability statute, Wash. Rev. Code. § 9A.08.020" and the instructions did not, "in and of themselves, give rise to a constitutional violation." Br. Opp. 2, 12.

The Ninth Circuit's conclusion that instructions 45 and 46 misstate the accomplice intent element of Washington law is flawed for two reasons. First, in reviewing a state court decision under AEDPA, the federal courts may not second-guess state court determinations of state law. *Uttecht v. Brown*, 127 S. Ct. 2218, 2231 (2007). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle*, 502 U.S. at 67–68.

For example, in *Bradshaw v. Richey*, 546 U.S. 74 (2005), this Court held that the Sixth Circuit erred when it disregarded the Ohio Supreme Court's ruling that transferred intent was a permissible basis for a murder conviction. A "state court's "interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Id.* at 76; *see also Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 629 (1988) (federal courts "are not at liberty to depart from the state appellate court's resolution of these issues of state law"); *Patterson v. New York*, 432 U.S. 197, 210 (1977) (elements of a state crime are necessarily established by state law); *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975) (state courts are the ultimate expositors of state law and what constitutes the elements of a crime under a state statute); *Martin v. Ohio*, 480 U.S. 228, 235 (1987) (same); *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977); *Cupp v. Naughten*, 414 U.S. 141, 143 (1973).

Here 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. For example, the circuit court states that instructions 45 and 46 in Sarausad's trial were "very similar" to instructions held invalid by the Washington Supreme Court in *Roberts,* noting that the instructions began with reference to "a crime." Pet. App. 69a–70a. The circuit court's concern with the phrase "a crime" in the introductory sentence of instructions 45 and 46 exceeds the scope of habeas corpus review, because it ignores the authoritative interpretation of the Washington courts that the instructions complied with *Roberts*.

The second flaw in the Ninth Circuit's reasoning is that it wrongly interpreted state law. The Washington courts specifically ruled that the instructions in Sarausad's trial correctly instructed the jury on state law and fully set forth the elements of accomplice liability. Pet. App. 191a, 201a–15a. The instructions mirrored the state's accomplice liability statute, differing only in using the word "it," while the instructions used the words "the crime." *Compare* J.A. 16–17 *with* Pet. App. 274a. The same pattern instructions had been approved by the Washington Supreme Court prior to the trial. *See State v. Davis,* 101 Wash. 2d 654, 656–59, 682 P.2d 883 (1984). The same instructions were cited with approval following the trial in *Roberts*, 142 Wash. 2d at 509–13. As Judge Callahan noted in dissent, "[n]o Washington court has ever disapproved of a jury instruction that tracked the exact language of section [Wash. Rev. Code §] 9A.08.020." Pet. App. 11a. "Every decision examining the jury instructions given in Sarausad's case, as well as [Wash. Rev. Code] § 9A.08.020, has determined that the

instruction adequately and properly informs the jury of the intent necessary to find criminal liability under Washington law." Pet. App. 12a–13a. The instructions did not omit an element of the offense, create a presumption, reduce the burden of proof, or shift the burden to the defendant. Pet. App. 15a. As Judge Callahan recognized, "Washington law clearly holds that the jury instruction in this case was a proper statement of Washington's accomplice liability law." Pet. App. 13a.

Moreover, the Ninth Circuit was incorrect in concluding that the term "a crime" in the accomplice instruction is constitutionally problematic; it is used in the introductory sentence of the statutory definition of an accomplice. Wash. Rev. Code § 9A.08.020. Because accomplice liability can be applied to all crimes committed in Washington, the statute and the instructions necessarily state that a person can be guilty of "a crime" when he or she acts as an accomplice in the commission of "the crime." Wash. Rev. Code § 9A.08.020(1), (2)(c), (3). *Roberts*, 142 Wash. 2d at 509–13. As explained by Judge Bybee in dissent, the erroneous use of "a crime" discussed in *Roberts*, 142 Wash. 2d at 508–13, does not exist in Sarausad's instructions. Instead, as the Washington Supreme Court has ruled, instructions 45 and 46 "correctly instructed the jury that it could convict Mr. Sarausad of murder or attempted murder as an accomplice only if it found he knowingly aided in the commission [of] 'the' crime charged." Pet. App. 191a.

The Ninth Circuit compounded its flawed review of state law by concluding that the state courts should have required "an explicit statement

that an accomplice must have *knowledge of the actual crime the principal intends* to commit." Pet. App. 69a (emphasis added). According to the panel opinion, due process required the instructions to contain a sentence specifying that the accomplice is guilty of "a crime" only when that person "knows that 'a crime' is 'the crime' the principal intends to commit." Pet. App. 71a. This demand for an additional instruction is flawed for three reasons.

First, a federal court sitting in habeas corpus, does not exercise supervisory power over the state courts, and it cannot require state courts to use particular language in an instruction when the language is not commanded by statute or the Constitution, even if language might be judicially desirable. *See Cupp*, 414 U.S. at 146–47. In reaching its conclusion that state law was so ambiguous that it required a narrowing and clarifying gloss, the Ninth Circuit relied on *Staples v. United States*, 511 U.S. 600 (1994), *Ratzlaf v. United States*, 510 U.S. 135 (1994), and *Liparota v. United States*, 471 U.S. 419 (1985). Pet. App. 72a–74a. However, these cases are inapposite because they concern the construction of federal statutes that were silent on mens rea, and not the requirements of due process applicable to state statutes. *See Staples*, 511 U.S. at 604–09; *Ratzlaf*, 510 U.S. at 138–49; *Liparota*, 471 U.S. at 423–34. This Court has never held that due process requires the States to adopt a particular standard of mens rea with respect to accomplice liability or to use particular language when instructing a jury on that element of a criminal charge. *See, e.g.*, *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("the Constitution does not require that any

particular form of words be used in advising the jury of the government's burden of proof").

States play the preeminent role in preventing and dealing with crime, and States possess primary authority for defining and enforcing the criminal law. *Patterson*, 432 U.S. at 210; *Martin*, 480 U.S. at 232; *Engle v. Isaac*, 456 U.S. 107, 128 (1982). "[I]t is normally within the power of the State to regulate procedures under which its laws are carried out," and the Court has declared it will "not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986).

Thus, a federal court is not "a rulemaking organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 564 (1967). "[A] state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.'" *Spencer*, 385 U.S. at 564 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). For this reason, this Court has not required states to adopt particular instructions that the federal courts thought were wise. *Cupp*, 414 U.S. at 146–47 (Ninth Circuit did not have supervisory power to prohibit use of instruction by state court); *Henderson*, 431 U.S. at 153–57 (due process did not require additional instruction on element of causation); *Martin*, 480 U.S. at 233–35 (instructions involving self-defense to aggravated murder did not violate due process even though the instructions could have been clearer).

Second, no Washington court has required this specific sentence in accomplice instructions. The Washington courts have held that the accomplice need not share the same mental state as the principal, or have specific knowledge of every element of the crime committed by the principal. Pet. App. 201a–02a (citing *Roberts*, 142 Wash. 2d at 513; *Cronin*, 142 Wash. 2d at 579). The sentence proposed by the Ninth Circuit exceeds the elements of accomplice liability under Washington law.

Third, the "explicit statement" cited by the Ninth Circuit is inconsistent with the State's knowledge requirement. Washington does not require "knowledge of the actual crime the principal intends," as demanded by the circuit court. Pet. App. 69a. Washington requires only that the jury find Sarausad "acted with knowledge that his . . . conduct would *promote or facilitate* 'the crime' for which he [was] eventually charged." Pet. App. 201a (emphasis added) (citing *Roberts*, 142 Wash. 2d at 513; *Cronin*, 142 Wash. 2d at 579). Thus, the State did not have to prove that Sarausad had knowledge of every element of the crime committed by the principal, Ronquillo. Pet. App. 202a. The State did not have to prove Sarausad knew Ronquillo had the kind of culpability required for any particular degree of murder. Pet. App. 202a–04a. Under Washington law, the State had to show only that Sarausad knew generally that his conduct was promoting or facilitating a homicide. Pet. App. 204a–05a.

Under 28 U.S.C. § 2254(d)(1), the Ninth Circuit should have accepted the state court determination that the instructions fully and correctly set out state law governing the intent

element of accomplice liability. No clearly established rule of constitutional law, binding on the state courts, requires otherwise, and nothing requires the explicit sentence found lacking by the Ninth Circuit. *See* Pet. App. 112a (Bybee, J., dissenting) ("the majority has no case law to support its proposition that an additional explicit statement is, or has ever been, required by Washington courts"). By conducting an independent examination of state law, and by concluding the proposed additional instruction is required, the Ninth Circuit exceeded its authority under 28 U.S.C. § 2254.

3. The State Courts Reasonably Concluded That The Accomplice Liability Instruction Did Not Deprive Sarausad Of Due Process

Sarausad claims that the accomplice liability instruction is ambiguous and, for that reason, violated his rights under the Due Process Clause. In reviewing an instruction that is allegedly ambiguous, the test 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)). The majority below concluded that there was a due process violation because the accomplice liability instructions were so ambiguous that they permitted the State to convict Sarausad without proving every element of the crime beyond a reasonable doubt. Specifically the Ninth Circuit concluded that the State had been relieved of the burden to prove beyond a reasonable doubt that Sarausad had

knowledge that he was facilitating or promoting a drive-by shooting.

a. The Ninth Circuit Ignored The High Burden Necessary To Establish A Due Process Violation

The majority below did not apply the high burden Sarausad must meet to establish his due process claim. This Court has repeatedly held that the mere alleged failure to correctly instruct a jury on state law does not rise to the level of a constitutional error requiring habeas corpus relief. *E.g.*, *Estelle*, 502 U.S. at 67; *Engle*, 456 U.S. at 119–21 & n.21; *Middleton v. McNeil*, 541 U.S. 433 (2004). In fact, outside of capital cases, this Court has "never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993).[1]

[1] Even in capital cases, the Court has repeatedly upheld against constitutional challenges jury instructions that correctly set forth the applicable state law. *Boyde v. California*, 494 U.S. 370 (1990) (instruction mirroring statute on consideration of mitigation evidence did not violate Eighth Amendment); *Brown v. Payton*, 544 U.S. 133 (2005) (state court reasonably concluded that an instruction using verbatim the text of California statute did not violate the Eighth Amendment); *Ayers v. Belmontes*, 127 U.S. 469 (2006) (instruction that followed statute governing consideration of mitigating factors did not violate the Eighth Amendment).

To obtain relief based on an allegedly erroneous instruction, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp*, 414 U.S. at 146. "The question in such a collateral proceeding is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Henderson*, 431 U.S. at 154 (quoting *Cupp*, 414 U.S. at 147). The burden of showing that an erroneous instruction was so prejudicial to support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. *Henderson* 431 U.S. at 154; *see also United States v. Frady*, 456 U.S. 152, 166 (1982); *Engle*, 456 U.S. at 134–35. As in *Henderson,* Sarausad's "burden is especially heavy because no erroneous instruction was given; his claim of prejudice is based on the failure to give any explanation beyond the reading of the statutory language itself of the causation element." *Henderson*, 431 U.S. at 155. "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.*; *see also Holland v. United States*, 348 U.S. 121, 141 (1954) (refusal to give instructions on the wording of a statute was not prejudicial where the trial court "fully and correctly instructed the jury on every element of the crime").

Finally, because the constitutional issue is whether the instruction by itself rendered the entire trial fundamentally unfair, "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*, 502 U.S. at 72 (quoting *Cupp*, 414 U.S. at 147). This standard recognizes "a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge." *Cupp*, 414 U.S. at 147. The standard also recognizes that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380–81. "Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Id.* at 381.

b. The Ninth Circuit's Reliance On *Winship* And *Sandstrom* Is Misplaced

The majority relied on *In re Winship*, 397 U.S. 358 (1970), and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Pet. App. 53a–54a. Washington's accomplice liability instructions do not violate the holdings of these decisions. *Winship* held that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364. As the *Cupp* Court recognized, *Winship* "was a different case from that before us now. There the trial judge made an express finding that the State was not required to

prove guilt beyond a reasonable doubt . . . ." *Cupp*, 414 U.S. at 148. As in *Cupp*, the State's burden of proof in Sarausad's trial "was emphasized and re-emphasized in the course of the complete jury instructions." *Id.* The burden was also repeatedly emphasized in the closing arguments of defense counsel. *See, e.g.*, J.A. 51–54, 110–14. Sarausad's instructions "by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under [Washington] law." *Cupp*, 414 U.S. at 148. The instructions did not violate *Winship*.

The Ninth Circuit's reliance on *Sandstrom* is also misplaced. *Sandstrom* is a descendent of *Winship*, but "it simply held that an instruction which creates a presumption of fact violates due process if it relieves the State of its burden of proving all of the elements of the offense charged beyond a reasonable doubt." *Gilmore*, 508 U.S. at 343; *see* S*andstrom*, 442 U.S. at 512–26. Since the instructions here did not create a presumption of fact, the instructions did not violate *Sandstrom*.

c. Sarausad Has Not Satisfied The High Burden Imposed By The Due Process Clause

The decision below is incorrect because Sarausad has not satisfied the high burden required to show a due process violation, and he did not show that the state court adjudication was an objectively unreasonable application of clearly established federal law.

The majority below relied on *Estelle* (Pet. App. 54a) to find a constitutional error, but that

decision actually cuts against the Ninth Circuit's decision. *Estelle* dealt with an instruction that was allegedly erroneous under California law. The Court held that the instruction did not so infect the entire trial with unfairness as to violate due process. *Estelle*, 502 U.S. at 70–75. "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Middleton*, 541 U.S. at 437. In reviewing whether the allegedly erroneous instruction violated due process, the Court has "'defined the category of infractions that violate "fundamental fairness" very narrowly.'" *Estelle*, 502 U.S. at 73. "'Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.'" *Id.* at 73. While the instruction in *Estelle* was not as clear as it might have been, when viewed in context of the entire trial the instruction did not render Estelle's trial so fundamentally unfair so as to violate due process. *Id*. at 72–75.

Similarly, in *Middleton*, the Court summarily reversed the Ninth Circuit in an analogous case. The circuit court granted habeas relief because of one incorrect instruction on "imperfect self defense" notwithstanding the totality of the instructions. This Court held that this "conclusion failed to give appropriate deference to the state court's decision." *Middleton*, 541 U.S. at 437. The state court was entitled to weigh the impact of the incorrect instruction in light of the overall correct instructions. *Id.* at 438.

The Court has also rejected the notion that there is a due process violation when the state fails to give an additional instruction that the federal

deems wise. In *Cupp*, the Ninth Circuit found an instruction that every witness is presumed to speak the truth, although correct under Oregon law, relieved the State of the burden of proving every element of the crime. *Cupp*, 414 U.S. at 143–44. The Ninth Circuit found a *Winship* violation because the state trial court did not specifically cure the allegedly faulty instruction. *Id.* at 147. The circuit court's "analysis put the cart before the horse." *Id.* "[T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* *Winship* was different because "the trial judge made an express finding that the State was not required to prove guilt beyond a reasonable doubt . . . ." *Id.* at 148. In contrast, the Oregon "instruction by its language neither shifts the burden of proof nor negates the presumption of innocence accorded under Oregon law." *Id.* at 148. Because the jury was fully charged on the presumption of innocence and burden of proof, the theoretical tangential undercutting of such clearly stated propositions "is not of constitutional dimension." *Id.* at 149.

Similarly, in *Henderson*, the Second Circuit invalidated Kibbe's murder conviction by ruling the state court's failure to give a specific instruction defining the element of causation relieved the prosecution of the burden of proving every element of the offense of second degree murder. *Henderson*, 431 U.S. at 151. The Court explained that once the judge instructed the jury that all elements of the crime must be proved beyond a reasonable doubt, then an

objection predicated on *Winship* is "without merit." *Id.* at 154. *Henderson* rejects "the suggestion that the omission of more complete instructions on the causation issue 'so infected the entire trial that the resulting conviction violated due process.'" *Henderson*, 431 U.S. at 156–57. Even if "the jury might have reached a different verdict pursuant to an additional instruction, that possibility is too speculative to justify the conclusion that constitutional error was committed." *Id.* at 157.

In *Patterson v. New York*, 432 U.S. 197 (1977), the Court found no due process violation in a conviction where "the jury was instructed in accordance with the statute . . . ." *Patterson*, 432 U.S. at 206. The state statute defined the elements of murder as death, intent, and causation, and no facts were either presumed or inferred to constitute the crime. *Id.* at 205–06. Since the jury was instructed in the language of the statute, and the evidence was sufficient to prove the elements, "the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which (Patterson was) charged.'" *Id.* at 206.

Under the Court's holdings, the state court could reasonably conclude the instructions correctly setting forth state law did not violate due process by relieving the State of the burden of proof. The instructions did not omit an element of the offense, did not create a presumption of fact, and did not shift the burden of proof to the defendant. The instructions correctly informed the jury of Washington law. Nothing in the holdings of this Court put the state courts on notice that the

instructions given in Sarausad's trial violated due process by virtue of ambiguity. *See* Pet. App. 100a–01a, 115a–16a (Bybee, J., dissenting); *see also Smith v. Horn*, 120 F.3d 400, 425 (3d Cir. 1997) (Alito, J., dissenting) ("No Supreme Court case . . . has held that the Due Process Clause is violated whenever a state trial judge, in instructing a jury on the elements of a state offense, uses ambiguous language that prejudices the defendant."). Because the state court decision was not objectively unreasonable, relief is barred under 28 U.S.C. § 2254(d).

4. The Other Factors Relied Upon By The Ninth Circuit To Find A Due Process Violation Do Not Satisfy The Highly Deferential Standard Of Section 2254(d)(1)

The majority below also relied on three other factors to support its conclusion that there was a due process violation. In considering each of those factors, the majority failed to give proper deference to the state court adjudication. For this reason, the decision below must be reversed.

a. The State Court Reasonably Concluded The Prosecutor's Closing Arguments Did Not Cause The Jury To Misapply The Instructions

The Ninth Circuit placed significant weight on the prosecutor's closing argument and the state court adjudication that that argument did not cause the jury to misapply the instruction. In doing so, the Ninth Circuit erroneously disregarded the state court determination that the prosecutor's closing argument

was proper. Pet. App. 209a–14a. Specifically, the state court found the prosecutor did not argue that Sarausad was liable for murder if he merely thought Ronquillo intended a fistfight. Instead, having reviewed the record, the state court found that the prosecutor focused on Sarausad's knowledge that Ronquillo intended to shoot. Pet. App. 209a–14a. As the state court noted, the prosecutor argued:

> "'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*.'" Pet. App. 212a (emphasis added).

The Ninth Circuit, however, concluded that the state court "misstated" the record and ignored portions of the prosecution's argument. Pet. App. 77a. This conclusion exceeds the scope of review under AEDPA.

"If the interpretation of the . . . remarks is deemed a legal issue, it is surely an issue of state law that the Court of Appeals should have accepted, since the views of the state's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). In light of the state court ruling that the argument did not misstate Washington law, the "constitutional violation found by the Court of Appeals dissolves." *Id*. Since the prosecutor did not misstate Washington law, her argument did not cause the jury

to misapply the correct instructions on accomplice liability.

In the alternative, if the state court determination is viewed as a determination of a factual issue, the Ninth Circuit again failed to give proper deference to this factual ruling. *Wainwright*, 464 U.S. at 84–85. Sarausad must rebut a state court determination of fact by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The record here supports the state court. It confirms that the prosecutor did not argue Sarausad would be guilty of second degree murder if he only intended to assist in a fistfight. Instead, the prosecution argued that all three defendants acted with premeditated intent to kill. J.A. 43–48. The prosecutor argued the defendants intended to kill because "[f]ists weren't going to regain respect. A gun was, in their eyes." J.A. 44. The prosecutor repeated this theme. "Shoving wasn't going to regain their respect, a gun was. And that's why they went back for a second trip. Mr. Ronquillo got that gun from Michael Vicencio." J.A. 45.

The prosecutor described Sarausad as a "classic accomplice," the "wheelman," who knowingly aided in the commission of murder by driving in a manner that facilitated the drive-by shooting. J.A. 39. The prosecutor pointed to evidence that Sarausad drove towards the students in a "swooping motion," and "slowed down on the dime, slowed down before the shots were fired, stayed slowed down until the shots were over and immediately sped up." J.A. 39.

The prosecutor argued that Sarausad knew what Ronquillo was going to do because there "was no hesitation, there was no stopping the car. There was no attempt for Mr. Sarausad to swerve his car out of the way so that innocent people wouldn't get shot. That was like clockwork. There was no hesitation. He sped off." J.A. 40. And after the shooting, the prosecutor argued that there "was no thought to getting rid of the shell casings. Nothing said to the defendant, Mr. Ronquillo, because there was nothing to say. Nobody asked him why he did it. *They all knew. They all knew what they were there for*." J.A. 41 (emphasis added).

The prosecutor also argued that Sarausad knew Ronquillo was going to shoot because the Diablos had discussed shooting in the car prior to the shooting. J.A. 47. The prosecutor emphasized that shooting was what the defendants intended: "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. . . ." J.A. 49.

In rebuttal, the prosecutor again argued that Sarausad knowingly assisted Ronquillo in the shooting. The prosecutor stated: "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*." J.A. 123 (emphasis added). The prosecutor emphasized that shooting was necessary, arguing that 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." J.A. 123–24.

In light of the prosecutor's argument that Sarausad knew that there was going to be a shooting, he cannot meet his burden of rebutting the state court finding of fact by clear and convincing evidence as required by § 2254(d)(1).

The majority below faulted the state court's characterization of the prosecutor's argument, concluding the state court's incorrect description of the argument was "flatly contradicted by the record." Pet. App. 67a. To support this conclusion, the Ninth Circuit, quoted "only a small portion of the prosecutor's argument:"

> "Let me give you a good example of accomplice liability. A friend comes up to you and says, 'Hold this person's arms while I hit him.' You say, 'Okay, I don't like that person anyway.' You hold the arms. The person not only gets assaulted, he gets killed. You are an accomplice and you can't come back and say, 'Well, I only intended this much damage to happen.' . . . The law in the State of Washington says, if you're in for a dime, you're in for a dollar." Pet. App. 67a (alteration in original).

The Ninth Circuit believed the "hold his arms" hypothetical misstated Washington law, and the circuit court believed the state court ignored this hypothetical when describing the prosecutor's argument as a correct statement of Washington law. Pet. App. 67a. However, as the Washington Court of Appeals stated, "[t]he 'hold his arms while I hit him' hypothetical may or may not be problematic under *Roberts*." Pet. App. 214a. The Washington Court of

Appeals noted the accomplice in the prosecutor's hypothetical might have been better charged with felony murder (as was Sarausad in count two), or he might also have knowingly facilitated the particular conduct that formed the basis of the charge. Pet. App. 214a. The Washington Court of Appeals correctly recognized that, regardless of whether the prosecutor's isolated hypothetical misstated the *Roberts* standard, "the prosecutor's accomplice liability arguments as a whole" (Pet. App. 214a) did not prejudice Sarausad.[2] Unlike the Ninth Circuit, which viewed portions of the argument in isolation, the Washington Court of Appeals correctly viewed the record as a whole in considering Sarausad's challenge to the instructions.

The majority's reliance on this small part of the closing argument is flawed because "whole context of the trial" must be considered in determining whether instructions, and the prosecutor's argument on such instructions, violated the Constitution. *Brown v. Payton*, 544 U.S. 133, 144 (2005). In *Brown*, the prosecutor argued, contrary to the law, that certain mitigating evidence should not

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[2] The jury's inability to reach a verdict as to Reyes shows the jury was not misled by the prosecution's argument. The prosecution's "hold his arms" hypothetical was directed at Reyes, being preceded and followed by arguments as to why Reyes was guilty as an accomplice to Ronquillo in the shooting. J.A. 38. If, as the Ninth Circuit concluded, this hypothetical was so egregious that it misled the jury to erroneously believe it could convict Sarausad as an accomplice if he merely expected a fistfight, then the jury would have also convicted Reyes. The fact the jury did not convict Reyes showed the jury followed the law and correctly applied the instructions given by the trial court.

be considered by the jury in the penalty phase of a capital case. The Court found no basis for relief under AEDPA because the argument came after the defense presented the mitigating evidence and the jury was properly instructed. *Brown*, 544 U.S. at 146.

Thus, even if the example that the majority singles out is inconsistent with state law, those statements were made in the course of an argument that consistently emphasized knowledge and intent. Further, the statements followed Sarausad's testimony where he attempted to show he did not know Ronquillo had a gun and intended to shoot. Moreover, the prosecutor's argument was followed by the arguments of both Reyes and Sarausad that the jury could not convict them unless they knowingly assisted Ronquillo in committing the crimes charged—the crimes of murder and attempted murder. J.A. 51–114.

Finally, defense counsel repeatedly emphasized that the jury could not convict either defendant if they did not know Ronquillo was armed and intended to shoot. Sarausad's counsel argued that Sarausad was not an accomplice to murder and attempted murder because he intended nothing more than a fistfight, and did not know that Ronquillo was armed and intended to shoot. J.A. 81–82. Counsel argued Sarausad was "simply caught up in a foolish macho taunting scheme that unexpectedly worsened severely when shooting erupted. There is not a

single circumstance, though, that points conclusively to his having any guilty knowledge or intent to assist in a shooting anywhere in the evidence." J.A. 82–83.

Reminding the jury of the legal definition of an accomplice, counsel argued that Sarausad was not an accomplice because he did not knowingly assist Ronquillo in committing "the crime being charged." J.A. 83–84. Counsel argued:

> "There is no question here that Cesar Sarausad assisted Brian Ronquillo. That's beyond dispute. [H]e drove him to the scene. The question is whether Cesar had knowledge that his assistance would promote or facilitate the crime of premeditated murder. That's the question for you. This could only have happened if Cesar knew that Brian Ronquillo had premeditated intent to murder someone. That's the only way." J.A. 83.

Counsel also emphasized that "the burden is on the State to prove that Cesar is an accomplice beyond a reasonable doubt." J.A. 84. He discussed the evidence at length, arguing it showed Sarausad did not know there would be a shooting. J.A. 85–108.

Reyes' counsel began his argument by cautioning the jury to look to the instructions regardless of what is represented by counsel, and by reminding the jury of the duty to accept the law as instructed by the court. J.A. 51–54. Reyes' counsel reminded the jury that it should

disregard any remark by counsel that is not supported by the evidence or the law as given by the court. J.A. 54–55. Reyes' counsel also reminded the jury of the prosecution's burden to prove every element of the crime beyond a reasonable doubt. J.A. 56–57. Counsel then urged the jury to pay particular attention to the instructions on accomplice liability, quoting instruction number 46. J.A. 57–58. Counsel argued extensively that Reyes was not an accomplice because he did not know Ronquillo was armed, and did not know Ronquillo was going to shoot. J.A. 68–72. Counsel argued that Reyes, like Sarausad and the others in the car, were surprised when Ronquillo started shooting. J.A. 68–69.

Referring to instruction number 46, Reyes' counsel argued that Reyes was not an accomplice because "there is no evidence at all that Jerome Reyes was anything other than present at the scene" and "no evidence that he even knew that there was a gun." J.A. 74.

Therefore, to the extent the prosecutor's argument at some point misstated accomplice liability, that misstatement is not constitutional error. As this Court has held, the "arguments of counsel generally carry less weight with a jury than do instructions from the court." *Boyde* v. *California,* 494 U.S. 370, 384 (1990). Jurors are presumed to have followed their instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). The state court could therefore reasonably conclude the jury disregarded the prosecutor's argument to the extent the argument conflicted with the accomplice liability instructions. Pet. App. 214a.

As in *Brown,* it was not unreasonable for the state court to recognize that the correct instructions to the jury preclude finding error based on the prosecutor's statements. When viewing the trial as a whole, including the evidence and arguments presented by defense counsel, it was not unreasonable for the state courts to conclude the jury was not misled by any misstatements of the prosecution, but instead correctly understood that Sarausad must have knowingly assisted Ronquillo in committing "the crime" charged. *Brown*, 544 U.S. at 144–46.

b. The State Court Reasonably Applied Clearly Established Law When It Concluded The Trial Judge Correctly Responded To The Jury's Request For Clarification

The Ninth Circuit also relied on three inquiries from the jury about the instructions to support its conclusion that there was a reasonable likelihood that the jury had applied the accomplice instructions to relieve the prosecutor of the burden to prove knowledge according to state law. Pet. App. 76a–77a.

There are three reasons why these inquiries do not support the Ninth Circuit's conclusion that the accomplice liability instructions were ambiguous or that there was a reasonable likelihood of unconstitutional application of the instructions. First, the trial judge correctly responded to the jury inquiries by referring the jury to the instructions that correctly set forth state law. This is all that is required under the Constitution. As the Court

explained in *Weeks*, because the "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.

Second, the Ninth Circuit's conclusion is based on conjecture, and conjecture should not be relied on in habeas review. *See Ayers v. Belmontes*, 127 U.S. 469, 479 (2006). The law presumes that the jury, having reread the instructions pursuant to the court's responses, understood and correctly applied the instructions. *Weeks*, 528 U.S. at 234. The state court adjudication cannot be faulted on this basis.

Third, the record in this case does not support the conclusion that the jury remained confused. Having submitted numerous jury inquiries, "[t]his particular jury 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." *Weeks*, 528 U.S. at 235–36. As in *Weeks,* "[Sarausad's] jury did not inform the court that after reading the relevant paragraph of the instruction, it still did not understand its role." *Id.* at 234. Since the jury did not request further clarification, one must assume the jury understood the response. "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, counsel for Reyes and Sarausad referred to the instructions during closing arguments, repeatedly emphasizing to the jury that it must find Reyes and Sarausad knowingly assisted in the commission of "the crime" charged in order to convict them as accomplices. J.A. 51–114. That defense counsel argued at length, without objection, that the jury could not convict Sarausad and Reyes because they did not know Ronquillo was armed and going to shoot, "certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous." *Boyde*, 494 U.S. at 384.

Similarly, the jury's inability to reach a verdict as to Reyes indicates the jury was not confused. The prosecution argued that both Sarausad and Reyes were guilty for knowingly aiding Ronquillo in the shooting. If, as Sarausad claims, the jury erroneously believed it could convict him as an accomplice if he merely expected a fistfight, then it would have also convicted Reyes. The fact the jury did not convict Reyes showed the jury followed the law and correctly applied the instructions given by the trial court.

Once the jury received the court's responses to the inquiries, the jury had not only the text of the instruction but also "its own recollection of defense counsel's closing argument for guidance." *Weeks*, 528 U.S. at 236. Not only is the challenged instruction just one of many instructions, "but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Cupp*, 414 U.S. at 147. Here, the instructions correctly informed the jury about the

elements of accomplice liability, and defense counsel stressed these elements in closing argument. The state courts could reasonably conclude the instructions did not mislead the jury.

c. The Allegedly "Thin Evidence" Did Not Render The State Court Adjudication Unreasonable Since The Evidence Was Sufficient To Prove Sarausad's Guilt

Finally, the Ninth Circuit justified its conclusion that there was a reasonable likelihood that the jury misapplied the instructions to relieve the State of the burden of proof by describing the evidence of guilt as "thin." Pet. App. 75a–76a. To make this point, the Ninth Circuit disregarded the state court analysis of the evidence and simply concluded the state court overstated the strength of the prosecution's case. Pet. App. 75a. This reasoning gives no deference to the state court's view of the evidence, and it makes little sense in light of the Ninth Circuit's conclusion that the state court could reasonably conclude the evidence was sufficient to prove Sarausad guilty beyond a reasonable doubt. Because the state court could reasonably conclude the evidence presented at Sarausad's trial was sufficient for the jury to find the elements of the crime beyond a reasonable doubt, the state court could also reasonably determine that the evidence did not cause the jury to misapply the instruction.

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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