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 OF RESPONDENT

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QUESTION PRESENTED

Whether it was objectively unreasonable for the state court to conclude that there was no reasonable likelihood the jury misunderstood the level of *mens rea* needed to find Cesar Sarausad guilty as an accomplice to murder where, after the jury repeatedly expressed confusion on this issue, reported that it was having difficulty agreeing on the definition of accomplice liability, and proposed an incorrect reading of the accomplice instructions:

(1) the trial court again directed the jury to "re-read" instructions on accomplice liability, as well as to read instructions on intent and knowledge, and to consider all other instructions in the case, but did not clarify the instructions;

(2) Washington courts, commentators, and the lawyers in closing arguments had construed the statute that mirrored the accomplice liability instructions in different and conflicting ways, which later required clarification by the Washington Supreme Court; and

(3) a correct understanding of the *mens rea* for accomplice liability was essential to resolve Sarausad's central defense to the State's thin evidence, at best, of alleged complicity in murder.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited in Petitioner's brief, the following constitutional provisions are involved:

U.S. Const. art. III § 2: "the trial of all crimes, except in cases of impeachment, shall be by jury."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."

STATEMENT OF THE CASE

In 1975, the Washington Legislature enacted its current accomplice liability statute. Wash. Rev. Code § 9A.08.020(3). Under this statute, a person "is an accomplice of another person in the commission of a crime" if the person acts with knowledge that his or her conduct "will promote or facilitate the commission of the crime." *Id.* Twenty-five years later, a divided Washington Supreme Court clarified that this statutory language limited the scope of accomplice liability to persons who acted with "knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged," and rejected the State's argument that accomplice liability attaches "so long as the defendant knows that he or she is aiding in the commission of *any* crime." *State* v. *Cronin*, 14 P.3d 752, 757 (Wash. 2000) (en banc) (emphases in original); *State* v. *Roberts*, 14 P.3d 713 (Wash. 2000) (en banc).

Although the Washington Supreme Court has now clarified the meaning of the statute, its meaning in

the intervening years was not clear. After enactment in 1975, judges and counsel failed to recognize the significance of the language referring to "knowledge ... of the crime" as opposed to "a crime" and instructed juries that accomplice liability attached where a person had knowledge that his or her conduct would promote or facilitate "a crime." Wash Rev. Code. § 9A.08.020(3)(a); *State* v. *Boyde*, 586 P.2d 878, 886 (Wash. Ct. App. 1978). In 1984, the Washington Supreme Court itself assumed that a jury instruction that imposed liability for "knowledge ... of a crime" was consistent with Washington law. *State* v. *Rice*, 102 Wash. 2d 120, 124 (en banc) (1984). The Washington Supreme Court did so shortly after it upheld use of an instruction that referred to "knowledge of ... the crime." Br. at 11 (emphasis omitted) (citing *State* v. *Davis*, 101 Wn. 2d 883 (1994)).

Substituting "a" for "the" in jury instructions on accomplice liability became accepted in Washington practice. By 1994, the Washington Supreme Court Committee on Jury Instructions formally adopted the convention of using "a" instead of "the" in the state's criminal pattern jury instructions. 11 *Washington Pattern Jury Instructions-Criminal* 10.51 (2d ed. 1994). The practice was so entrenched that trial judges continued to instruct juries in this manner years after the Washington Supreme Court expressly disapproved of it. *State* v. *Wolff*, No. 30381-1-II, 2005 Wash. App. LEXIS 517, at *10 (Mar. 30, 2005) (noting that *Roberts* and *Cronin* were decided "two years prior to the trial in this case" where an erroneous accomplice instruction was used); see also *State* v. *Shott*, No. 54359-8-I, 2006 Wash. App. LEXIS 1033, at *11 (May 22, 2006) (per curiam) (incorrectly describing accomplice liability as "knowledge that

[conduct] will promote or facilitate the commission of a crime").

The trial in this case occurred in 1994, six years before the Washington Supreme Court's decisions in *Roberts* and *Cronin* clarified the *mens rea* required for accomplice liability. The direct appeal was decided in 1998, also prior to *Roberts* and *Cronin*. In the direct appeal, a unanimous appellate court misread the accomplice liability statute in precisely the manner the state supreme court would later reject. This case is before the Court because there is a reasonable likelihood that the jury in Sarausad's case similarly misunderstood the statute.

1. Factual Summary

On March 23, 1994, one student was killed and another wounded by a 16-year old, Brian Ronquillo, who fired shots from a car at Ballard High School in Seattle, Washington. Petitioner's Appendix ("Pet. App.") 196a, 198a, 238a. There is no dispute that Respondent Cesar Sarausad, then a 19-year-old freshman at the University of Washington, drove the car. Pet. App. 32a. The issue is whether, in driving Ronquillo and others to Ballard, Sarausad knew he was promoting or facilitating a murder.

Before college, Sarausad tutored other high school students in mathematics. Pet. App. 32a-33a. Through his tutoring, he met persons associated with a gang called the 23rd Street Diablos (referred to below as the "23rd" or the "Diablos"). Pet. App. 33a. The 23rd included, among others, Ronquillo and Sarausad's other co-defendant, Jerome Reyes. Pet. App. 33a.

On the morning of March 23rd, Sarausad met with Reyes, Ronquillo, and others. Pet. App. 235a. Reyes told the group that he had been chased away from

Ballard several days earlier by the Bad Side Posse ("the BSP"), a gang. Pet. App. 197a. The group decided to return to Ballard. Pet. App. 235a. Once there, they exchanged "words" with students and flashed gang signs from their cars. Pet. App. 136a. Several people, but not Sarausad, "eventually got out" of the cars. Pet. App. 236a. A "shoving match" accompanied by "harsh words" ensued. Pet. App. 136a.

Someone indicated police were nearby. Pet. App. 136a. The group left and traveled to a friend's home. *Id.* While outside, Ronquillo obtained a gun and put it in his pants. Pet. App. 34a. Sarausad was not present when Ronquillo obtained the gun. *Id.* Sarausad also was not present for a subsequent conversation about the possibility of a shooting. Pet. App. 45a.

After some time, the group left the house in two cars. Pet. App. 236a. Ronquillo rode in the front passenger seat of Sarausad's car. *Id.* Reyes and two others rode in the back. Pet. App. 136a. A few blocks from Ballard, the cars pulled next to each other. Pet. App. 34a. After a brief conversation, Sarausad said "[a]re you ready?," and the two cars proceeded to Ballard. Pet. App. 198a.

As the cars approached Ballard, a passenger in the backseat of Sarausad's car asked, "[a]re we going to cap?" Pet. App. 48a. Ronquillo started shooting before anyone could respond. Pet. App. 48a-49a. The cars then "sped away." Pet. App. 198a. Sarausad dropped off his passengers and returned home (*id.*), where he was arrested that day.

2. Sarausad's Trial

Ronquillo, Reyes, and Sarausad were charged and jointly tried for first-degree murder, second-degree

murder, attempted first-degree murder, and second-degree assault. Pet. App. 237a. The State argued that Ronquillo, the shooter, was the principal and that Sarausad and Reyes were his accomplices.

Sarausad's defense was that he was not an accomplice to murder because he did not know that Ronquillo or anyone else in the group had a gun or had planned a murder. Pet. App. 199a. Sarausad testified that he did not intend to facilitate a murder and returned to Ballard expecting no more than a fight. *Id.*

Though the State presented no direct evidence that Sarausad knew Ronquillo had a gun or knew of a plan to shoot BSP members (Pet. App. 265a), the State contended that Sarausad was a classic "wheelman" (Pet. App. 211a). It argued that Sarausad was affiliated with a gang and, therefore, would have knowingly participated in whatever the gang deemed necessary to protect its "honor." Pet. App. 216a. The State also argued that the manner in which he drove showed he intended to facilitate the shooting. *Id.*

3. The Jury Instructions

The court gave the jury 53 instructions. Instruction 12 defined the elements necessary to convict Sarausad of first-degree murder. Joint Appendix ("J.A.") 9. Instruction 17 defined the elements necessary to convict Sarausad of second-degree murder. Instruction 17 stated in pertinent part:

> To convict the defendant, Cesar Frasco Sarausad of the crime of murder in the second degree (intentional), a lesser included offense of Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

> (1) That on or about the 23rd day of March, 1994, the defendant, Cesar Frasco Sarausad, *or an accomplice* discharged a firearm;
>
> (2) That defendant, Cesar Frasco Sarausad, *or an accomplice* acted with intent to cause the death of another person;
>
> (3) That Melissa Ursula Fernandes died as a result of defendant, Cesar Frasco Sarausad's acts, *or the acts of an accomplice* ....

J.A. 10 (emphases added).

Instructions 45 and 46 tracked Washington's accomplice liability statute. Instruction 45 stated:

> 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.

Instruction 46 stated:

> 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.

J.A. 17.

Instructions 47 and 48 defined intent and knowledge for purposes of the accomplice liability instructions and the murder instructions. Instruction 47 stated:

> A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

Id.

Instruction 48 stated:

> 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.

J.A. 18.

Counsel for Sarausad and Reyes objected to the pattern jury instructions and joined in each other's objections. J.A. 22-29. Each submitted proposed

instructions that would have clarified the mental state required for accomplice liability. J.A. 21. Sarausad's attorney explained that the pattern instruction "is fine in most cases. But this is a special case. And I think the Court should take extra care to be sure that the jury understands the limits of accomplice liability." J.A. 27.

Counsel for Reyes further explained that the jury:

> should be advised that we don't simply accept the term accomplice because of a person's gang involvement…. I'm concerned that this jury may simply say, well, all right, you're a 23rd, they're responsible for anything any 23rd member does as an accomplice….

J.A. 23-24.

All of their objections were overruled. J.A. 24-25, 27-29.

4. The Closing Arguments

The closing arguments addressed the law of accomplice liability. After initial observations about the significance of gang membership and an exhortation to ignore the defendants' youth, the prosecutor announced that she was "not going to repeat all the facts," but instead would "talk to you about some of the legal principles, some of the instructions that the Court has given you on the law that applies in this case, because those particular instructions will be the most important in terms of guiding your deliberations through this case." J.A. 32.

The prosecutor asked the jury to focus on "two instructions," "number 45," and "another instruction right behind it which breaks down all the ways somebody can assist or aid in the commission of a

crime." J.A. 37. She then provided several illustrations of accomplice liability.

Her first illustration involved Reyes. It asserted a theory of accomplice liability that did not require any knowledge on Reyes' part of a gun, a potential murder, or even a crime. "Reyes, by setting the wheels in motion, by simply calling his friends, getting them together, saying, 'Let's go avenge this problem,' he's an accomplice." *Id*.

The prosecutor also offered "a good example of accomplice liability" that did not require knowledge of murder:

> 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." Your presence, your readiness to assist caused the crime to occur and you are an accomplice. The law in the State of Washington says, if you're in for a dime, you're in for a dollar. If you're there or even if you're not there you're helping in some fashion to bring about this crime, you are just as guilty.

J.A. 38.

In response, both Reyes' and Sarausad's attorneys focused on the *mens rea* for accomplice liability. Reyes' attorney referred three times to Instruction 46 (accomplice liability) by its number and "urg[ed]" the jury to attend to it because it was "particularly acute" in this case. J.A. 56-57, 73-74. Among other arguments, he stressed that there was no evidence that Reyes knew of a gun. J.A. 74.

Sarausad's attorney then attempted to explain the minimum *mens rea* needed for accomplice liability:

> There is no question here that Cesar Sarausad assisted Brian Ronquillo. That's beyond dispute. [H]e drove him to the scene....
>
> With respect to every charged crime, Counts I through V, and the lesser included crime that you will be considering, … the same question for you [is] 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. That's the question. He had such knowledge only if he knew that Brian Ronquillo would commit the particular crime being charged, whether it's murder one, attempted murder one or manslaughter. If he did not think any crime was planned, he's not guilty of anything but bad judgment. If he 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.

J.A. 83-84. Sarausad's attorney then explained at length why this standard was critical to Sarausad's defense, given the lack of any evidence establishing that Sarausad knew that Ronquillo had a gun or intended to kill. J.A. 84-110. He then reminded the jury that if Sarausad "didn't know of a gun or plans for use of a gun for any purpose, he was not an accomplice under the instructions even as to manslaughter. Because he didn't have knowledge his own actions would promote or facilitate the crime." J.A. 110.

In rebuttal, the prosecutor disputed Sarausad's legal framework for accomplice liability by describing the law as it was commonly understood at the time –

that an accomplice need not have the specific intent to kill to be guilty of murder. She argued first that the defendants should "answer for their respective conduct" because each was a "but for" cause of the murders. J.A. 115. She spoke "about the accomplice liability instruction," expressly disagreeing with Sarausad's statement of the law and re-emphasizing her analogy to assault:

> And I've told you the old adage, you're in for a dime, in for a dollar. If their logic was correct, they're not ever an accomplice to anything. The getaway driver for a bank robbery would say, "I just told him to rob them, I didn't tell him to shoot him, I didn't do anything." 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.

J.A. 123.

5. The Jury's Deliberations

During its deliberations, the jury submitted five questions to the judge, four of which related to Sarausad, and three of which related to the *mens rea* for accomplice liability.

A. *Jury's Second Question*[1]

On the third day of deliberations, the jury sent this inquiry about the first-degree murder instructions: "Request clarification on instructions No. 11 & No. 12 element (3); does the 'intent' apply to (the defendant

[1] The jury's first request, on the second day of deliberations, was for a cassette tape player to listen to a 911 tape. Supplemental Appendix ("S.A.") 3.

only) or to (the defendant or his accomplice)?" J.A. 126, 131-32. Over the objections of Sarausad's counsel, the court responded as follows: "Refer to instructions 46 and 47 and consider your instructions as a whole." *Id.*

B. *Jury's Third Question*

Two days later, the jury asked "to rehear the testimony of Cesar Frasco Sarausad II." The court responded that: "Testimony will not be repeated." J.A. 127, 133.

C. *Jury's Fourth Question*

On its sixth day of deliberations, the jury asked about Sarausad's second-degree murder instruction: "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?" J.A. 128, 135-36. Over defendants' objections, the court gave "the same reply it gave to the jury's previous inquiry" (J.A. 136) – to "[r]efer to instructions 45 & 46 and consider the instructions as a whole" (J.A. 128, 136).

D. *Jury's Fifth Question*

The jury conferred for another seven and one-half hours. It then reported difficulty agreeing on the *mens rea* standard for accomplice liability:

> 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?

J.A. 129, 137.

Sarausad's counsel proposed that the court either respond "no" or provide a supplemental instruction. J.A. 138. Over counsel's objections, the court responded: "Reread instructions #s 45, 46, 47, and 48 and consider your instructions as a whole." J.A. 129, 138.

The jury deliberated for another hour that day, and three more hours on the next (eighth) day of deliberations, before reaching verdicts on Ronquillo and Sarausad. J.A. 130.

6. Motions for New Trial and Reconsideration

The jury convicted Ronquillo of premeditated first-degree murder, first-degree attempted murder, and second-degree assault. It convicted Sarausad of second-degree murder, attempted second-degree murder (two counts), and second-degree assault. Pet. App. 234a. The jury was unable to reach a unanimous verdict as to Reyes. J.A. 130.

After the verdict, the jury met with defense counsel, prosecutors, and the judge. S.A. 25. Based on this discussion, Sarausad's counsel submitted declarations by two jurors and described the post-verdict statements of two others as evidence that the jury misunderstood the level of *mens rea* needed to convict Sarausad as an accomplice to murder. S.A. 25-27, 29-36.

One juror declared that "I and some of the other jurors believed that [Sarausad] never intended to see anyone killed or shot[,]" and "I did not believe that there was proof beyond a reasonable doubt that [Sarausad] even knew of the presence of a gun in the car or that he had knowledge of Ronquillo's intent to shoot a gun that day or to kill anyone." S.A. 32. Another juror stated that:

> We jurors found the jury instructions very confusing, particularly as they applied to Cesar.... We tried several times to get clarification from the judge as to how the "intent" requirement applied to Cesar. The main response we got was to "re-read instruction #46", the accomplice definition. We did re-read that instruction, along with others, but we remained confused, even after the verdict was announced in open court.

S.A. 35. The jurors described Sarausad's conviction as a "grave injustice." S.A. 33, 36.

7. Sarausad's Direct Appeal

On direct appeal, Sarausad argued that the facts were insufficient to support conviction and that the trial court failed to instruct and clarify for the jury that he was not an accomplice to murder unless he knew he was assisting a murder. Pet. App. 256a, 264a-65a. The State argued, based on settled law, that accomplice liability may properly be based on "knowledge that [the accomplice's] actions or presence will facilitate another in the commission of a crime[,]" meaning any crime. S.A. 39.

The Court of Appeals unanimously agreed with the State that "in Washington [accomplice liability] has been reduced to the maxim, 'in for a dime, in for a dollar.'" Pet. App. 235a. The court explained that "an accomplice, having agreed to participate in a criminal activity, runs the risk that the primary actor will exceed the scope of the preplanned illegality." Pet. App. 259a (quoting *Davis*, 101 Wn. 2d at 657-59). After having quoted the statute and jury instruction (Pet. App. 256a-58a), the court stated that "[a]n accomplice is criminally liable because of his intent to facilitate another in the commission of *a* crime" (*id.* at

265a) (emphasis added). The court therefore concluded that "it was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day." Pet. App. 266a. Rather, it was sufficient that Sarausad "knew of the possibility of a fight—he agreed to participate in a gang confrontation." *Id.*

Sarausad's petition for review to the Washington Supreme Court was denied. Pet. App. 231a-32a.

8. Sarausad's Personal Restraint Petition And The State Courts' Subsequent Clarification of Washington Law

Sarausad filed his initial personal restraint petition ("PRP") in the Washington Court of Appeals. Building on the rejection of his direct appeal, he argued that trial counsel was ineffective precisely because he "predicated [his] entire defense on an erroneous interpretation of Washington's law on accomplice liability." S.A. 41. The petition explained that "Sarausad's theory at trial, as implemented by his trial attorney, … was that Sarausad could not be guilty as an accomplice ... [because his] participation in a yelling match, even one that could lead to pushing and possibly blows, could not render him culpable for murder. This legal theory informed every aspect of Sarausad's defense[,] from opening argument to closing statement ... [and] objections to instructions." S.A. 42.

After Sarausad briefed his initial petition, the Washington Supreme Court, in *Roberts* and *Cronin*, effectively vindicated his trial counsel's objections. It rejected the State's "in for a dime" theory that the accomplice liability statute imposes liability "so long as the defendant knows that he or she is aiding in the commission of *any* crime." *Cronin*, 14 P.3d at 757;

Roberts, 14 P.3d 713. It also rejected the State's argument that the difference between Washington's Pattern Jury Instructions, which imposed "criminal liability" for "a crime," and the statute, which imposed liability for "the crime," was a distinction without a difference and did not alter the State's burden of proof. *Cronin*, 14 P.3d at 757; *Roberts*, 14 P.3d at 736

The majority instead held that the statute's distinction between "a" and "the" was significant and requires that the putative accomplice must have acted with "knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged." *Cronin*, 14 P.3d at 757; Pet. App. 201a. Four dissenters embraced the State's statutory reading as correct and consistent with long-standing practice. *Cronin*, 14 P.3d at 761.

In light of *Roberts* and *Cronin*, Sarausad amended his PRP to reassert his challenges to the trial judge's responses to the jury's questions, the instructions, and the prosecutor's arguments. S.A. 43-44. His PRP was denied. *Sarausad* v. *State*, 39 P.3d 308, 312 (Wash. Ct. App. 2001).

The PRP panel acknowledged that "the jury inquired three separate times during deliberations, indicating confusion with respect to the mens rea required for accomplice liability." Pet. App. 207a. The panel concluded, however, that "whatever the basis for the jury's confusion may have been, the accomplice liability instructions were sufficient, and nothing that the prosecutor argued to the jury required a remedial or supplemental instruction." Pet. App. 215a.

The PRP panel conceded that when the direct appeal court concluded "'that it was not necessary for

the State to prove Sarausad knew Ronquillo had a gun, or knew that there was potential for gunplay that day,'" it "erred." Pet. App. 205a. In the PRP panel's view, however, 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. The PRP panel believed "the prosecutor assigned a different meaning to the phrase 'in for a dime, in for a dollar'" to explain the "gang mentality" that could lead a gang member to agree to commit murder. *Id.*

Nowhere did the PRP panel consider whether, independent of the prosecutor's argument, directing the jury to re-read the same accomplice instructions over whose meaning they had disagreed, and over whose meaning the state appellate courts also had disagreed, would eliminate any reasonable likelihood that the jury would adopt the wrong standard.

The Washington Supreme Court denied discretionary review. Pet. App. 194a. Echoing the PRP panel, the commissioner stated the "prosecutor never suggested Mr. Sarausad could be found guilty if he had no knowledge that a shooting was to occur," and that "her proper point was that it was unnecessary for Mr. Sarausad to share Ronquillo's intent to kill." Pet. App. 192a. The commissioner likewise never addressed whether, apart from the prosecutor's argument, there was a reasonable likelihood that the jury misapplied the law.

9. Sarausad's Habeas Proceedings

Sarausad filed a habeas petition in the District Court for the Western District of Washington. The State's answer admitted that Sarausad had preserved

and exhausted the issue of jury confusion about accomplice liability.

The magistrate judge ruled that the state court's refusal to grant relief "was contrary to the clearly established law of *In re Winship*." Pet. App. 161a. Specifically, the magistrate found that the state courts had misconstrued the prosecutor's argument, overlooked the significance of the jury's questions, and erred in failing to give weight to the juror declarations. Pet. App. 162a-69a.

The magistrate also concluded that the record could not support a finding of every element beyond a reasonable doubt. Pet. App. 184a. In a detailed evaluation of the relevant transcripts that identified factual errors and omissions in the state opinions, the magistrate found "no evidence from which a reasonable juror could find, beyond a reasonable doubt, that [Sarausad] knew that anyone in his car was armed with a gun." Pet. App. 169a.

The district court noted that the Magistrate erred in considering the juror affidavits, but adopted the magistrate's recommendations. Pet. App. 128a-29a, 131a.

The Ninth Circuit affirmed. Pet. App. 79a. It held there was a reasonable likelihood that the jury was confused about accomplice liability and therefore that the State was relieved of its burden of proof on the "only seriously contested issue during Sarausad's trial." Pet App. 5a, 77a-78a.

The court found the instructions ambiguous because they: (1) did not plainly state that an accomplice must have knowledge of the actual crime the principal intends to commit; (2) were similar to those found to be inadequate by the Washington

Supreme Court; and (3) were misconstrued by the panel in Sarausad's direct appeal. Pet. App. 69a-71a.

The court then identified four reasons why this jury was in all reasonable likelihood confused. First, the evidence of intent was "thin" and "contradicted" or "minimized" by other evidence. Pet. App. 75a-77a. Second, the prosecutor "argued clearly and forcefully for the 'in for a dime, in for a dollar' theory of accomplice liability." Pet. App 76a. Third, the jury's questions "demonstrated substantial confusion about what the State was required to prove." *Id*. Finally, the PRP court "misstat[ed] the record and ignor[ed] the prosecutor's emphatic and repeated 'in for a dime, in for a dollar' argument." Pet. App. 77a.

Because the constitutional error related to "the only disputed issue," the panel concluded the error could not be harmless. Pet. App. 79a.

Judge Reinhardt concurred and dissented in part, concluding that "virtually no 'evidence,' direct or circumstantial," established Sarausad's purported knowledge. Pet. App. 89a. He observed, *inter alia*, that no evidence supported a finding that Sarausad knew of a gun or plan to shoot and that the manner of Sarausad's driving "was just as consistent with a planned fistfight." Pet. App. 93a.

Judge Bybee dissented. Pet. App. 99a. He found "[n]either the statute nor the instruction [to be] ambiguous," and saw no "reasonable likelihood" of jury confusion. Pet. App. 100a. He considered the "jury's questions … certainly understandable given the facts, the complexity of the issue, and the length of the jury instructions," but believed that directing the jury to re-read the accomplice instructions adequately resolved that confusion. Pet. App. 122a-23a. He subsequently joined four judges in

dissenting from denial of rehearing en banc on a theory that the panel majority had disregarded Washington law by concluding the jury was reasonably likely to have misunderstood the accomplice instructions. Pet. App. 2a.

SUMMARY OF ARGUMENT

The Due Process Clause requires a State to prove beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). Where there is a reasonable likelihood that a jury misunderstood the law in a manner that lowered the State's burden of proof on an essential element, the defendant is deprived of this clearly established constitutional right. *Estelle* v. *McGuire*, 502 U.S. 62, 73 n.4 (1991); *Francis* v. *Franklin*, 471 U.S. 307, 315-16 (1985); *Sandstrom* v. *Montana*, 442 U.S. 510, 521 (1979); see also *Bollenbach* v. *United States*, 326 U.S. 607, 611-13 (1946); *Sparf* v. *United States;* 156 U.S. 51, 73-74 (1895); *United States* v. *Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545) (Story, J.).

The jury's questions establish that this jury had "difficulty" reaching "agreement" on the level of *mens rea* for accomplice liability. Its final question on *mens rea* demonstrates that the jury contemplated applying a standard – incorrect under Washington law – in which a participant in a group activity is an accomplice to any crime any group member might subsequently commit. The trial court never told the jury that this standard was incorrect. Instead, the trial court directed the jury merely to "re-read" its instructions – instructions that the jury had repeatedly been told to read, and therefore that at least some jurors presumably viewed as supporting the erroneous standard in the question.

In these circumstances, it is reasonably likely that the jury misconstrued the instructions to provide for the lower standard of *mens rea* described in their question. That reasonable likelihood is underscored by the PRP court's acknowledgement that the state court itself "erred" in construing the instruction on direct review. Pet. App. 205a. Neither Petitioner nor the state courts has explained how there is not at least a reasonable likelihood that this jury misread and misapplied the accomplice instruction in the same manner as did the appellate panel on direct review. That likelihood is all the greater given that other appellate panels and state prosecutors in many cases misread the statute the same way. Again, Petitioner and the state courts have no response.

The state courts' analysis is objectively unreasonable because their inquiry was too narrow. The state courts asked only whether the prosecutor misled the jury and whether the accomplice instruction could be read consistently with Washington Supreme Court precedent on accomplice liability. The state courts should have asked whether the instructions alone were adequate to resolve the jury's confusion after the jury expressed difficulty reaching agreement on them and offered an erroneous standard of *mens rea* to illustrate its confusion. Had the state courts directly confronted that issue, they would have concluded that telling this jury to "re-read" instructions over which they disagreed was inadequate to prevent them from reaching the wrong construction, and thereby lowering the State's burden of proof on *mens rea*. Merely re-reading the statute had not prevented the state courts from misconstruing the same language. By not providing the jury any clarification akin to what the Washington Supreme Court later provided

the Washington courts, the trial court failed adequately to assist the jury in resolving its disagreement correctly. The trial court thus failed to eliminate a reasonable likelihood that the jury would misconstrue and misapply the law, just as the state court itself had done on direct review.

The state courts' failure to ask and properly answer the relevant question unreasonably departed from this Court's precedents. See *Sandstrom*, 442 U.S. at 521 (reversing even though instruction amenable to correct reading, and jury did not express confusion); *Francis*, 471 U.S. at 315-16 (same); see also *Boyde* v. *California*, 494 U.S. 370, 380 (1990) (recognizing that an instruction, "not concededly erroneous," can be "subject to an erroneous interpretation" that renders it unconstitutional); accord *Estelle*, 502 U.S. at 73 n.4. The state courts further erred in failing to assess the prosecutor's rebuttal in the context of Sarausad's closing argument, and in attempting to "somehow cordon off" a catch-phrase with an obvious legal connotation as conveying only a theory of gang motivation. See *Kelly* v. *South Carolina*, 534 U.S. 246, 255-56 (2002).

The state courts' failure to recognize the reasonable likelihood of jury confusion was objectively unreasonable in this case. Washington's pattern jury instructions may be adequate in other accomplice cases, but they proved inadequate to resolve the jury's expressed confusion here. This case exemplifies "the occasional abuse that the federal writ of habeas corpus stands ready to correct." *Jackson* v. *Virginia*, 443 U.S. 307, 322 (1979).

ARGUMENT

Sarausad is entitled to habeas relief "with respect to any claim that was adjudicated on the merits in

State court" that "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." 28 U.S.C. § 2254(d). A state court decision is "an 'unreasonable application of our' clearly established precedent if it 'correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.'" *Penry* v. *Johnson*, 532 U.S. 782, 792 (2001) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 407-08 (2000)). "Unreasonable" means "objectively unreasonable." *Williams*, 529 U.S. at 409. A state court decision is "objectively unreasonable" where it is founded, "in part, on a clear factual error," *Wiggins* v. *Smith,* 539 U.S. 510, 528 (2003), "fail[s] to evaluate the totality of the available [pertinent] evidence," *Williams*, 529 U.S. at 397-98; *Rompilla* v. *Beard*, 545 U.S. 374, 389 (2005), or rests upon an unduly narrow framing of the constitutional question, *Wiggins*, 539 U.S. at 527-28.

The habeas standard reflects deference to state courts, but "deference does not imply abandonment or abdication of judicial review." *Miller-El* v. *Cockrell*, 537 U.S. 322, 340 (2003). Furthermore, federal courts do not grant state decisions deference unless they "adjudicated ... the merits" of a federal claim. 28 U.S.C. § 2254(d). State court decisions that ignore or improperly frame federal claims or lack a clear resolution of such claims receive *de novo* review on questions of law and mixed questions of fact and law. See *Rompilla*, 545 U.S. 390.[2]

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[2] *Accord Bronshtein* v. *Horn*, 404 F.3d 700, 710 n.4, 715 (3d Cir. 2005) (Alito, J.) (reviewing habeas claims, including the adequacy of jury instructions, *de novo*); *Ellsworth* v. *Warden*, 333 F.3d 1, 4 (1st Cir. 2003) (en banc); *Hudson* v. *Hunt*, 235 F.3d

I. A CRIMINAL DEFENDANT HAS A CLEARLY ESTABLISHED RIGHT TO A FINDING ON EACH ELEMENT BY A JURY THAT IS NOT REASONABLY LIKELY TO MISCONSTRUE THE LAW.

1. This Court clearly established in *Winship* that the Due Process Clause of the Fourteenth Amendment guarantees a defendant the right not to be convicted unless the jury finds "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. at 364. An omission or misdescription of an element of the charge, or an instruction that lowers or eliminates the government's burden of proof on an element, denies the defendant the constitutional right to insist upon a jury finding on each element beyond a reasonable doubt. See *Neder* v. *United States*, 527 U.S. 1, 10 (1999) ("misdescriptions and omissions … preclude[] the jury from making a finding on the *actual* element of the offense"); *California* v. *Roy*, 519 U.S. 2, 5 (1996) (per curiam) (erroneous instruction is "as easily characterized" either as a "misdescription of an element" or an "error of omission") (internal quotations omitted); *Francis*, 471 U.S. at 318 (improper instruction on burden for proving intent).

A clearly established corollary of *Winship* is that a defendant is denied Due Process where there is a "reasonable likelihood" that the jury misunderstood the instructions in a manner that resulted in it not finding every fact necessary to constitute the crime beyond a reasonable doubt. *Estelle*, 502 U.S. at 72 (quoting *Boyde*, 494 U.S. at 380); *Francis*, 471 U.S. at

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892, 895 (4th Cir. 2000); *Miller* v. *Johnson*, 200 F.3d 274, 281 & n.4 (5th Cir. 2000).

318 (holding that instruction that altered burden of proof "with respect to the element of intent" was unconstitutional); *Carella* v. *California*, 491 U.S. 263, 265-67 (1989) (per curiam) (same with respect to instructions on other elements of the crime); *Sandstrom,* 442 U.S. at 521 (improper instruction on intent); cf. *Phillip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1064-65 (2007) (holding states cannot permit a "significant" risk that a jury's misunderstanding deprived a civil defendant of Due Process). The "reasonable likelihood" standard is clearly established to be a likelihood of jury confusion greater than a bare "possibility," yet *less* than "more likely than not." *Boyde*, 494 U.S. at 380.

2. It is "self-evident" that the Due Process right, under *Winship* and its progeny, to a jury that understands the elements of the charged offense is "interrelated" with the Sixth Amendment right to a jury trial. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993); *Carella*, 491 U.S. at 268 (Scalia, J., joined by Brennan, Marshall, and Blackmun, J.J., concurring in judgment); see also *Sandstrom*, 442 U.S. at 523 (erroneous instruction impaired jury's constitutionally-assigned "factfinding function").

Justice Story described the right to a jury that understands and follows the law as "most sacred":

> Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.
>
> ... [This] is his privilege and truest shield against oppression and wrong ....

Battiste, 24 F. Cas. at 1043.

Echoing Justice Story, this Court has repeatedly recognized the constitutional importance of a jury grounded in the law. See *Sparf*, 156 U.S. at 73-74, 101-02 (quoting Justice Story in *Battiste* with approval and concluding that, with a contrary rule, "the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles"). Thus, a trial by jury, "in the primary and usual sense of the term at the common law and in the American constitutions," means a jury guided by a judge on the law. *Cap. Traction Co.* v. *Hof*, 174 U.S. 1, 13 (1899). Otherwise, the jury cannot fulfill its constitutional "responsibility for drawing appropriate conclusions." *Bollenbach*, 326 U.S. at 612.

For this reason, trial judges must explain the law to jurors "independently of any question from the jurors or any other indication of perplexity on their part." *Kelly*, 534 U.S. at 256; *Herron* v. *S. Pac. Co.*, 283 U.S. 91, 95 (1931) ("discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides"). When a jury raises a question, however, a judge has a "duty of special care" to respond with "concrete accuracy." *Bollenbach*, 326 U.S. at 612-13.

3. In *Sandstrom*, this Court established that a conviction may be unconstitutional where a jury instruction is not facially erroneous, but is subject to an erroneous interpretation. 442 U.S. at 517. In that case, the Montana Supreme Court had definitively construed a state law instruction on "deliberate homicide" in a manner consistent with federal constitutional requirements. *Id.* at 525. Although the jury did not ask the trial court to clarify the meaning of "deliberate homicide" or otherwise

express confusion on the issue, this Court nevertheless found, based on evidence outside the trial record, that "a reasonable jury could well have interpreted" the instruction incorrectly. *Id.* at 517.

This Court noted that "federal and state courts ha[d] warned" that the instruction could be misinterpreted. *Id.* at 517-18. The Court also noted that "the drafter of Montana's own Rules of Evidence" misunderstood the instruction in precisely the way the defendant feared the jury might have done. *Id.* at 518 & n.6. As a result, the Court unanimously reversed the judgment upholding the conviction because the jury "may have interpreted the judge's instruction" as "relieving the State of the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind." *Id.* at 521, 524.

This Court since has reaffirmed the central premise of *Sandstrom*—that a reasonable likelihood of jury confusion can exist even where an instruction is "not concededly erroneous," but is instead "subject to an erroneous interpretation." *Boyde*, 494 U.S. at 380; *Estelle*, 502 U.S. at 73 n.4. In such circumstances, this Court undertakes a "realistic assessment" of how a jury likely understood a set of instructions. See *Penry*, 532 U.S. at 804 (holding instructions may have misled jury about constitutional role in sentencing); *Bollenbach*, 326 U.S. at 612-14 (assessing likely impact on jury of erroneous supplemental instruction); *Bruton* v. *United States*, 391 U.S. 123, 135-37 (1968) (assessing jury's ability to follow instruction to disregard evidence); *United Bhd. of Carpenters & Joiners of Am.* v. *United States*, 330 U.S. 395, 410-11 (1947) (assessing likely impact of instructional error relating to corporate defendants on rights of individual defendants).

Where it is reasonably likely that a jury was confused about a principle of law important to carrying out its fact-finding role, this Court has found a constitutional violation. See *Penry*, 532 U.S. at 804; *Yates* v. *Evatt*, 500 U.S. 391, 401-02, 406 & n.6 (1991); *Francis*, 471 U.S. at 318; *Sandstrom*, 442 U.S. at 514.

4. Petitioner principally claims that federal habeas relief may not be granted here without "second-guess[ing] state court determinations of state law." Br. at 26. This claim is baseless.

Petitioner argues that no relief is available because this case involves, at most, an error on an issue of state law on accomplice liability. Quoting *Gilmore*, Petitioner claims that 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." Br. at 33 (quoting *Gilmore* v. *Taylor*, 508 U.S. 333, 342 (1993) (citing *Estelle*, 502 U.S. 62)).

Petitioner is wrong both about the availability of habeas relief and the relevance of *Gilmore*. Federal courts can and do grant habeas relief where a jury's confusion over state law deprives a defendant of "some constitutional right." *Estelle*, 502 U.S. at 72 (internal alterations omitted); accord *Middleton* v. *McNeil*, 541 U.S. 433, 436 (2004) (per curiam). *Gilmore* did not purport to disturb this principle of habeas jurisprudence. Moreover, the defendant in *Gilmore* did not argue that an instruction "somehow lessened the State's burden of proof" or "misstated applicable state law" on an element of the charge. 508 U.S. at 340. He complained of an inability to assert an affirmative defense under state law. *Id.* at 342-43. "*Winship's* due process guarantee does not

apply" to state-law affirmative defenses. *Id.* at 343. Thus, the defendant in *Gilmore* was, in effect, seeking relief based on an error of state law. *Id.* at 343-44. Here, in contrast, Sarausad seeks relief based on federal law: a "sacred right" under the Constitution to a jury that is not reasonably likely to have lowered the State's burden of proof by misunderstanding the *mens rea* needed to convict him as an accomplice.

Petitioner also relies on cases such as *Cupp* v. *Naughten*, 414 U.S. 141 (1973), *Henderson* v. *Kibbe*, 431 U.S. 145 (1977), and *Patterson* v. *New York*, 432 U.S. 197 (1977) as establishing a "high burden" for finding that a jury instruction caused a constitutional error. See Br. at 30, 34-36, 37-40. None of these cases, however, involved a challenge to a court's failure to remedy a jury's expressed confusion and inability to agree on an instruction establishing the state's burden of proof with respect to *mens rea*, let alone an instruction that was misconstrued by the state court on direct appeal. See Part II, *infra*. Thus, while instructing a jury "in the language of the statute" (Br. at 39) may often be adequate, it is not and has never been deemed adequate by this Court to resolve a jury's admitted confusion in circumstances remotely comparable to those here.

Petitioner's reliance upon *Bradshaw* v. *Richey*, 546 U.S. 74, 76 (2005) (per curiam) is similarly misplaced. Br. at 26. In *Bradshaw*, the Ohio Supreme Court had provided "perfectly clear" and "authoritative" guidance on the construction of an Ohio statute. 546 U.S. at 76-78. This Court reversed because the federal court of appeals disagreed with the Ohio Supreme Court's construction. *Id.* at 76. Here, in contrast, the Washington Supreme Court's eventual clarification of its accomplice liability statute has been and remains controlling. Indeed, the

Washington Supreme Court's eventual clarification on accomplice liability forms the backdrop for why the reasonable likelihood of jury confusion in this case deprived Sarausad of his clearly established rights under *Winship*.

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. Although state courts possess "final authority" on the meaning of state statutes, state courts do not have "final authority" on whether a lay jury misunderstood an instruction. *Sandstrom*, 442 U.S. at 516; *Francis*, 471 U.S. at 315-16; see also 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 45:2 (7th ed. 2008) (decisions construing statutes not evidence that statutes are incapable of reasonable alternative constructions). The question is not what a State's highest court has "declare[d] the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning" under the circumstances. *Francis,* 471 U.S. at 315-16; *Sandstrom*, 442 U.S. at 516-17; accord *Boyde*, 494 U.S. at 380; *Mills* v. *Maryland*, 486 U.S. 367, 375-76 (1988); see also, *e.g.*, *Smith* v. *Texas*, 543 U.S. 37, 45 (2004) (per curiam) (rejecting state court's determination that jury was adequately instructed); *Penry*, 532 U.S. at 804 (granting habeas relief despite state court ruling that jury did not need guidance on instruction that quoted statute); *Carella*, 491 U.S. at 264-65 (rejecting state court's views about how jury understood statutory language); *Mullaney* v. *Wilbur*, 421 U.S. 684, 686 (1975); see also *id.* at 704 (Rehnquist, J., concurring).

Any other approach would insulate jury trials from constitutional challenge whenever juries were

instructed with copies of relevant criminal code provisions and told to "re-read" them to find the answers to questions. No matter how vague or ambiguous a state statute, state courts eventually will settle upon a definitive reading. Yet such resolution will not answer the separate question of whether a given jury reached the same reading. The state courts and dissenting judges below erred in failing to recognize this critical distinction.

Thus, as it has repeatedly done in the past, this Court here should determine whether an instruction, "not concededly erroneous," is nevertheless "subject to an erroneous interpretation" or otherwise could have contributed to "a reasonable likelihood" of confusion. *Boyde*, 494 U.S. at 380; *Estelle*, 502 U.S. at 73 n.4. Accepting the Washington Supreme Court's clarification of the accomplice liability statute, Sarausad is nevertheless entitled to habeas relief because it is reasonably likely that his jury did not understand accomplice liability as the Washington Supreme Court later dispositively construed it.

II. THE STATE COURTS' APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW WAS OBJECTIVELY UNREASONABLE

Under clearly established federal law as determined by this Court, Sarausad's conviction was unconstitutional and should be set aside. There is a reasonable likelihood that the jury misunderstood the *mens rea* required under Washington law for conviction as an accomplice to murder. The state courts' failure to vacate the conviction on this ground was objectively unreasonable.

A. There Is A Reasonable Likelihood That The Jury Misapplied The Accomplice Liability Instruction As Lowering The State's Burden Of Proof On *Mens Rea*.

This Court often must evaluate the reasonable likelihood of jury confusion solely by analyzing an ambiguity in a challenged instruction and extrinsic evidence of confusion in other cases. See, *e.g.*, *Sandstrom*, 442 U.S. at 514. Here, however, the Court also has direct evidence that the jury misunderstood its instructions. After seven days of deliberations, and after counsel and the court directed the jury to read the accomplice instructions multiple times,[3] the jury reported its "difficulty agreeing on the legal definition and concept of 'accomplice.'" J.A. 129. Specifically, it disagreed over whether a person who "willing[ly] participates in a group activity" is "an accomplice to any crime committed by anyone in the group[.]" *Id.*

In *Cronin*, the Washington Supreme Court rejected the State's argument that accomplice liability attaches "so long as the defendant knows that he or she is aiding in the commission of *any* crime." 14 P.3d at 757. Yet the only answer the jury received to this question was a direction to "re-read" four

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[3] The jury's first two questions on *mens rea* show it was confused about whether it had to find any level of *mens rea* for Sarausad. Over counsel's strong objection (J.A. 19, 25-26), Instructions 12 and 17 were phrased such that a jury could conclude that Sarausad, "the defendant," was guilty of first or second-degree murder, so long as either he "*or*" his "accomplice," Ronquillo, had the necessary *mens rea*. J.A. 9-10. By directing the jury to read Instruction 46 in answer to each of these first two questions, the trial court directed the jury to apply Instruction 46 to Sarausad. The jury's final question thus reflects its disagreement over the meaning of Instruction 46.

instructions and consider the fifty-three instructions as a whole. J.A. 129. Although the jury subsequently reached a verdict as to Sarausad, the issue is how the jury resolved its disagreement about accomplice liability. Did it erroneously conclude, as did the court of appeals on direct review, that knowledge of a "gang confrontation" was enough, and that "it was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day"? Pet. App. 266a. Or did the jury conclude, as the PRP court did, that the State had to prove that Sarausad "knew generally that he was facilitating a homicide"? Pet. App. 204a.

Because the trial court merely directed the jury to re-read the instructions about whose meaning it disagreed, a reasonable likelihood exists that the jury accepted its own proposed incorrect interpretation. This is true because: (1) the state court on direct review adopted that incorrect reading; (2) other Washington courts and state prosecutors adopted that incorrect reading; (3) Instruction 46 (accomplice liability) on its face is potentially ambiguous; (4) Instructions 47 (intent) and 48 (knowledge) magnified the likelihood of the jury misconstruing Instruction 46; (5) re-reading Instruction 46 a third time after seven days of deliberations was unlikely to assist the jury; (6) the jury's verdict reflects confusion about accomplice liability; and (7) the prosecutor urged the jury to adopt an incorrect reading of Instruction 46.

1. First, it is at least reasonably likely that the jury adopted the same erroneous interpretation of Instruction 46 as the state appellate court on direct review. There, three appellate judges read and quoted Instruction 46 and the statute from which it is directly drawn. Pet. App. 256a-58a. They then

rejected Sarausad's argument "that the Washington Legislature did not intend to hold accomplices strictly liable for all crimes of the principal," and endorsed "the State's 'in for a dime, in for a dollar' theory" of liability. Pet. App. 261a, 265a-66a. The PRP court later conceded the court on direct appeal "erred" by failing to construe the accomplice liability statute to require, at a minimum, that Sarausad knew Ronquillo had a gun, or that there was potential for gunplay, thus lowering the State's burden of proof on the *mens rea* element. Pet. App. 205a.

If three judges after reading Instruction 46 in the context of this case made this error, then more than a bare possibility exists that a jury would make the same mistake. Neither the PRP court nor Petitioner has ever explained their confidence that the jury understood the law better than the panel of appellate judges on direct review. There is no good explanation.

The direct review panel presumably adopted an "objectively reasonable" construction of the accomplice statute. *Safeco Ins. Co. of Am.* v. *Burr*, 127 S. Ct. 2201, 2215-16 (2007) (statutory construction not "objectively unreasonable" where "sufficiently convincing ... to have persuaded [a] District Court to adopt it"). Jurors must be deemed to be at least "reasonably likely" to adopt an objectively reasonable statutory construction accepted on direct review. Any other result would unreasonably impugn the judgment of either the state court or the jury.

2. The PRP court's assumption that the jury understood Instruction 46 as the majority in *Roberts* and *Cronin* did flies in the face of the contrary reading on direct review, the longstanding disagreement among Washington courts at all levels over the meaning of the accomplice liability statute,

and the longstanding position of state prosecutors. Numerous Washington decisions, as well as the dissents in *Roberts* and *Cronin*, reflect the mistaken view that Washington's accomplice statute permits a defendant to be convicted as an accomplice to murder even absent knowledge of a plan or method to commit murder, so long as the defendant knew his conduct might assist in any crime. See *In re Smith*, 73 P.3d 386, 391 (Wash. Ct. App.) (unanimously concluding "we ourselves failed to recognize [the problem] until the *Cronin* and *Roberts* decisions"), *abrogated by In re Domingo*, 119 P.3d 816, 824 (Wash. 2003) (noting, over four dissents, that "even this court failed to understand the" contours of accomplice liability).

For example, in a case where the jury received the same accomplice liability instruction as Sarausad, the defendant argued that "knowledge ... of the crime" referred to "the" specific crime charged. *State* v. *du Mas*, 86 Wash. App. 1014, 1997 WL 258450, at *8-9 (1997). The appellate court disagreed, accepting instead the State's "'in for a dime, in for a dollar' theory of accomplice liability." *Id.* at *15. The court held "accountability for 'the crime'" included accountability for "general knowledge that the principle intend[ed] to commit 'a crime.'" *Id.* at *8-9. The court thus affirmed a second degree murder conviction assuming the accomplice "did not know that [the principal] was premeditating murder [or] ... was actually committing murder." *Id.*; see also *State* v. *Robbins*, 87 Wash. App. 1112, 1997 WL 662015, at *2-3 (1997) (accomplice liability may be predicated on knowledge that one's actions "will promote or facilitate commission of criminality" or "general knowledge that [one] is assisting the principal in committing a crime").

Likewise, state prosecutors incorrectly advocated for years that accomplice liability attached for knowledge of *any* crime. That position is additional "strong evidence" of an objectively reasonable alternative reading of the accomplice liability statute. See *Gilmore*, 508 U.S. at 344-45 & n.3 (plurality); *United States* v. *Finnell*, 185 U.S. 236, 244 (1902).

Petitioner nonetheless contends (and the PRP court assumed) that the jury would not have misunderstood Instruction 46 because it does not substitute "a crime" for "the crime," which the Washington Supreme Court held erroneous in *Roberts*. The short answer to that argument is that it cannot be reconciled with the decision in this case on direct review. That court, like numerous other courts, had the statutory language before it, yet made precisely the error in construction that Petitioner insists the jury cannot be deemed reasonably likely to have made. The decision on direct review, the decisions of other Washington courts, and state prosecutors' previous positions render Petitioner's argument untenable.

3. A third reason this jury is at least reasonably likely to have misunderstood the *mens rea* for accomplice liability is that it lacked the benefit of the explanations of Instruction 46 subsequently provided by Petitioner and the Washington appellate courts, which go well beyond the plain language of the accomplice liability statute and Instruction 46.

This Court has recognized 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. Yet even lawyers and judges have needed help beyond the language of this statute to reach the correct

construction as clarified by the Washington Supreme Court.

Petitioner now clarifies for this Court that the State must prove knowledge of "*the* crime" and that "the" crime "*means the charged offense*." Br. at 11 (second emphasis added); see *id.* at 49 ("Sarausad must have knowingly assisted Ronquillo in committing 'the crime' charged"). Petitioner also devotes nearly one page to further explicating the meaning of "the crime." Br. at 31. There, for example, Petitioner explains that knowledge of "the crime" means knowing "generally that [one's] conduct [is] promoting or facilitating a homicide." *Id.* Neither the prosecutor nor the trial court, however, told the jury that Sarausad was not an accomplice unless he had knowledge "generally" that he was facilitating a murder.

The Washington Supreme Court also needed more than the language of the statute to set the boundaries of accomplice liability. In rejecting "the State's argument that accomplice liability attaches so long as the defendant knows that he or she is aiding in the commission of *any* crime," that court clarified that "the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate '*the* crime' for which he or she is eventually charged." *Cronin*, 14 P.3d at 757. The PRP court summarized the standard of *mens rea* for accomplice liability in Washington in this way:

> From this, we conclude 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, but need not have known that the principal had the kind of

> culpability required for any particular degree of murder.

Pet. App. 204a. The jury – though it pleaded for help in understanding its instructions – received not even an italicized "*the*," let alone clarification akin to what Petitioner and the state courts have now provided.

In such circumstances, this Court again should ask, as it did in *Bollenbach*: "What reason is there for assuming that the jury did not also fail to appreciate these factors which the Government, in an elaborate argument, explains as requisite for a proper understanding of that which at best was dubiously expressed?" 326 U.S. at 613. In *Bollenbach,* this Court refused to sustain a conviction on direct review where "three circuit judges" had concluded that a supplemental instruction was erroneous, and therefore the government's contrary assessment rendered the instruction at best "equivocal." *Id.* Instruction 46 also should be deemed equivocal, because here the definitive construction of Instruction 46 by the state courts includes an explanation well beyond what the jury was provided, and because the history of the statute shows that many jurists and the State misconstrued it. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Id.*

4. Fourth, the court directed the jury to consider two instructions along with the accomplice instruction, and the phrasing of those instructions increased the reasonable likelihood that the jury would misunderstand the *mens rea* for accomplice liability. Those instructions – Nos. 47 and 48 – focused on knowledge of or intent to commit "a crime" rather than "the crime" charged.

The first time the trial judge directed the jury to consider Instruction 48 was in response to the jury's final question on *mens rea*. It therefore is reasonable to suppose that the jury considered Instruction 48 particularly relevant to answering that final question. Instruction 48 defined "knowledge" as follows:

> 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.

J.A. 18 (emphases added). It is reasonably likely that the jurors, reading Instructions 46 and 48 together, would have determined that "knowledge" for purposes of accomplice liability merely required knowledge of "a crime" – not necessarily of "the charged offense." Instruction 48 thus pointed the jury toward the interpretation of accomplice liability adopted by the court of appeals on direct review, not the interpretation accepted by the majority in *Cronin* and *Roberts*.

The trial court also again referred the jury to Instruction 47, which defined "intent" in terms of committing "a crime": "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes *a crime*." J.A. 17 (emphasis added). Under the *Roberts* approach of placing weight on the article "a," Instruction 47 suggests that Sarausad acted with the

intent necessary to be an accomplice to murder if he intended to facilitate "a crime," such as a fistfight. Thus, reading Instructions 47 and 48 together with Instructions 45 and 46 does not eliminate the reasonable likelihood that the jury failed to appreciate the linguistic significance of the "a crime" / "the crime" distinction; if anything, those instructions make it more likely still that the jury misapplied the law.

5. Fifth, this Court's decisions make clear that merely directing a jury to re-read the "plain meaning" of accomplice instructions already considered by it at length "does nothing to dispel [its] misunderstanding." See *Simmons* v. *South Carolina*, 512 U.S. 154, 170 (1994); *id.* at 178-79 (O'Connor, J., concurring). The jury's questions on *mens rea* should have left the trial court with "no doubt" that the jury lacked a "clear understanding" of accomplice liability. See *Shafer* v. *South Carolina*, 532 U.S. 36, 53 (2001).

This Court has observed that "[i]t almost goes without saying that if the jury ... understood the 'plain meaning'" of the instructions, "there would have been no reason for the jury to inquire about" them. *Simmons*, 512 U.S. at 170 n.10; *id.* at 178 (O'Connor, Rehnquist, and Kennedy, JJ., concurring in judgment) ("that the jury in this case felt compelled to ask" a question "shows that the jurors did not know" how to read the instruction). That is certainly true here, where the jury's final question on accomplice liability occurred only after it had been repeatedly directed, in answer to prior questions, to read the accomplice liability instructions. This "jury could not have intended to put a question [to the trial court] which had been already answered" by the instructions. *Armstrong* v. *Toler*, 24 U.S. 258, 279 (1826); see also *Shafer*, 532 U.S. at 53. Instructing

this jury merely to re-read the instructions over the meaning of which it disagreed was therefore unreasonable.

Petitioner, however, argues based on *Weeks* v. *Angelone*, 528 U.S. 225 (2000) that there is no "reasonable likelihood of unconstitutional application of the instructions" so long as a court *always* answers questions by pointing the jury back to the instructions and waiting for it to ask another question. Br. at 49-50. *Weeks* does not stand for this proposition, and Petitioner's reading cannot be reconciled with the above-cited decisions.

The jury in *Weeks* identified, in one question, two possible ways to perform its sentencing function. The court directed the jury to one paragraph in one instruction that unequivocally rejected the incorrect option and affirmed the correct one. *Weeks*, 528 U.S. at 228-29, 231-32. The jury here, in contrast, repeatedly asked about the *mens rea* for accomplice liability, stated that it was having difficulty understanding the definition, and offered an incorrect *mens rea* standard as an example of what it thought the instructions might permit. The trial court did not focus the jury on a discrete portion of one instruction that unequivocally answered its question and that might have been overlooked by the jury. Instead, the trial court told the jury to re-read four instructions on *mens rea* in the context of all the instructions.

The single paragraph highlighted by the trial court in *Weeks* also had been upheld by this Court as "constitutionally sufficient." *Id.* at 227, 231. The pedigree of Washington's accomplice liability instructions, by contrast, is one of confusion. Furthermore, *Weeks* discounted the alleged risk of jury confusion because the defendant's attorney "did not view the judge's answer to the jury's question as a

serious flaw in the trial at that time." *Id.* at 236. The attorney had made an oral motion to set aside the verdict, but failed to "even mention [the] incident in his motion." *Id.* at 237. In contrast, Sarausad's trial attorney (along with Reyes') objected at every available opportunity on the ground that the jury would misunderstand accomplice liability, including a standing objection to the instructions and responses to the jury's questions, and post-trial motions arguing that the jury did not understand the accomplice instructions. J.A. 19, 22-29, 132, 136, 138.[4]

In addition, the trial court in *Weeks* demonstrated that it was willing to assist the jury in what proved not to be a difficult sentencing decision. The jury asked two questions in six hours of deliberations. The trial judge responded to the first with a supplemental instruction and to the second by directing it to one paragraph in the instructions. Here, the jury had deliberated for *thirty hours* over *seven days*, and the court repeatedly declined to provide a supplemental instruction. By the final question, this jury surely had reached "a state of frayed nerves and fatigued attention, with the desire to go home." *Bollenbach*, 326 U.S. at 612. A reviewing court therefore cannot presume, as Petitioner suggests (Br. at 50), that if this jury remained confused, it would have asked yet another question.

Last, the jury in *Weeks* confirmed in open court that it acted in accordance with the law on the precise

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[4] Sarausad's objections also render *Henderson* v. *Kibbe*, 431 U.S. 145 (1977) inapposite. The defendant in *Henderson* failed to propose an instruction on an omitted element and failed to object at the trial and intermediate levels. *Id.* at 154-56. The jury also received other instructions such that the omitted instruction would not have affected its verdict. *Id.* at 156.

issue raised by its earlier question to the court. 528 U.S. at 234-35. The verdict in Sarausad's case offers no such assurances.

For all of these reasons, unlike in *Weeks*, the trial judge's responses did not eliminate the "reasonable likelihood," not merely the "slight *possibility*," that the jury remained confused about accomplice liability.

6. Sixth, the jury's verdict is consistent with an incorrect reading of the accomplice instructions as imposing liability for knowledge of *any* crime. Some jurors may reasonably have concluded that neither Reyes nor Sarausad knew of a gun or plan to shoot, and yet still voted to acquit only Reyes because Sarausad was driving, while Reyes was merely present in the car. J.A. 39. It is at least reasonably likely that some jurors found this distinction significant because, under the instructions, "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. Even if some jurors thought neither Sarausad nor Reyes knew of a gun or plan to shoot, this instruction gave them a unique basis to acquit Reyes.

Petitioner ignores this ready explanation for the jury's verdict and instead infers from the mistrial on Reyes that the jury settled upon a correct construction of the accomplice liability statute. Br. at 51. Such an inference is neither possible nor appropriate on this record. See *Sandstrom*, 442 U.S. at 526 (finding constitutional error where reviewing court had "no way of telling" from "general" verdict whether jury interpreted instruction to lower the state's burden of proof). Because the jury did not return even a partial verdict as to Reyes, the mistrial on Reyes does not establish that the jury concluded

that Sarausad knew of a gun or a plan for a shooting, which the PRP admitted was essential to convict Sarausad as an accomplice to murder. Pet. App. 204a-05a. Moreover, any evidence that Sarausad knew of a gun was at best circumstantial, whereas direct evidence indicated Reyes knew of the gun. S.A. 13-15. Under the correct *mens rea* standard, the jury could not rationally acquit Reyes but convict Sarausad on weaker evidence of knowledge of a gun. The mistrial as to Reyes thus does not eliminate the reasonable likelihood that the jury adopted an incorrect theory of accomplice liability as to Sarausad.

7. Finally, the prosecutor repeatedly, specifically, and incorrectly described "the law" of accomplice liability. The hypotheticals she offered were "problematic" (Pet. App. 213a-14a) precisely because they suggested that Sarausad could be an accomplice to murder even if he knew nothing about a gun, a plan to shoot, or a plan to commit murder, but knew only that he was aiding gang activity that might lead at most to a fistfight. See *Cronin,* 14 P.3d at 757.

The prosecutor directed the jury to Instructions 45-46 on accomplice liability and offered her interpretation of those instructions. She described Instruction 46 as "all the ways somebody can assist or aid in the commission of a crime." J.A. 37. Reyes, for example, was an "accomplice" because he set "the wheels in motion, by simply calling his friends, getting them together, saying, 'Let's go avenge this problem.'" *Id.* Nowhere did she limit accomplice liability to Reyes' having general knowledge that "avenging" would include shooting.

Instead, she offered the jury "a good example of accomplice liability" that easily could be understood by a jury to impose accomplice liability even where

the accomplice lacks any knowledge that the principal would commit murder. J.A. 38. In her example, a person agrees to hold the arms of a victim about to be hit by a third person, but the principal beats the person to death. *Id.* According to the prosecutor, the person holding the arms is liable as "an accomplice and ... can't come back and say, 'Well, I only intended this much damage to happen.' Your presence, your readiness to assist caused the crime to occur and you are an accomplice. The law in the State of Washington says, if you're in for a dime, you're in for a dollar." *Id.*

Using "commonsense understanding," *Johnson* v. *Texas*, 509 U.S. 350, 368 (1993); *Penry*, 532 U.S. at 800, the jury would have thought the prosecutor was arguing about the law of accomplice liability because that is what she said she was doing. The prosecutor told the jury that, "[t]he *law* in the State of Washington says, if you're in for a dime, you're in for a dollar." J.A. 38 (emphasis added). Though she may at times also have directed arguments at "gang mentality," the overall "import of [her] argument simply cannot be compartmentalized" solely that way. *Kelly*, 534 U.S. at 255-56. Her arguments thus further establish a reasonable likelihood that the jury would have believed the instructions imposed criminal liability for knowledge of any crime.

B. The State Court's Application Of Clearly Established Law Was Objectively Unreasonable.

The analysis above demonstrates that the state court's decision was incorrect. The only remaining issue is whether that decision also was "objectively

unreasonable." *Wiggins*, 539 U.S. at 527-28.[5] It plainly was.

1. The PRP panel's decision was objectively unreasonable first because it framed the constitutional issue in an unduly narrow way and failed to address the most significant problem. It acknowledged the likelihood of "confusion with respect to the *mens rea* required for accomplice liability." Pet. App. 207a. But it then dismissed the problem as insubstantial because the instruction mirrored the statutory language and because the prosecutor's arguments were not (in the court's view) misleading. Pet. App. 207a, 215a. The court never considered whether, apart from these issues, asking the jury to re-read the accomplice instructions multiple times served to eliminate any reasonable likelihood that the jury remained confused about the law.

It was objectively unreasonable for the PRP court not to address whether the trial court fulfilled its duty to instruct the jury adequately on the law when, after the jury expressed disagreement over the meaning of its instructions and had been deliberating for more than a week, the judge told them once again

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[5] Petitioner nowhere challenges, either in the Question Presented, petition for certiorari, or opening brief, the Ninth Circuit's conclusion that the error cannot be deemed "harmless." Pet. App. 78a-79a. The Court therefore should affirm the Ninth Circuit's ruling on that point. Even where the issue is properly preserved and addressed, this Court typically defers to a lower court's assessments of harmless error. *Francis*, 471 U.S. at 326 n.10. In any event, misapplication of the *mens rea* standard could not reasonably be deemed harmless here. It affected Sarausad's central defense, and the facts do "not overwhelmingly preclude that defense." *Id.* at 325. The panel deemed the evidence of guilt "thin," and two federal judges and a magistrate judge deemed it insufficient to support the verdict.

to "re-read" the instructions. A judge's duty to instruct a jury adequately on the law is not a novel twenty-first century obligation. Courts have recognized since our nation's earliest days the judge's essential role in ensuring that the jury understands the law adequately to carry out its critical fact-finding function. *E.g.*, *Sparf*, 156 U.S. at 70-74 (collecting authorities). A judge's answer to a jury's first question does not have to be perfect and need not anticipate and answer all potential questions that might be lurking therein.[6] *Armstrong*, 24 U.S. at 278-79. But where, as here, it is clear that the jury does not understand an instruction, redirecting the jury to the source of its confusion is obviously inadequate, and the PRP court's failure to address that inadequacy was objectively unreasonable.

The predicate facts were not disputed by the PRP court. Specifically, the court acknowledged that:

- the jury had "inquired three separate times during deliberations, indicating confusion with respect to the *mens rea* required for accomplice liability" (Pet. App. 207a);

- the trial judge's only answers were "to re-read various instructions, including the accomplice liability instructions, together with the instructions as a whole" (Pet. App. 208a); and

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[6] Petitioner also complains that the Ninth Circuit should not have proposed a supplemental jury instruction on accomplice liability, which it views as flawed. Br. at 28-32. Federal courts can properly conclude that a supplemental instruction was "necessary" to preserve a criminal defendant's constitutional rights. *E.g.*, *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1668-69 & n.14 (2007). But, in any event, federal courts need not propose supplemental instructions to find written instructions alone were insufficient to resolve a jury's expressed confusion.

- the panel on direct appeal "erred" in construing the accomplice liability instructions in the context of this very case (Pet. App. 205a).

Given these acknowledged facts, the core constitutional defect in Sarausad's conviction – that there is a reasonable likelihood that the jury misconstrued the accomplice liability instruction the same way the direct appeal panel did – was apparent.

Yet the PRP court never confronted this problem. It never explained why it is not reasonably likely that the jury, left on its own to parse Instructions 45 and 46, over which it confessedly was in disagreement, together with Instructions 47, 48, and the rest of the instructions, would have concluded – just as the panel on direct review did – that Sarausad could lawfully be deemed an accomplice to murder even if he did not know he was assisting in a shooting. The PRP court's failure to assess the essence of the constitutional violation renders its decision objectively unreasonable. Compare Pet. App. 204a-15a with *Wiggins*, 539 U.S. 527-28 (holding that state court's decision was "objectively unreasonable" because court "did not conduct an assessment" of whether counsel's investigation was adequate, but assumed that it was).

The PRP court chose instead to focus its analysis on the prosecutor's statements in closing argument. Pet. App. 208a-15a. Once the PRP court concluded that the prosecutor did not argue "in for a dime, in for a dollar" as a theory of law, it concluded that the jury could not have misconstrued the accomplice liability instructions. Pet. App. 212a-15a.

This framing of the issue is unduly narrow. The jury told the trial court that it was considering a theory of liability under which a willing participant

in group activity becomes an accomplice to any crime that any participant later commits. J.A. 129. Even if the PRP court were correct that *the prosecutor* did not plant this theory in the jury's mind, *something* did. Because the direct review court erred in answering the same question, it was objectively unreasonable for the PRP court not to address the likelihood that this jury would have erred in the same way.

Thus, even after the PRP's analysis of the prosecutor's closing, two questions remain: (1) how did the jury resolve the internal disagreement set forth in its final question, and (2) did it choose the direct appeal panel's incorrect reading? The PRP court's interpretation of the prosecutor's closing argument does not answer these questions. The decision of the panel on direct appeal demonstrates that the jury reasonably could have adopted an incorrect understanding of Washington law. The PRP court's incorrect application of federal constitutional law is objectively unreasonable because it fails to grapple with the central constitutional defect in the trial proceedings.

2. The PRP court's decision is objectively unreasonable for a second, independent reason: its assessment of the prosecutor's argument is manifestly incorrect. As shown in Part II.B.1, *supra*, even if a reviewing court were to accept the prosecutor's argument as legally sound, that is insufficient to remove the reasonable possibility that the jury misinterpreted the instruction. The PRP court's evaluation of the prosecutor's argument cannot withstand even the deferential scrutiny appropriate on habeas review.

First, the PRP's analysis is objectively unreasonable because it conflicts with the State's usage of "in for a dime, in for a dollar" as an

explication of the legal scope of accomplice liability in other cases. *State* v. *Evans*, 114 P.3d 627, 635 (Wash. 2005) (holding that the same prosecutor as in Sarausad's case improperly argued "in for a dime, in for a dollar" theory of accomplice liability). Such usage confirms that the catch-phrase, even if apt as an explanation of gang behavior, also conveys a legal theory of accomplice liability. The PRP court plainly erred in attempting to "compartmentalize[]" one meaning from another. *Kelly*, 534 U.S. at 255-56.

Second, the PRP court's analysis is objectively unreasonable because it misconstrues the usage that the prosecutor made of the catch-phrase in this case. For example, the prosecutor framed her closing argument as principally about the law, not the facts. She told the jury that "what I'm going to do is talk to you about some of the legal principles, some of the instructions that the Court has given you on the law that applies in this case." J.A. 32; see also J.A. 34, 37. She then used her discussion of Instructions 45 and 46, her hypotheticals, and her flat disagreement with Sarausad's counsel on the law of accomplice liability to link "in for a dime, if for a dollar" to the *mens rea* needed for accomplice liability. J.A. 37-38.

The PRP court's contrary conclusion rests chiefly on its observation that the prosecutor never told the jury in so many words "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. But by overlooking the closing argument of Sarausad's counsel, the PRP

failed to see that the prosecutor effectively conveyed exactly that point in rebuttal.[7]

Sarausad's counsel had argued – in language that closely tracks the standard Petitioner now concedes is correct – that Sarausad was not an accomplice to murder unless he had "knowledge that his assistance in driving the car would promote or facilitate the charged crime or a lesser crime being charged." J.A. 83-84; compare *id.*, with Br. at 11. Sarausad's counsel also told the jury – in words the PRP court would later vindicate – that if Sarausad "didn't know of a gun or plans for use of a gun for any purpose, he was not an accomplice under the instructions even as to manslaughter. Because he didn't have knowledge his own actions would promote or facilitate the crime." J.A. 110; compare *id.*, with Pet. App. 205a.

This context is critical, because in rebuttal, the prosecutor did not concede the accuracy of *any* aspect of Sarausad's legal position. Instead, the prosecutor disputed it as inconsistent with the "old adage, you're in for a dime, you're in for a dollar." J.A. 123. She argued that "there is nothing, nothing whatsoever in the accomplice liability instructions that you have that says they have to sit down and plan a talk about it. It is sufficient ladies and gentlemen, if you are present, if you are ready to assist." J.A. 118. Otherwise, she argued, "they're not ever an accomplice to anything." J.A. 123. She reminded the jury again of her example of being guilty of murder merely by agreeing to help assault. *Id.* Using that

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[7] The PRP court noted (Pet. App. 215a n.11) that defense counsel also argued that Sarausad was not an accomplice to murder unless he shared the same intent as Ronquillo. The PRP court overlooked that the jury was never given any instruction to distinguish between that level of knowledge and knowledge generally that actions would promote a homicide.

example as a legal yardstick, she concluded again that "If you're in for a dime, you're in for a dollar." *Id.*

The rebuttal argument – when read in the context the jury heard it, as disputing Sarausad's presentation of the law – confirms that it is reasonably likely that the jury understood that the prosecutor wanted them to equate the scope of accomplice liability with "in for a dime, in for a dollar." The PRP court's failure to address the prosecutor's argument in the context of Sarausad's counsel's closing was objectively unreasonable.

The PRP panel also did not consider the fact that the panel on direct review understood the prosecutor's argument as a legal argument or that petitioner never claimed otherwise to that court. Given the context of the rebuttal argument and the direct appeal court's understanding of the catch-phrase as a "maxim" of law, "[t]here is surely a reasonable likelihood that the jurors accepted" her arguments as a guide to the applicable law. See *Brewer* v. *Quarterman*, 127 S. Ct. 1706, 1712 (2007). "When viewed in [the] light" of this record, the gloss given to the prosecutor's argument by the PRP court thus "resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of" the prosecutor's words and intent. *Wiggins*, 539 U.S. at 526-27. The prosecutor's use of "in for a dime, in for a dollar" to describe "gang mentality" does not eliminate the reasonable likelihood of confusion as to the legal standard; if anything, the pervasive use of the catch-phrase increased the likelihood that the jury was misled. [8]

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[8] Petitioner cites *Brown* v. *Payton*, 544 U.S. 133 (2005), where the Court denied relief under AEDPA based on an improper

3. The objective unreasonableness of the PRP court's decision also is apparent when this case is compared to prior decisions by this Court. In *Sandstrom*, as here, the state supreme court had definitively construed the statute, rendering its meaning clear as a matter of state law. 442 U.S. at 520-21 & n.10. Nevertheless, this Court found a reasonable likelihood that the jury could have misread that instruction because the decisions of other courts and the mistaken reading of the drafters of the Montana Rules of Evidence indicated the potential for misreading of the instruction. *Id.* at 517.

Here, the potential for the jury to have misunderstood the instruction is far more apparent. The court on direct appeal in this very case, and the drafters of the state's model jury instructions, misunderstood the accomplice statute. Sophisticated lawyers attempting to guide lay jurors failed to grasp its meaning. And beyond the record of scholarly and judicial confusion, which alone sufficed in *Sandstrom*, the jury here confirmed its confusion on three occasions, including by proposing an incorrect, alternative reading of the accomplice instruction.

The circumstances here also present a stronger case for jury misapplication than in *Mills*. There, as here, a majority of the state supreme court had adopted a "plausible" reading of an instruction and

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closing argument. There, the jurors were "not likely" to have been misled because, unlike here, the prosecutor "was not given an opportunity to rebut defense counsel's argument," the meaning of the instruction was plain, the jury asked no questions, and the prosecutor's argument was self-evidently meritless because, to credit it, the jury "would have had to believe that the penalty phase served virtually no purpose at all." *Id.* at 143-46.

verdict form, 486 U.S. at 377-78, but unlike here, the jury completed the verdict form without expressing any confusion. *Id.* at 370, 381 (noting lack of "extrinsic evidence of what the jury ... thought"). This Court nonetheless reversed because of a "substantial" risk that the jury misunderstood the law. *Id.* at 381. A dissenting justice on Maryland's highest court had expressed surprise at "the majority's reading of the statute and verdict form," which he described as contrary to "nearly ten years of extensive litigation involving [the] statute." *Id.* at 381 (quoting *Mills* v. *State*, 527 A.2d 3, 33 (Md. 1987)). The correct reading "may not have been evident at all to the jury." *Id.* at 369. This Court thus "conclude[d] that there [was] a substantial probability" the jury picked the wrong reading. *Id.* at 384.

Here, not just one but four judges of the state supreme court, as well as the direct review panel, numerous other appellate panels, and the Supreme Court Committee on Model Jury Instructions all misread the statute. Here, moreover, the jury itself, after having been instructed twice to read the instruction defining *mens rea* for accomplice liability, told the judge it did not agree on the definition of accomplice and was considering applying an incorrect standard. Given this Court's prior holdings, the state court's failure to identify and evaluate these indicators of jury confusion was objectively unreasonable.

4. Finally, the PRP court's decision is objectively unreasonable because it is fundamentally inequitable. Petitioner maintains that it is not reasonably likely that the jury adopted a theory of accomplice liability that the State itself successfully endorsed for years. The State's position as described by the

Washington Supreme Court in *Cronin* and *Roberts* was that knowledge of *any* crime sufficed because accomplice liability could be reduced to "in for a dime, in for a dollar." It was objectively unreasonable for the PRP court to fail to recognize that a jury could reasonably have reached the same erroneous construction advocated by the State. See *Bradshaw* v. *Stumpf*, 545 U.S. 175, 189 (2005) ("serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings") (Souter, J., concurring).

* * * *

It is readily apparent from the trial record, as described by the PRP court, that it was at least reasonably likely, perhaps even more likely than not, that the jury applied an incorrect, and lower, standard of *mens rea.* Such a standard relieved the State of its burden of proving that Sarausad acted with knowledge that he was promoting or facilitating murder. It was objectively unreasonable for the state courts to conclude otherwise given: (a) the jury's repeated questions on *mens rea* and statement that it was considering applying an erroneous standard; (b) the history of judicial error in construing the statutory language, including on direct appeal; (c) the trial court's refusal to answer the jury's questions other than with a direction to re-read instructions, including instructions that lacked the clarification Petitioner and the state courts have since provided; (d) the prosecutor's misleading arguments to the jury; and (e) the longstanding, well-established duty of trial courts to ensure that juries understand the governing law adequately to carry out their fact-finding duty. *Francis*, 471 U.S. at 315-16; *Sandstrom*, 442 U.S. at 516-17; *Mills*, 486 U.S. at 384; see also, *e.g.*, *Smith*, 543 U.S. at 45; *Penry*, 532

U.S. at 804; *Carella*, 491 U.S. at 264-65; *Mullaney*, 421 U.S. at 686.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

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Supplemental Appendix