

NO. 37413-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ADRIAN EDWARD REKDAHL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-01737-6

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
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I. STATEMENT OF THE FACTS

The State accepts the statement of the facts as set forth by the Appellant.

II. RESPONSE TO ASSIGNMENTS OF ERROR. 1 AND 2

The first two assignments of error raised by the Appellant claim that the jury was given improper jury instructions as they relate to the concept of accomplice liability.

The defendant was tried separately from three other individuals on a claim of a crime spree where they had planned to burglarize a house for purposes of robbery. During the course of that conduct, one person was seriously assaulted, another person was killed, and a third individual was able to flee as they were attempting to kill her.

The Third Amended Information (CP 11) charges the defendant with four counts: Felony Murder in the First Degree, Assault in the First Degree (related to Gerald Newman), Assault in the First Degree (related to Laura Harrington), and Burglary in the First Degree. A copy of the Third Amended Information is attached hereto and by this reference incorporated herein.

The defendant went to trial on these charges and the Court's Instructions to the Jury (CP 30) are also attached hereto and by this reference incorporated herein.

The claim in the Appellant's Brief specifically refers to Instruction No. 10 of the packet that was provided to the jury. Instruction No. 10 reads as follows:

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.

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

-(Court's Instructions to the Jury, CP 30,
Instruction No.10)

The defense maintains that this instruction is ambiguous and that it is a defective instruction. The primary cases that the defense relies on to make this claim are State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2001) and a case out of the Ninth Circuit, Sarausad v. Porter, 479 F.3d 671, 2007 U.S. App. LEXIS 5264 (2007).

Concerning Instruction No. 10, neither party in this case objected to the instruction. Because of that it became the “law of the case”. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Before raising an alleged instructional error on appeal, the party challenging the instruction must show that he objected to the instruction at trial. State v. Reid, 74 Wn. App. 281, 292, 872 P.2d 1135 (1994). In order to preserve this issue, the defendant needed to have complied with CrR 6.15(c) and excepted to the instruction. State v. Salas, 127 Wn.2d 173, 897 P.2d 1246 (1995).

Nevertheless, the State maintains that the jury was properly instructed on the concepts of accomplice liability. An accomplice need only have general knowledge of the crime and does not need to have specific knowledge of every element of the crime committed by the principle. State v. Roberts, 142 Wn.2d at 511-512. As used in Washington’s Accomplice Liability Statute, “a crime” means the charged offense. Roberts, 142 Wn.2d at 510; RCW 9A.08.020(3).

RCW 9A.08.020 provides that an individual may be held liable as an accomplice for the criminal conduct of another. State v. Carter, 154 Wn. 2d 71, 77-78, 109 P.3d 823 (2005). Where an individual does not actually commit a crime, he can still be held criminally liable for such crime as an accomplice of another if, "[w]ith knowledge that it will promote or facilitate the commission of the crime," he "solicits, commands, encourages, or requests [another] person to commit it" or "aids or agrees to aid [another] person in planning or committing it." Carter, 154 Wn.2d at 78 (quoting RCW 9A.08.020(3)(a)(i), (ii)). Physical presence and assent alone are insufficient to constitute aiding and abetting. State v. Everybodytalksabout, 145 Wn.2d 456, 472, 39 P.3d 294 (2002). Something more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite to finding accomplice liability. Everybodytalksabout, 145 Wn.2d at 472. The State must show that the defendant aided in the planning or commission of the crime and had knowledge of the crime. State v. Berube, 150 Wn. 2d 498, 511, 79 P.3d 1144 (2003).

If convicted as an accomplice, a defendant is considered to have actually committed the crime because the liability of the accomplice is the same as that of the principal. Carter, 154 Wn.2d at 78 (citing State v. Graham, 68 Wn. App. 878, 881, 846 P.2d 578 (1993)). Intent to facilitate

another in the commission of the crime by providing assistance through presence and actions makes an accomplice equally criminally liable. State v. Galisia, 63 Wn. App. 833, 840, 822 P.2d 303 (1992). Thus, an individual convicted as an accomplice is subject to all the legal consequences of a crime as if he or she had actually been a principal in its commission. Carter, 154 Wn.2d at 78.

An example of this is found in State v. Bolar, 118 Wn. App. 490, 78 P.3d 1012 (2003). Bolar has the following discussion:

The mens rea for accomplice liability is knowledge, and the legislature intended that the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has knowledge. Id. at 511. But the mens rea for felony murder is based solely on the mens rea for the predicate offense--here, burglary in the first degree:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, *the actor or another participant* in the crime (a) is armed with a deadly weapon, or (b) assaults any person. RCW 9A.52.020 (emphasis added).

Thus, intent to commit a crime against a person or property in the unlawfully entered building is the mens rea required of a burglar. "A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). "When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally." RCW 9A.08.010(2).

RCW 9A.32.030 (1)(c) provides that a person is guilty of murder in the first degree when he or she commits or attempts to commit the crime of burglary in the first degree (among other listed felonies) "and in the course of or in furtherance of such crime or in immediate flight therefrom, *he or she, or another participant*, causes the death of a person other than one of the participants" (Emphasis added.) By finding Bolar guilty of felony murder in the first degree, the jury necessarily found that he was a participant in the first degree burglary that resulted in the death of Hill, that is that he entered the building where Hill was found with the intent to commit a crime against persons or property therein--and thereby knowingly facilitated the crime of burglary, as a matter of law.

-(Bolar, 118 Wn. App. at 502-503)

A plain reading of Instruction No. 10 demonstrates that if the jury found a defendant to be an accomplice, it had to find that the defendant participated in a specific crime and that someone committed the crime beyond a reasonable doubt. In addition, this instruction did not exist in a vacuum but, rather, followed an explicit definition of what it means to be an accomplice, i.e., to participate in the crime. Finally, the "to convict" instructions for each count instructed the jury that it must find that the defendant, or an accomplice, committed each element of the crime beyond a reasonable doubt. Jury instructions involving accomplices do not require that the defendant have specific knowledge of every element of the crime committed by the principle, provided that he has general knowledge of that specific crime. Roberts, 142 Wn.2d at 512.

The defendant on Appeal spends the bulk of the pages discussing the Ninth Circuit case of Sarausad v. Porter, supra, which determined that these matters were confusing and an incorrect statement of the law. General knowledge of the crime is sufficient. Our appellate courts noted that the legislative history established that “the crime” means the charged offense. The Ninth Circuit’s opinion in Sarausad conflicts with this precedent and is not binding on the Washington courts. In re Grisby, 121 Wn.2d 419, 430, 853 P.2d 901 (1993); State v. Barefield, 110 Wn.2d 728, 756 P.2d 731 (1988). As indicated in Young v. Seattle, 25 Wn.2d 888, 894, 172 P.2d 222 (1946), while a federal appellate court’s reasoning might be persuasive authority, state courts are not bound by those decisions.

The Sarausad decision out of the Ninth Circuit was appealed to the U.S. Supreme Court, which issued its Opinion on January 21, 2009. In that decision it reversed and remanded the Ninth Circuit finding, among other things, “a defendant challenging the constitutionality of a jury instruction that quotes a state statute must show both that the instruction was ambiguous and that there was “a reasonable likelihood” that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt. The

instruction must be considered in the context of the instructions as a whole and the trial record and the pertinent question is whether the instruction by itself so infected the entire trial that the resulting conviction violates due process.”

The Supreme Court went on to indicate that “because the Washington Court’s conclusion that the jury instruction was unambiguous was not objectively unreasonable, the Ninth Circuit should have ended its inquiry there. The instruction parroted the state statute’s language, requiring the jury to find Sarausad guilty as an accomplice “in the commission of the murder” if he acted “with knowledge that his conduct would promote or facilitate the commission of the murder”. The instruction cannot be assigned any meaning different that the one given to it by the Washington Courts.”

The decision that this comes from is Waddington v. Sarausad, 172 L. Ed.2d 532, 239 U.S. LEXIS 867 (January 21, 2009 decided). A copy of this slip opinion of the recent reversal is attached hereto and by this reference incorporated herein.

The State submits that the instruction complained of by Sarausad and found to be appropriate by the U.S. Supreme Court is identical to the instructions provided in our case. Instruction No. 10 when read in

conjunction with the other instructions and the evidence in the case is not confusing or misleading or ambiguous. It is a correct statement of the law and was properly applied by the trial court.

III. RESPONSE TO ASSIGNMENTS OF ERROR 3 AND 4

The third and fourth assignments of error are both interconnected with the concept of a faulty jury instruction claimed in Assignments of Error 1 and 2.

The Appellate Court reviews questions of statutory construction de novo State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002) and sufficiency of evidence challenges in a light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). It accepts the State's evidence as true and views all reasonable inferences in favor of the State. Salinas, 119 Wn.2d at 201. Circumstantial evidence is as reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience." 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 5.01, at 124 (2d ed. 1994). A trier of fact may rely exclusively upon circumstantial evidence to support its decision. State v. Kovac, 50 Wn. App. 117, 119, 747 P.2d 484 (1987). The

Appellate Court defers to the trier of fact in matters of witness credibility and weight of evidence. State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992). It will affirm if the trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201.

The defendant, on appeal, argues that the actions taken against Gerald Newman, Rob Harrington, and Laura Harrington were the result of “rogue actions by panicked intruders”. (Appellant’s Brief at Page 27). The State accepted the factual summary of the testimony that was offered in this case. It did indicate that Laura and Rob Harrington were invited guests of Gerald Newman at his home and that later in the evening as they were sitting in the home three strangers burst through the door wearing camouflage clothing and carrying some type of automatic weapons. (RP 175-176). As Mr. Newman was being shot and beaten, Mr. and Mrs. Harrington tried to exit through another part of the residence into the backyard. (RP 176-178). As they tried to get away Rob Harrington was shot repeatedly. Laura Harrington was able to avoid being shot and was able to hide in the bushes. (RP 178-180). As she was hiding in the bushes she could hear a gunman on the other side of the shrubbery looking for her. A second person yelled out for them to leave right away and she heard three car doors shutting and the car leaving. (RP 180-181).

Through the work of a good Samaritan, the vehicle was tracked and the Oregon license plate was taken down and relayed on to the authorities. (RP 222-225). That vehicle was stopped by the Clark County Sheriff's Office and contained four men, three of them got out of the car and the fourth from the front passenger side bolted and ran away. (RP 309-313).

The morning after Mr. Harrington was murdered, the defendant, Rekdahl, called a friend of his from Vancouver asking for a ride home. (RP 358-361). He was picked up in Vancouver and asked his friend not to say anything about the ride, to say it "never happened". (RP 362).

The defendant met with a friend of his mother's, Danny Stroup, Mr. Stroup testified that the defendant told him he had to get away for a while. (RP 536). The defendant ultimately told Mr. Stroup about what happened at Gerald Newman's house. (RP 547). He told him that he and some friends went into the residence and that "it went wrong". (RP 548). When asked what was going on there he indicated that there was gunfire in the residence and that he indicated that he was one of the people in the house. Further, he indicated that he had stayed in the front room (that's the area where Gerald Newman was shot and beaten). He discussed with Mr. Stroup this scuffle in the front room. He was asked why they did it, what

was the plan and he told Mr. Stroup that the plan was to do a robbery. (RP 547-549).

Other corroborative evidence was also introduced at the time of trial. The phone calls that the defendant made to get a ride from Vancouver hit cell towers that were in close proximity to where Mr. Newman's house was. Further, he knew the other people involved in this, Balaski, Odell, and Johnson. There was evidence offered that they had all been together early that evening at a local adult establishment and the video shows the defendant getting into the vehicle that was involved in this with the other participants. The State also offered hand writing expert that indicated that a list found in an Atlas was in the defendant's writing. This was information concerning Gerald Newman's address in Vancouver.

This direct and circumstantial evidence dealt specifically with credibility of some of the witnesses. The jury decided to go ahead and agree with the credibility of some of the information. The defendant would have you believe that no one knew what was going on in the house, yet the defendant clearly told a friend that they were there to commit a robbery. It was during the course of that breaking into the residence for purposes of committing the robbery that non-participants in the crime were severely injured and one of them was killed. There is nothing to indicate here that these were "rogue actions by panicked intruders". The only panic appears

to come when they can't find Laura Harrington out in the bushes and have to leave a witness alive there at the scene. Other than that, it appears that they are carrying out their stated intentions of committing a robbery. Each was armed with an automatic weapon and clearly was willing and able to use those weapons as necessary. The defendant clearly has a general knowledge of the crimes of Robbery and Burglary and Assault in the First Degree. Certainly the assault as it related to Gerald Newman because if we take the defendant at his own word, he was in the area where Mr. Newman was shot and beaten. The State would submit that the evidence would demonstrate that he was an active participant in this and that he has knowledge that certain of his actions will promote and facilitate the commission of the crime that they set out to perform, which was a robbery and burglary.

The State submits that there is sufficient evidence to have allowed all of these crimes to go to the jury.

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IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 11 day of Feb, 2009.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNE, WSBA#7869
Senior Deputy Prosecuting Attorney

FILED

FEB 07 2006

JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JASON ZACHARY BALASKI

and

MICHAEL DARRIN ODELL

and

ADRIAN EDWARD REKDAHL

DANIEL CARL JOHNSON

Defendants.

THIRD AMENDED INFORMATION

No. 05-1-01729-5

No. 05-1-01731-7

No. 05-1-01737-6

FOURTH AMENDED INFORMATION

No. 05-1-01730-9

(VPD 05-15393)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendants are guilty of the crime(s) committed as follows, to wit:

COUNT 01 – FELONY MURDER IN THE FIRST DEGREE - 9A.08.020/9A.32.030(1)(c)(3)

That they, JASON ZACHARY BALASKI and MICHAEL DARRIN ODELL and ADRIAN EDWARD REKDAHL, and DANIEL CARL JOHNSON, together and each of them, in the County of Clark, State of Washington, on or about August 8, 2005 did commit or attempt to commit the crime of burglary in the first degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, the Defendant, or another participant, caused the death of a person other than one of the participants, to-wit: Robert Harrington; contrary to Revised Code of Washington 9A.08.020 and 9A.32.030(1)(c)(3).

13
of

1 And further, that the defendant, or an accomplice, did commit the foregoing offense while armed
2 with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(3).
3 [FIREARM]

4 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act
5 (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9A.94A.570).

6 **COUNT 2 – ASSAULT IN THE FIRST DEGREE – 9A.08.020/9A.36.011(1)(a)**

7 That they, JASON ZACHARY BALASKI and MICHAEL DARRIN ODELL and ADRIAN
8 EDWARD REKDAHL, and DANIEL CARL JOHNSON, together and each of them, in the County
9 of Clark, State of Washington, on or about August 6, 2005, with intent to inflict great bodily
10 harm, did assault another person, to wit: Gerald Newman, with a firearm or any deadly weapon
11 or by any force or means likely to produce great bodily harm or death; contrary to Revised Code
12 of Washington 9A.08.020 and 9A.36.011(1)(a).

13 And further, that the defendant, or an accomplice, did commit the foregoing offense while armed
14 with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(3).
15 [FIREARM]

16 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act
17 (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

18 **COUNT 3 – ASSAULT IN THE FIRST DEGREE – 9A.08.020/9A.36.011(1)(a)**

19 That they, JASON ZACHARY BALASKI and MICHAEL DARRIN ODELL and ADRIAN
20 EDWARD REKDAHL, and DANIEL CARL JOHNSON, together and each of them, in the County
21 of Clark, State of Washington, on or about August 6, 2005, with intent to inflict great bodily
22 harm, did assault another person, to wit: Laura Harrington, with a firearm or any deadly weapon
23 or by any force or means likely to produce great bodily harm or death; contrary to Revised Code
24 of Washington 9A.08.020 and 9A.36.011(1)(a).

25 And further, that the defendant, or an accomplice, did commit the foregoing offense while armed
26 with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(3).
27 [FIREARM]

28 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act
29 (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

**COUNT 04 - BURGLARY IN THE FIRST DEGREE - 9A.08.020/9A.52.020(1)(a)/
9A.52.020(1)(b)**

That they, JASON ZACHARY BALASKI and MICHAEL DARRIN ODELL and ADRIAN
EDWARD REKDAHL, and DANIEL CARL JOHNSON, together and each of them, in the County
of Clark, State of Washington, on or about August 6, 2005 with intent to commit a crime against
a person or property therein, did enter or remain unlawfully in the building of Gerald Newman,
located at 15708 SE Evergreen Hwy, Vancouver, Washington, and, in entering or while in the
building or in immediate flight therefrom, the defendant or another participant in the crime was
armed with a deadly weapon and/or did intentionally assault any person therein; contrary to
Revised Code of Washington 9A.08.020 and 9A.52.020(1)(a)(b).

1 And further, that the defendant, or an accomplice, did commit the foregoing offense while armed
2 with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.533(3).
3 [FIREARM]

4 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act
5 (RCW 9.94A.030(28), RCW 9.94A.505(2)(a)(v) and RCW 9A.94A.570).

6 ARTHUR D. CURTIS
7 Prosecuting Attorney In and for
8 Clark County, Washington

9 Date: February 7, 2006

10 BY: 

JAMES D. SENESCU, WSBA #27137
Deputy Prosecuting Attorney

| | | | |
|--|----------|-----------------|-----------|
| 11 DEFENDANT: JASON ZACHARY BALASKI | | | |
| 12 RACE: W | SEX: M | DOB: 1/17/1972 | |
| 13 DOL: BALASJZ284BP WA | | SID: WA22794548 | |
| HGT: 510 | WGT: 205 | EYES: HAZ | HAIR: BRO |
| 14 WA DOC: | | FBI: 94539NA4 | |
| 15 LAST KNOWN ADDRESS(ES): | | | |
| HOME - 8708 NE 161ST AVE, VANCOUVER WA 98682 | | | |

| | | | |
|---|----------|-----------------|-----------|
| 16 DEFENDANT: MICHAEL DARRIN ODELL | | | |
| 17 RACE: W | SEX: M | DOB: 8/27/1965 | |
| 18 DOL: 3675949 OR | | SID: WA15453451 | |
| HGT: 511 | WGT: 190 | EYES: BLU | HAIR: BLN |
| 19 WA DOC: | | FBI: 140208NA3 | |
| 20 LAST KNOWN ADDRESS(ES): | | | |
| HOME - 718 N WINCHELL ST, PORTLAND OR 97217 | | | |

| | | | |
|--|----------|-----------------|-----------|
| 21 DEFENDANT: ADRIAN EDWARD REKDAHL | | | |
| 22 RACE: W | SEX: M | DOB: 10/21/1972 | |
| 23 DOL: 4473907 OR | | SID: OR08530487 | |
| HGT: 505 | WGT: 140 | EYES: BRO | HAIR: BRO |
| 24 WA DOC: | | FBI: 477926MA9 | |
| 25 LAST KNOWN ADDRESS(ES): | | | |
| DOL - 502 SW EASTMAN CT, GRESHAM OR 97080 | | | |
| 26 FORS - NO RECORD, | | | |
| JIS - 6160 SW 45TH AVENUE, PORTLAND OR 97221 | | | |

32

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

ADRIAN EDWARD REKDAHL,

Defendants.

No. 05-1-01737-6

FILED

JAN 23 2008

Sherry W. Parker, Clerk, Clark Co.

Received @ 12:00 pm
Jennifer Olson

COURT'S INSTRUCTIONS TO THE JURY

G. R. Lewis

SUPERIOR COURT JUDGE

DATE *January 23, 2008*

250 ges

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

~~As jurors, you are officers of this court.~~ You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

A separate crime is charged in each count. You must separately decide each count charged. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 5

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

Jury Instruction No. 8

Evidence of prior inconsistent statements by witnesses has been admitted for impeachment purposes only.

The evidence may be considered by you for the sole purpose of weighing the witness's credibility and must not be considered by you for any other purpose.

Jury Instruction No. 9

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 10

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.

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

INSTRUCTION NO. 11

A person commits the crime of murder in the first degree when he, or an accomplice, commits burglary in the first degree and in the course of or in furtherance of such crime, or in immediate flight from such crime, he or another participant, causes the death of a person other than one of the participants.

INSTRUCTION NO. 12

To convict the defendant, Adrian Edward Rekdahl, of the crime of murder in the first degree, as charged in count one, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 6, 2005, Robert Harrington was killed;
- (2) That the defendant, Adrian Edward Rekdahl, or an accomplice, was committing burglary in the first degree;
- (3) That the defendant, Adrian Edward Rekdahl, or an accomplice, caused the death of Robert Harrington in the course of or in furtherance of such crime or in immediate flight from such crime;
- (4) That Robert Harrington was not a participant in the crime; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Jury Instruction No. 13

It is defense to a charge of murder in the first degree based upon committing burglary in the first degree that the defendant:

- (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and
- (2) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury; and
- (3) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article or substance; and
- (4) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

This defense must be established by the preponderance of the evidence.

Preponderance of the evidence means that you must be persuaded by, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he assaults another with a firearm or with any deadly weapon or by any force or means likely to produce great bodily harm or death.

INSTRUCTION NO. 15

To convict the defendant, Adrian Edward Rekdahl, of the crime of assault in the first degree, as charged in count two, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 6, 2005, the defendant, Adrian Edward Rekdahl, or an accomplice, assaulted Gerald Newman;
- (2) That the assault was committed with a firearm or by a force or means likely to produce great bodily harm or death;
- (3) That the defendant, Adrian Edward Rekdahl, or an accomplice, acted with intent to inflict great bodily harm or death; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

To convict the defendant, Adrian Edward Rekdahl, of the crime of assault in the first degree, as charged in count three, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 6, 2005, the defendant, Adrian Edward Rekdahl, or an accomplice, assaulted Laura Harrington;
- (2) That the assault was committed with a firearm or by a force or means likely to produce great bodily harm or death;
- (3) That the defendant, Adrian Edward Rekdahl, or an accomplice, acted with intent to inflict great bodily harm or death; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 17

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon or assaults any person.

INSTRUCTION NO. 18

To convict the defendant, Adrian Edward Rekdahl, of the crime of burglary in the first degree, as charged in count four, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 6, 2005, the defendant, Adrian Edward Rekdahl, or an accomplice, entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant, Adrian Edward Rekdahl, or an accomplice, in the crime charged was armed with a deadly weapon or assaulted a person; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

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

INSTRUCTION NO. 20

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is 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.

INSTRUCTION NO. 21

An assault is an intentional touching or striking or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or shooting is offensive if the touching or striking or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 22

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

INSTRUCTION NO. 23

A firearm, whether loaded or unloaded, is a deadly weapon.

INSTRUCTION NO. 24

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 25

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 26

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 27

You will also be given special verdict forms for the crimes charged in counts 1-4. If you find the defendant not guilty for any one of the counts, do not use the special verdict form pertaining to that count. If you find the defendant guilty of any one of the counts 1-4, you will then use the special verdict form pertaining to that count. Fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no".

INSTRUCTION NO. 28

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Counts 1-4 as to ~~each~~ ^{the} defendant.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether this connection existed, you should consider the nature of the crime, the type of firearm, and the circumstances under which the firearm was found.

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

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*172 L. Ed. 2d 532; 2009 U.S. LEXIS 867, *;
 21 Fla. L. Weekly Fed. S 602*

DOUG WADDINGTON, SUPERINTENDENT, WASHINGTON CORRECTIONS CENTER,
 PETITIONER v. CESAR SARAUSAD

No. 07-772

SUPREME COURT OF THE UNITED STATES

172 L. Ed. 2d 532; 2009 U.S. LEXIS 867; 21 Fla. L. Weekly Fed. S 602

October 15, 2008, Argued
 January 21, 2009, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [*1]

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

Sarausad v. Porter, 479 F.3d 671, 2007 U.S. App. LEXIS 5264 (9th Cir. Wash., 2007)

DISPOSITION: Reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Respondent prison inmate was convicted as an accomplice to murder and other offenses related to a gang-related driveby shooting, but the inmate asserted that a jury instruction concerning accomplice liability was ambiguous. Upon the grant of a writ of certiorari, petitioner prison superintendent appealed the judgment of the U.S. Court of Appeals for the Ninth Circuit which affirmed a grant of the inmate's habeas corpus petition.

OVERVIEW: The inmate drove a vehicle from which a co-defendant shot and killed a victim, but the inmate contended at trial that there was no evidence that the inmate was aware that the co-defendant intended to shoot the victim. The inmate argued that a jury instruction failed to clarify that the inmate must have knowledge of the murder, rather than any crime, in order to be convicted as an accomplice to the murder, in view of the prosecutor's argument that accomplice liability was premised on "in for a dime, in for a dollar." The U.S. Supreme Court held that the jury was properly instructed that, in order to find the inmate guilty as an accomplice, the inmate must have had knowledge that his conduct would promote or facilitate the commission of the murder. The instruction properly quoted the accomplice-liability statute, Wash. Rev. Code § 9A.08.020 (2008), in requiring that the inmate have knowledge of the crime with which the inmate was charged as an accomplice. Further, there was no reasonable likelihood that the prosecutor's arguably improper closing statement influenced the jury, since both the prosecution and

the defense focused on the inmate's knowledge of the shooting.

OUTCOME: The judgment affirming the grant of the inmate's habeas corpus petition was reversed, and the case was remanded for further proceedings. 6-3 decision; 1 Opinion; 1 Dissent.

CORE TERMS: accomplice, murder, accomplice liability, prosecutor's, shooting, dime, dollar, gang, you're, ambiguous, juror, objectively unreasonable, hypothetical, convicted, fight, high school, jury instructions, state law, reasonable likelihood, assault, commit, accomplice-liability, postconviction, reasonable doubt, correctly, convict, front, closing argument, general knowledge, fistfight

LEXISNEXIS® HEADNOTES

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HN1  See [Wash. Rev. Code § 9A.08.020\(1\)-\(3\)](#) (2008).

[Criminal Law & Procedure](#) > [Habeas Corpus](#) > [Review](#) > [Standards of Review](#) > [Contrary & Unreasonable Standard](#) > [General Overview](#) 

HN2  Under the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, a federal court may grant habeas corpus relief on a claim adjudicated on the merits in state court only if the decision 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\(d\)\(1\)](#). Where it is the state court's application of governing federal law that is challenged, the decision must be shown to be not only erroneous, but objectively unreasonable. [More Like This Headnote](#)

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HN3  Habeas precedent places an especially heavy burden on a defendant who seeks to show constitutional error from a jury instruction that quotes a state statute. Even if there is some ambiguity, inconsistency, or deficiency in the instruction, such an error does not necessarily constitute a due process violation. Rather, the defendant must show both that the instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the state of its burden of proving every element of the crime beyond a reasonable doubt. In making this determination, the jury instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. Because it is not enough that there is some slight possibility that the jury misapplied the instruction, the pertinent question is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Habeas Corpus](#) > [Cognizable Issues](#) > [Questions of State Law](#) 

HN4  It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Juries & Jurors](#) > [Jury Questions to the Court](#) > [Appellate Review](#) 

HN5  Where a judge responds to a jury's question by directing its attention to the precise paragraph of a constitutionally adequate instruction that answers its inquiry, and the jury asks no followup question, a reviewing court presumes that the jury fully understood the judge's answer and appropriately applied the jury instructions. [More Like This Headnote](#)

SYLLABUS

Respondent Sarausad drove the car in a driveby shooting at a high school, which was the culmination of a gang dispute. En route to school, Ronquillo, the front seat passenger, covered his lower face and readied a handgun. Sarausad abruptly slowed down upon reaching the school, Ronquillo fired at a group of students, killing one and wounding another, and Sarausad then sped away. He, Ronquillo, and Reyes, another passenger, were tried on murder and related charges. Sarausad and Reyes, who were tried as accomplices, argued that they were not accomplices to murder because they had not known Ronquillo's plan and had expected at most another fistfight. In her closing argument, the prosecutor stressed Sarausad's knowledge of a shooting, noting how he drove at the scene, that he knew that fighting alone would not regain respect for his gang, and that he was "in for a dime, in for a dollar." The jury received two instructions that directly quoted Washington's accomplice-liability law. When it failed to reach a verdict as to Reyes, the judge declared a mistrial as to him. The [*2] jury then convicted Ronquillo on all counts and convicted Sarausad of second-degree murder and related crimes. In affirming Sarausad's conviction, the State Court of Appeals, among other things, referred to an "in for a dime, in for a dollar" accomplice-liability theory. The State Supreme Court denied review, but in its subsequent *Roberts* case, it clarified that "in for a dime, in for a dollar" was not the best descriptor of accomplice liability because an accomplice must have knowledge of the crime that occurred. The court also explicitly reaffirmed its precedent that the type of jury instructions used at Sarausad's trial comport with Washington law. Sarausad sought state postconviction relief, arguing that the prosecutor's improper "in for a dime, in for a dollar" argument may have led the jury to convict him as an accomplice to murder based solely on a finding that he had anticipated that an assault would occur. The state appeals court reexamined the trial record in light of *Roberts*, but found no error requiring correction. The State Supreme Court denied Sarausad's petition, holding that the trial court correctly instructed the jury and that no prejudicial error resulted from the [*3] prosecutor's potentially improper hypothetical. Sarausad then sought review under 28 U.S.C. § 2254, which, *inter alia*, permits a federal court to grant habeas relief on a claim "adjudicated on the merits" in state court only if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court, § 2254(d)(1). The District Court granted the petition, and the Ninth Circuit affirmed, finding it unreasonable for the state court to affirm Sarausad's conviction because the jury instruction on accomplice liability was ambiguous and there was a reasonable likelihood that the jury misinterpreted the instruction in a way that relieved the State of its burden of proving Sarausad's knowledge of a shooting beyond a reasonable doubt.

Held: Because the state-court decision did not result in an "unreasonable application of . . . clearly established Federal law," § 2254(d)(1), the Ninth Circuit erred in granting habeas relief to Sarausad. Pp. 10-17.

(a) When a state court's application of governing federal law is challenged, the decision "must be shown to be not only erroneous, but objectively unreasonable." *Middleton v. McNeil*, 541 U.S. 433, 436, 124 S. Ct. 1830, 158 L. Ed. 2d 701 [*4] (*per curiam*). A defendant challenging the constitutionality of a jury instruction that quotes a state statute must show both that the instruction was ambiguous and that there was "a reasonable likelihood" that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385. The instruction "must be considered in the context of the instructions as a whole and the trial record," *ibid.*, and the pertinent question is whether the "instruction by itself so infected the entire trial that the resulting conviction violates due process," *ibid.* Pp. 10-11.

(b) Because the Washington courts' conclusion that the jury instruction was unambiguous was not objectively unreasonable, the Ninth Circuit should have ended its § 2254(d)(1) inquiry there. The instruction parroted the state statute's language, requiring the jury to find

Sarausad guilty as an accomplice "in the commission of the [murder]" if he acted "with knowledge that [his conduct would] promote or facilitate the commission of the [murder]," Wash. Rev. Code §§ 9A.08.020(2)(c), (3)(a). The instruction cannot be assigned any [*5] meaning different from the one given to it by the Washington courts. Pp. 11-12.

(c) Even if the instruction were ambiguous, the Ninth Circuit still erred in finding it so ambiguous as to cause a federal constitutional violation requiring reversal under AEDPA. The Washington courts reasonably applied this Court's precedent when they found no "reasonable likelihood" that the prosecutor's closing argument caused the jury to apply the instruction in a way that relieved the State of its burden to prove every element of the crime beyond a reasonable doubt. The prosecutor consistently argued that Sarausad was guilty as an accomplice because he acted with knowledge that he was facilitating a driveby shooting. She never argued that the admission by Sarausad and Reyes that they anticipated a fight was a concession of accomplice liability for murder. Sarausad's attorney also homed in on the key question, stressing a lack of evidence showing that Sarausad knew that his assistance would promote or facilitate a premeditated murder. Every state and federal appellate court that reviewed the verdict found the evidence supporting Sarausad's knowledge of a shooting legally sufficient to convict him under [*6] Washington law. Given the strength of that evidence, and the jury's failure to convict Reyes -- who had also been charged as an accomplice to murder and admitted knowledge of a possible fight -- it was not objectively unreasonable for the Washington courts to conclude that the jury convicted Sarausad because it believed that he, unlike Reyes, had knowledge of more than just a fistfight. The Ninth Circuit's contrary reasoning is unconvincing. Pp. 13-17.

479 F.3d 671, reversed and remanded.

JUDGES: THOMAS ↘, J., delivered the opinion of the Court, in which ROBERTS ↘, C. J., and SCALIA ↘, KENNEDY ↘, BREYER ↘, and ALITO ↘, JJ., joined. SOUTER ↘, J., filed a dissenting opinion, in which STEVENS ↘ and GINSBURG ↘, JJ., joined.

OPINION BY: THOMAS ↘

OPINION

JUSTICE THOMAS ↘ delivered the opinion of the Court.

This case arose from a fatal driveby shooting into a group of students standing in front of a Seattle high school. Brian Ronquillo was ultimately identified as the gunman; at the time of the shooting, he was a passenger in a car driven by respondent Cesar Sarausad II. A jury convicted Sarausad as an accomplice to second-degree murder, attempted murder, and assault; he was sentenced to just over 27 years of imprisonment. The Washington courts [*7] affirmed his conviction and sentence on direct review, and his state-court motions for postconviction relief were denied.

Respondent, then, filed a federal petition for a writ of habeas corpus. The District Court granted the writ. On appeal, the Court of Appeals for the Ninth Circuit agreed with the District Court that the state-court decision was an objectively "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Court of Appeals found it unreasonable for the state court to reject Sarausad's argument that certain jury instructions used at his trial were ambiguous and were likely misinterpreted by the jury to relieve the State of its burden of proving every element of the crime beyond a reasonable doubt. ***Sarausad v. Porter*, 479 F.3d 671 (2007)**. We disagree. Because the Washington courts reasonably applied our precedent to the facts of this case, we reverse the judgment below.

I

A

The driveby shooting was the culmination of a gang dispute between the 23d Street Diablos, of which Cesar Sarausad was a member, and the Bad Side Posse, which was headquartered at Ballard High School in Seattle, [*8] Washington. A member of the Diablos, Jerome Reyes, had been chased from Ballard by members of the Bad Side Posse, so the Diablos decided to go "to Ballard High School to show that the Diablos were not afraid" of the rival gang. App. to Pet. for Cert. 235a. The Diablos started a fight with the Bad Side Posse, but left quickly after someone indicated that police were nearby. They went to a gang member's house, still angry because the Bad Side Posse had "called [them] weak." Tr. 2660-2661. Brian Ronquillo retrieved a handgun, and the gang decided to return to Ballard and "get [their] respect back." *Id.*, at 2699.

Sarausad drove, with Ronquillo in the front passenger seat and Reyes and two other Diablos in the back seat. En route, someone in the car mentioned "capping" the Bad Side Posse, and Ronquillo tied a bandana over the lower part of his face and readied the handgun. *Sarausad v. State*, 109 Wn. App. 824, 844, 39 P. 3d 308, 319 (2001). Shortly before reaching the high school, a second car of Diablos pulled up next to Sarausad's car and the drivers of the two cars talked briefly. Sarausad asked the other driver, "Are you ready?" *id.*, at 844-845, 39 P. 3d, at 319, and then sped the [*9] rest of the way to the high school. Once in front of the school, Sarausad abruptly slowed to about five miles per hour while Ronquillo fired 6 to 10 shots at a group of students standing in front of it. *Id.*, at 831, 39 P. 3d, at 312. Sarausad "saw everyone go down," Tr. 2870, and then sped away, 109 Wn. App. , at 832, 39 P. 3d, at 313. The gunfire killed one student; another student was wounded when a bullet fragment struck his leg. *Id.*, at 831-832, 39 P. 3d, at 312-313.

B

Sarausad, Ronquillo, and Reyes were tried for the first-degree murder of Melissa Fernandes, the attempted first-degree murders of Ryan Lam and Tam Nguyen, and the second-degree assault of Brent Mason. Sarausad and Reyes, who were tried as accomplices, argued at trial that they could not have been accomplices to murder because they "had no idea whatsoever that Ronquillo had armed himself for the return trip." *Id.*, at 832, 39 P. 3d, at 313. They claimed that they expected, at most, another fistfight with the Bad Side Posse and were "totally and utterly dismayed when Ronquillo started shooting." *Ibid.*

Sarausad's counsel, in particular, argued that there was no evidence that Sarausad expected anything more than that the [*10] two gangs "would exchange insults, and maybe, maybe get into a fight." Tr. 1151. Sarausad testified that he considered only the "possibility of a fight," *id.*, at 2799, but never the possibility of a shooting, 109 Wn. App. , at 832, 39 P. 3d, at 313. During closing arguments, Sarausad's attorney again argued that the evidence showed only that Sarausad was "willing to fight them the way they fought them the first time. And that is by pushing and shoving and more tough talk." App. 81. That was not sufficient, the attorney argued, to find that "Cesar [Sarausad] had knowledge that his assistance would promote or facilitate the crime of premeditated murder." *Id.*, at 83. Sarausad's attorney also explained to the jury that knowledge of just any crime, such as knowledge that criminal assistance would be rendered after the shooting, would be insufficient to hold Sarausad responsible as an accomplice to murder because "[a]ccomplice liability requires that one assists with knowledge, that their actions will promote or facilitate the commission of *the* crime." *Id.*, at 100 (emphasis added).

In response, the prosecutor focused much of her closing argument on the evidence of Sarausad's knowledge of [*11] a shooting. He had "slowed down before the shots were fired, stayed slowed down until the shots were over and immediately sped up." *Id.*, at 39. "There was no hesitation, there was no stopping the car. There was no attempt for Mr. Sarausad to swerve his car out of the way so that innocent people wouldn't get shot." *Id.*, at 40. She also argued that Sarausad knew when he drove back to the school that his gang's "fists didn't work, the pushing didn't work, the flashing of the signs, the violent altercation didn't work" because the Bad Side Posse still "laughed at them, they called them weak, they

called them nothing." *Id.*, at 44. So, "[w]hen they rode down to Ballard High School that last time, . . . [t]hey knew they were there to commit a crime, to disrespect the gang, to fight, to shoot, to get that respect back. A fist didn't work, pushing didn't work. Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar." *Id.*, at 123-124.

At the close of trial, the jury received two instructions that directly quoted Washington's accomplice-liability statute. ¹ Instruction number 45 provided:

"You are instructed that a person is guilty of a crime if **[*12]** 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*." *Id.*, at 16 (emphasis added).

Instruction number 46 provided, in relevant part:

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

"(1) solicits, commands, encourages, or requests another person to commit the crime or

"(2) aids or agrees to aid another person in planning or committing the crime." *Id.*, at 17 (emphasis added).

FOOTNOTES

¹ Washington's accomplice-liability statute provides, in pertinent part:

HN1 "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.

"A person is an accomplice of another person in the commission of a crime if . . . [w]ith knowledge that it will promote or facilitate the commission of the crime, he

"(i) solicits, commands, encourages, **[*13]** or requests such other person to commit it; or

"(ii) aids or agrees to aid such other person in planning or committing it." Wash. Rev. Code §§ 9A.08.020(1)-(3) (2008) (internal numbering omitted).

During seven days of deliberations, the jury asked five questions, three of which related to the intent requirement for accomplice liability. One questioned the accomplice-liability standard as it related to the first-degree murder instructions; one questioned the standard as it related to the second-degree murder instructions; and one stated that the jury was "having difficulty agreeing on the legal definition and concept of 'accomplice'" and whether a person's "willing participat[ion] in a group activity" makes "that person an accomplice to any crime committed by anyone in the group." *Id.*, at 129. In response to each question, the judge instructed the jury to reread the accomplice-liability instructions and to consider the

instructions as a whole.

The jury was unable to reach a verdict as to Reyes, and the judge declared a mistrial as to him. The jury then returned guilty verdicts on all counts for Ronquillo and convicted Sarausad of the lesser included crimes of second-degree murder, attempted [*14] second-degree murder, and second-degree assault.

C

On appeal, Sarausad argued that because the State did not prove that he had intent to kill, he could not be convicted as an accomplice to second-degree murder under Washington law. The Washington Court of Appeals affirmed his convictions, explaining that under Washington law, an accomplice must have "general knowledge" that the crime will occur, but need not have the specific intent required for that crime's commission. App. to Pet. for Cert. 259a. The court referred to accomplice liability as "a theory of criminal liability that in Washington has been reduced to the maxim, 'in for a dime, in for a dollar.'" *Id.*, at 235a. The Washington Supreme Court denied discretionary review. *State v. Ronquillo*, 136 Wn. 2d 1018, 966 P.2d 1277 (1998).

Shortly thereafter, the Washington Supreme Court clarified in an unrelated criminal case that "in for a dime, in for a dollar" is not the best descriptor of accomplice liability under Washington law because an accomplice must have knowledge of "the crime" that occurs. *State v. Roberts*, 142 Wn. 2d 471, 509-510, 14 P. 3d 713, 734-735 (2000). Therefore, an accomplice who knows of one crime -- the dime -- [*15] is not guilty of a greater crime -- the dollar -- if he has no knowledge of that greater crime. It was error, then, to instruct a jury that an accomplice's knowledge of "a crime" was sufficient to establish accomplice liability for "the crime." *Ibid.* ² The Washington Supreme Court limited this decision to instructions containing the phrase "a crime" and explicitly reaffirmed its precedent establishing that jury instructions linking an accomplice's knowledge to "the crime," such as the instruction used at Sarausad's trial, comport with Washington law. *Id.*, at 511-512, 14 P. 3d, at 736 (discussing *State v. Davis*, 101 Wn. 2d 654, 656, 682 P.2d 883, 884 (1984)). An instruction that references "the crime" "copie[s] exactly the language from the accomplice liability statute" and properly hinges criminal punishment on knowledge of "the crime" for which the defendant was charged as an accomplice. 142 Wash. 2d, at 512, 14 P. 3d, at 736.

FOOTNOTES

² The instruction found faulty in *Roberts* provided in full:

"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 [*16] person when he is an accomplice of such other person in the commission of a crime.

"A person is an accomplice in the commission of a crime, whether present at the time of its commission or not, if, with knowledge that it will promote or facilitate its commission, he either:

"(a) solicits, commands, encourages, or requests another person to commit the crime; or

"(b) aids or agrees to aid another person in planning or committing the crime." 142 Wash. 2d, at 488-489, 14 P. 3d, at 724 (emphasis added).

D

Sarausad next sought postconviction relief from the Washington courts. He argued that although the accomplice-liability instruction used at his trial complied with *Roberts*, "an

additional clarifying instruction should have been given" because the prosecutor may have confused the jury by improperly arguing that he had been "in for a dime, in for a dollar." *Sarausad*, 109 Wn. App., at 829, 39 P. 3d, at 311. Therefore, he argued, the jury may have convicted him as an accomplice to second-degree murder based solely on his admission that he anticipated that an assault would occur at Ballard High School.

The Washington Court of Appeals reexamined the trial record in its entirety in light of *Roberts*, [*17] see 109 Wn. App., at 834, 39 P. 3d, at 313-314, but found no error requiring correction. According to the court, the prosecutor's closing argument in its entirety did not convey "that the jury could find Sarausad guilty as an accomplice to murder if he had the purpose to facilitate an offense of any kind whatsoever, even a shoving match or fist fight." *Id.*, at 840, 39 P. 3d, at 317. The prosecutor's "in for a dime, in for a dollar" illustration also did not convey that standard. *Id.*, at 842-843, 39 P. 3d, at 318. The court explained that in every situation but one, the prosecutor clearly did not use that phrase to argue that Sarausad could be convicted of murder if he intended only a fistfight. Instead, she used it to convey a "gang mentality" that requires a wrong to the gang to be avenged by any means necessary. *Ibid.* Thus, according to the prosecutor, when a fight did not work, Sarausad knew that a shooting was required to avenge his gang. See *ibid.*

There was one "in for a dime, in for a dollar" hypothetical in the prosecutor's closing that did not convey this gang-mentality meaning and thus, the court recognized, "may or may not be problematic under *Roberts*" depending on how it [*18] was interpreted. *Id.*, at 843, 39 P. 3d, at 318. ³ The court concluded that it did not need to decide whether the hypothetical was improper under state law because, even if it was, it did not prejudice Sarausad. Sarausad's jury was properly instructed and "the prosecutor made it crystal clear to the jury that the State wanted Sarausad found guilty . . . because he knowingly facilitated the drive-by shooting and for no other reason." *Id.*, at 843-844, 39 P. 3d, at 319.

FOOTNOTES

³ The prosecutor had argued in the hypothetical that an accomplice who knows that he is helping someone assault a victim bears responsibility if the victim is killed. The hypothetical stated in full:

"Let me give you a good example of accomplice liability. A friend comes up to you and says, 'Hold this person's arms while I hit him.' You say, 'Okay, I don't know 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 [*19] for a dollar. If you're there or even if you're not there and you're helping in some fashion to bring about this crime, you are just as guilty." App. 38.

Sarausad sought discretionary postconviction review from the Supreme Court of Washington. In denying his petition, the court held that "the trial court correctly instructed the jury" that knowledge of the particular crime committed was required. App. to Pet. for Cert. 191a. The court also found that no prejudicial error resulted from the prosecutor's potentially improper hypothetical. *Id.*, at 192a. "[W]hatever the flaws in the argument, the prosecutor properly focused on Mr. Sarausad's knowing participation in the shooting, not in some lesser altercation." *Ibid.*

E

Sarausad filed this petition for a writ of habeas corpus in Federal District Court pursuant to 28 U.S.C. § 2254. The District Court granted the petition, finding "ample evidence that the jury was confused about what elements had to be established in order for [Sarausad] to be found guilty of second degree murder and second degree attempted murder." App. to Pet. for

Cert. 129a. The Court of Appeals for the Ninth Circuit affirmed, finding that the state postconviction court unreasonably [*20] applied this Court's decisions in *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991), *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), and *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), in affirming Sarausad's conviction in spite of ambiguous jury instructions and the "'reasonable likelihood that the jury . . . applied the challenged instruction in a way' that violates the Constitution." 479 F.3d at 683 (quoting *Estelle, supra*, at 72, 112 S. Ct. 475, 116 L. Ed. 2d 385). The court denied rehearing en banc over the dissent of five judges. *Sarausad v. Porter*, 503 F.3d 822 (2007). We granted certiorari, 552 U.S. ___, 128 S. Ct. 1650, 170 L. Ed. 2d 352 (2008), and now reverse.

II

HN2 Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a federal court may grant habeas relief on a claim "adjudicated on the merits" in state court only if the decision "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)(1). Where, as here, it is the state court's application of governing federal law that is challenged, the decision "'must be shown to be not only erroneous, but objectively unreasonable.'" *Middleton v. McNeil*, 541 U.S. 433, 436, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004) (per [*21] curiam) (quoting *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003) (per curiam)); see also *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable -- a substantially higher threshold").

HN3 Our habeas precedent places an "especially heavy" burden on a defendant who, like Sarausad, seeks to show constitutional error from a jury instruction that quotes a state statute. *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). Even if there is some "ambiguity, inconsistency, or deficiency" in the instruction, such an error does not necessarily constitute a due process violation. *Middleton, supra*, at 437, 124 S. Ct. 1830, 158 L. Ed. 2d 701. Rather, the defendant must show both that the instruction was ambiguous and that there was "'a reasonable likelihood'" that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt. *Estelle, supra*, at 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (quoting *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)). In making this determination, the jury instruction "'may not be judged in artificial isolation,' but must be considered [*22] in the context of the instructions as a whole and the trial record." *Estelle, supra*, at 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973)). Because it is not enough that there is some "slight possibility" that the jury misapplied the instruction, *Weeks v. Angelone*, 528 U.S. 225, 236, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000), the pertinent question "is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,'" *Estelle, supra*, at 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (quoting *Cupp, supra*, at 147, 94 S. Ct. 396, 38 L. Ed. 2d 368).

A

The Washington courts reasonably concluded that the trial court's instruction to the jury was not ambiguous. The instruction parroted the language of the statute, requiring that an accomplice "in the commission of *the crime*" take action "with knowledge that it will promote or facilitate the commission of *the crime*." App. 16-17 (emphasis added); Wash. Rev. Code §§ 9A.08.020(2)(c), (3)(a) (2008). It is impossible to assign any meaning to this instruction different from the meaning given to it by the Washington courts. By its plain terms, it instructed the jury to find Sarausad guilty as an accomplice "in the commission of the [murder]" only if he acted "with knowledge that [his conduct] will [*23] promote or facilitate the commission of the [murder]." App. 16-17. ⁴ Because the conclusion reached by the Washington courts that the jury instruction was unambiguous was not objectively unreasonable, the Court of Appeals' 28 U.S.C. § 2254(d)(1) inquiry should have ended there.

FOOTNOTES

⁴ The dissent would reverse the Washington state courts based on the alleged confusion in Washington courts, and specifically in the Washington Court of Appeals on direct review, about the meaning of the Washington accomplice liability statute. *Post*, at 2-5 (opinion of SOUTER, J.). But the confusion in the Court of Appeals over the application of the statute involved the related, but legally distinct, question whether an accomplice is required to share the specific intent of the principal actor under Washington law. On direct appeal, respondent argued that he should not have been convicted as an accomplice to murder because he did not have the specific intent to kill. The Washington Court of Appeals rejected that argument because "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" under Washington law, App. to Pet. for Cert. [*24] 266a, where "accomplice liability predicates criminal liability on general knowledge of a crime, rather than specific knowledge of the elements of the principal's crime," *id.*, at 259a. But the Washington Court of Appeals never held that knowledge of a completely different crime, such as assault, would be sufficient under Washington law for accomplice liability for murder. See *id.*, at 258a-259a; see also *In re Domingo*, 155 Wn. 2d 356, 367-368, 119 P. 3d 816, 822 (2005) ("[N]either *Davis* nor any of this court's decisions subsequent to *Davis* approves of the proposition that accomplice liability attaches for any and all crimes committed by the principal so long as the putative accomplice knowingly aided in any one of the crimes"). In [*25] other words, the Court of Appeals had evaluated whether respondent's conviction required a specific intent versus a general intent to kill, not whether it required knowledge of a murder versus knowledge of an assault -- the issue under review here. Thus, the confusion in the state courts referenced by the dissent has no bearing on the question presented in this appeal, and does not support the dissent's argument that the jury instruction in question was ambiguous.

⁵ To the extent that the Court of Appeals attempted to rewrite state law by proposing that the instruction should have included "an explicit statement that an accomplice must have knowledge of . . . the actual crime the principal intends to commit," 479 F.3d 671, 689-690 (CA9 2007), it compounded its error. The Washington Supreme Court expressly held that the jury instruction correctly set forth state law, App. to Pet. for Cert. 191a, and we have repeatedly held that ^{HN4} "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

B

Even if we agreed that the instruction was ambiguous, the Court of Appeals still erred in finding that [*26] the instruction was so ambiguous as to cause a federal constitutional violation, as required for us to reverse the state court's determination under AEDPA, 28 U.S.C. § 2254(d). The Washington courts reasonably applied this Court's precedent when they determined that there was no "reasonable likelihood" that the prosecutor's closing argument caused Sarausad's jury to apply the instruction in a way that relieved the State of its burden to prove every element of the crime beyond a reasonable doubt. The prosecutor consistently argued that Sarausad was guilty as an accomplice because he acted with knowledge that he was facilitating a driveby shooting. Indeed, Sarausad and Reyes had admitted under oath that they anticipated a fight, Tr. 2671, 2794, and yet the prosecutor never argued that their admission was a concession of accomplice liability for murder. She instead argued that Sarausad knew that a shooting was intended, App. 123, because he drove his car in a way that would help Ronquillo "fire those shots," *id.*, at 39. The closing argument of Sarausad's attorney also homed in on the key legal question: He challenged the jury to look for evidence that Sarausad "had knowledge that his [*27] assistance would promote or facilitate the crime of premeditated murder" and argued that no such evidence

existed. *Id.*, at 83.

Put simply, there was no evidence of ultimate juror confusion as to the test for accomplice liability under Washington law. Rather, the jury simply reached a unanimous decision that the State had proved Sarausad's guilt beyond a reasonable doubt. Indeed, every state and federal appellate court that reviewed the verdict found that the evidence supporting Sarausad's knowledge of a shooting was legally sufficient to convict him under Washington law. **479 F.3d at 677-683**; *Sarausad*, 109 Wn. App., at 844-845, 39 P. 3d, at 319. Given the strength of the evidence supporting the conviction, along with the jury's failure to convict Reyes -- who also had been charged as an accomplice to murder and also had admitted knowledge of a possible fight -- it was not objectively unreasonable for the Washington courts to conclude that the jury convicted Sarausad only because it believed that he, unlike Reyes, had knowledge of more than just a fistfight. The reasoning of the Court of Appeals, which failed to review the state courts' resolution of this question through the deferential **[*28]** lens of AEDPA, does not convince us otherwise.

First, the Court of Appeals found that the evidence of Sarausad's knowledge of the shooting was so "thin" that the jury must have incorrectly believed that proof of such knowledge was not required. **479 F.3d, at 692-693**. That conclusion, however, is foreclosed by the Court of Appeals' own determination that the evidence was sufficient for a rational jury to reasonably infer that Sarausad knowingly facilitated the driveby shooting. As explained above, the Court of Appeals acknowledged that the evidence showed that Ronquillo, while seated in Sarausad's front passenger seat, tied a bandana over the lower part of his face and pulled out a gun. *Id.*, at **681**. There also was evidence that Sarausad then asked the Diablos in the other car, "Are you ready?" before driving to the school and "slow[ing] his car in front of the school in a manner that facilitated a drive-by shooting." *Ibid.* Other gang members testified to prior knowledge of the gun and to discussing the shooting as an option during the gang meeting held between trips to Ballard High School. *Id.*, at **682**. There also was testimony from Sarausad that he suspected that members of the Bad **[*29]** Side Posse would be armed when they returned to Ballard High School, *ibid.*, making it reasonable to conclude that Sarausad would expect his gang to be similarly prepared for the confrontation. There was nothing "thin" about the evidence of Sarausad's guilt.

Second, the Court of Appeals faulted the prosecutor for arguing "clearly and forcefully" for an "in for a dime, in for a dollar" theory of accomplice liability. *Id.*, at **693**. But the Washington Court of Appeals conducted an in-depth analysis of the prosecutor's argument and reasonably found that it contained, at most, one problematic hypothetical. *Sarausad, supra*, at 842-843, 39 P. 3d, at 318-319. The state court's conclusion that the one hypothetical did not taint the proper instruction of state law was reasonable under this Court's precedent, which acknowledges that "arguments of counsel generally carry less weight with a jury than do instructions from the court." *Boyde*, 494 U.S., at 384, 110 S. Ct. 1190, 108 L. Ed. 2d 316. On habeas review, the Court of Appeals should not have dissected the closing argument and exaggerated the possible effect of one hypothetical in it. There was nothing objectively unreasonable about the Washington courts' resolution of this question. **[*30]**⁶

FOOTNOTES

⁶ The dissent accuses us of downplaying this ambiguous hypothetical, arguing that it is so rife with improper meaning that it "infect[ed] every further statement bearing on accomplice law the prosecutor made," *post*, at 7, and ensured that the jury misinterpreted the trial court's properly-phrased instruction. We disagree. The proper inquiry is whether the state court was objectively unreasonable in concluding that the instruction (which precisely tracked the language of the accomplice-liability statute) was not warped by this one-paragraph hypothetical in an argument and rebuttal spanning 31 pages of the joint appendix. The state court's conclusion was not unreasonable. The hypothetical was presented during closing arguments, which juries generally "vie[w] as the statements of advocates" rather than "as definitive and binding statements of the law," *Boyde v. California*, 494 U.S. 370, 384, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), and which, as a whole, made clear that the State sought a guilty verdict based solely on

Sarausad's "knowledge that his assistance would promote or facilitate the crime of premeditated murder," App. 83; see also *id.*, at 123-124.

Third, and last, the Court of Appeals believed that the jury's [*31] questions "demonstrated substantial confusion about what the State was required to prove." **479 F.3d, at 693.** Sarausad focuses special attention on this factor, arguing that it was the "failure to remedy" this confusion that sets this case apart from previous decisions and establishes that the jury likely "did not understand accomplice liability" when it returned its verdict. Brief for Respondent 29, 31. But this Court has determined that the Constitution generally requires nothing more from a trial judge than the type of answers given to the jury here. *Weeks*, 528 U.S., at 234, 120 S. Ct. 727, 145 L. Ed. 2d 727. ^{HN5} Where a judge "respond[s] to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry," and the jury asks no followup question, this Court has presumed that the jury fully understood the judge's answer and appropriately applied the jury instructions. *Ibid.*

Under this established standard, it was not objectively unreasonable for the state court to conclude that Sarausad's jury received the answers it needed to resolve its confusion. ⁷ Its questions were spaced throughout seven days of deliberations, involved different criminal [*32] charges, and implicated the interrelation of several different jury instructions. The judge pinpointed his answers to the particular instructions responsive to the questions and those instructions reflected state law. Under these circumstances, the state court did not act in an objectively unreasonable manner in finding that the jury knew the proper legal standard for conviction.

FOOTNOTES

⁷ The dissent argues that we "sideste[p] the thrust of this record" by finding that the trial judge's answers to the jury's questions were satisfactory. *Post*, at 9-10. But our decision cannot turn on a *de novo* review of the record or a finding that the answers were "the best way to answer jurors' questions," *id.*, at 10. On federal habeas review, this Court's inquiry is limited to whether the state court violated clearly established federal law when it held that the jury applied the correct standard, in light of the answers given to its questions. See 28 U.S.C. § 2254(d)(1). On that issue, the state court was not objectively unreasonable; the jury's questions were answered in a manner previously approved by this Court, and they consistently referred the jury to the correct standard for accomplice liability in [*33] Washington. The dissent also ignores the important fact that the jury convicted Ronquillo of first-degree murder, convicted respondent of second-degree murder, and failed to reach an agreement on Reyes' guilt, causing a mistrial on the first-degree murder charge pending against him. The jury's assignment of culpability to two of the codefendants, versus its deadlock over a third who, like respondent, conceded knowledge of an assault, demonstrates that the jury understood the legal significance of each defendant's relative knowledge and intent with respect to the murder.

III

Because the state-court decision did not result in an "unreasonable application of . . . clearly established Federal law," 28 U.S.C. § 2254(d)(1), the Court of Appeals erred in granting a writ of habeas corpus to Sarausad. The judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

DISSENT BY: SOUTER ▾

DISSENT

JUSTICE SOUTER ▼, with whom JUSTICE STEVENS ▼ and JUSTICE GINSBURG ▼ join, dissenting.

The issue in this habeas case is whether it was objectively reasonable for the state court to find that there was no reasonable likelihood that the jury convicted respondent Cesar Sarausad [*34] on a mistaken understanding of Washington law. The underlying question is whether the jury may have thought it could find Sarausad guilty as an accomplice to murder on the theory that he assisted in what he expected would be a fist fight, or whether the jury knew that to convict him Washington law required it to conclude Sarausad aided in what he understood was intended to be a killing.

So far as the instructions addressed these alternatives, the judge charged the jurors in these words:

"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."
App. 17.

The majority answers the underlying question by relying on the general rule that incorporating a clear statute into a jury charge almost always produces an adequate instruction, which the jury is assumed to follow. The kicker of course is that the general rule is only good if the incorporated statute is clear enough to require the jury to find facts amounting to a violation of [*35] the law as correctly understood.

Does the rule apply here? The majority says it does. It says the instruction quoted is unambiguous because it parrots the language of the Washington statute on accomplice liability, *ante*, at 11, and that "[i]t is impossible to assign any meaning to this instruction" and, by extension, the statute, "different from the meaning given to it by the Washington courts," *ibid*.

That is not, however, what the record shows. Rather than a single understanding, the Washington courts have produced a record of discordant positions on the meaning of the statute, and the Washington Court of Appeals can itself attest to a degree of difficulty in understanding the statutory requirement sufficient to show the statute to be ambiguous and the statute-based instruction constitutionally inadequate: that court read the statute to mean just the opposite of what the majority now claims it unambiguously requires.

On Sarausad's direct appeal in 1998, the State Court of Appeals set out the principles on which it understood accomplice liability in Washington to be premised. It did not say that the accomplice must understand that he is aiding in the commission of the same offense the [*36] principal has in mind, or the offense actually committed. Instead, the Washington Court of Appeals said this:

"(1) To convict of accomplice liability, the State need not prove that principal and accomplice shared the same mental state, (2) accomplice liability predicates criminal liability on general knowledge of a crime, rather than specific knowledge of the elements of the principal's crime, and (3) 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." *Washington v. Ronquillo*, No. 35840-5-I etc., 1998 Wash. App. LEXIS 334, *34 (Mar. 2, 1998), App. to Pet. for Cert. 233a, 258a-259a.

In support, the court cited *State v. Davis*, 101 Wn. 2d 654, 682 P.2d 883 (1984), in which the Supreme Court of Washington noted that "an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." *Id.*, at 658, 682 P. 2d, at 886. As today's majority notes, *ante*, at 6, the state appellate court remarked that the Washington law of accomplice liability (as it then understood it) "has been reduced to the maxim, 'in for a dime, in for a dollar'" "; [*37] the court also held that "it was not necessary for the State to prove Sarausad . . . knew that there was a potential for gunplay that day." *Washington v. Ronquillo*, *supra*, 1998 Wash. App. LEXIS 334 at *45, [App. to Pet. for Cert.] at 235a, 266a. So much for the majority's confidence that the statute-based instruction can only be understood as requiring what the State Supreme Court now says it requires: proof that the accomplice understood that he was aiding in the commission of the very crime he is charged with facilitating.

The State Supreme Court clarified this requirement two years after the Court of Appeals held against Sarausad. In *State v. Roberts*, 142 Wn. 2d 471, 14 P. 3d 713 (2000), the Supreme Court of Washington held that the Court of Appeals's "in for a dime, in for a dollar" view of accomplice liability was a misreading of the statute and a flat-out misstatement of law. In *Roberts*, the State Supreme Court revisited *Davis*, which it explained as standing for the principle "that an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided he has general knowledge of that specific crime." 142 Wash. 2d, at 512, 14 P. 3d, at 736. Although a "general knowledge" of "that specific crime" [*38] intended by a confederate and eventually committed will suffice for the mental element of accomplice liability, mere "knowledge by the accomplice that the principal intends to commit 'a crime' does not impose strict liability for any and all offenses that follow." *Id.*, at 513, 14 P. 3d, at 736. In other words, it was incorrect to read the statute as the Supreme Court of Washington had arguably done in *Davis* (and the State Court of Appeals certainly did in this case), to mean that anyone who agrees "to participate in a criminal act . . . runs the risk of [accomplice liability for a more serious crime if] the primary actor exceed[s] the scope of the preplanned illegality," 101 Wash. 2d, at 658, 682 P. 2d, at 886. The reductive maxim "in for a dime, in for a dollar" was now understood to be a distortion of Washington's accomplice liability law.

The Washington Court of Appeals said as much when Sarausad appeared before it the second time, seeking postconviction relief: "[Sarausad] points out, and correctly so, that this court decided [his direct] appeal on the premise that 'in for a dime, in for a dollar' correctly characterized Washington accomplice liability law. We said that 'an accomplice, [*39] "having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality.'" " *Sarausad v. Washington*, 109 Wn. App. 824, 833-834, 39 P. 3d 308, 313 (2001). The Court of Appeals said that it had "erred" in determining that it was unnecessary for the State to prove Sarausad knew he was facilitating a drive-by shooting. *Id.*, at 837, 39 P. 3d, at 315.

This profession of judicial error in understanding the law is the touchmark not of a clear statute, but of an indistinct or perplexing one, which the law calls ambiguous. The majority is thus unquestionably mistaken in finding it "impossible to assign any meaning to [the instruction quoting the statute that is] different from the meaning" the majority thinks is clear. *Ante*, at 11. Given that error on the majority's part, it has not justified its reversal of the Ninth Circuit by showing that the instruction was clear. *

FOOTNOTES

* As the majority notes, *ante*, at 11, n. 4, in the Washington Court of Appeals on direct review, Sarausad's counsel claimed that state law required that an accomplice to murder have a specific intent to kill (or aid in killing). The Court of Appeals rejected this position.

[*40] Contrary to the majority view, *ante*, at 12, n. 4, in gauging the adequacy of an

instruction incorporating statutory terms, the fact that defense counsel may have asked for too much does nothing to lessen the pertinence of opaque state law or its uncertainty in the minds of the state judges. The Court of Appeals in its very response to counsel's argument demonstrated its misunderstanding of the scope of Washington accomplice liability law: "accomplice liability predicates criminal liability on general knowledge of a crime." *Washington v. Ronquillo*, No. 35840-5-I etc., 1998 Wash. App. LEXIS 334, *34 (Mar. 2, 1998), App. to Pet. for Cert. 233a, 259a (emphasis added). For that matter, the Court of Appeals subsequently disavowed the very statement used by the majority to support its contention that the court was focused solely on the issue of specific intent. The court, in the postconviction proceedings, concluded that it was in fact necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew there was potential for gunplay that day. *Sarausad v. Washington*, 109 Wn. App. 824, 837, 39 P. 3d 308, 315 (2001). This knowledge would have been necessary regardless of whether the law required Sarausad to have specific [*41] or general intent to kill, unless, of course, accomplice liability was predicated on an "in for a dime, in for a dollar" theory of liability and knowledge of a fistfight could suffice.

There remains the question whether the majority's second conclusion is also unjustifiable: despite inadequate instruction, did the jurors nevertheless apply the correct view of state law, which only recently, and after the trial, attained its current clarity? The state postconviction court found no reasonable likelihood that the jurors failed to apply a correct understanding of accomplice liability, *Sarausad v. Washington*, *supra*, at 843-844, 39 P. 3d, at 318-319, and Sarausad's burden here (on federal habeas) is to demonstrate that the state court was objectively unreasonable in drawing this conclusion, 28 U.S.C. § 2254(d)(1). The District Court and the Ninth Circuit found he had done just that, whereas the majority today insists those courts were wrong.

The majority's position is simply unrealistic. Even a juror with a preternatural grasp of the statutory subtlety would have lost his grip after listening to the prosecutor's closing argument, which first addressed the state law of accomplice liability [*42] with a statement that was flatout error, followed that with a confusing argument that could have reflected either the correct or the erroneous view, and concluded with an argument that could have fit either theory but ended with a phrase defined to express the erroneous one.

In her first pass at the subject, the prosecutor said unequivocally that assaultive, not murderous, intent on Sarausad's part would suffice for the intent required of an accomplice to murder.

"Let me give you a good example of accomplice liability. A friend comes up to you and says, 'Hold this person's arms while I hit him.' You say, 'Okay, I don't like that person, anyway.' You hold the arms. The person not only gets assaulted, he gets killed. You are an accomplice and you can't come back and say, 'Well, I only intended this much damage to happen.' 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 and you're helping in some fashion to bring about this crime, you are just as guilty." App. 38.

Thus, in what the majority would launder into "one [*43] problematic hypothetical," *ante*, at 15, the prosecutor introduced the "in for a dime, in for a dollar" locution, which she defined to mean that readiness to aid in the commission of any crime thought to be intended by the principal is enough intent for accomplice liability for whatever crime the principal actually commits. This lead-off misstatement of the law, never corrected by the trial judge, infects every further statement bearing on accomplice law the prosecutor made, for into each effort she consistently introduced the viral catchphrase "in for a dime, in for a dollar."

In a second reference to accomplice law, the prosecutor discussed gang mentality and used

the phrase, without modifying her earlier explanation of its legal meaning, then followed up with a reference to the evidence that could have fit either the erroneous theory or the law as corrected by *Roberts*:

"Mr. Sarausad [was] present and . . . certainly ready to assist. And I remind you, too, what you heard not only from . . . the gang expert in this case, but from [gang] member after [gang] member who told you that an affront to one is an affront to all, 'When you disrespect me you disrespect my gang.' . . .

"They were [***44**] all there that day . . . ready to back each other up in whatever happened. In for a dime, they were in for a dollar and they were sticking together.

". . . You know, the best indication of what was going on just before the shooting is gleaned by what happened immediately after the fact. . . . Nothing [was] said to the [gunman], because there was nothing to say. Nobody asked him why he did it. They all knew. They all knew what they were there for. An affront to one is an affront to all." App. 40-41.

The confusion of the correct and erroneous theories of liability showed up again in the prosecutor's final rebuttal:

"Mr. Sarausad's lawyer says that an accomplice has to have the same mental state as the person doing the shooting Not true, not true. And that's not what the instruction says.

"And I've told you the old adage, you're in for a dime, you're in for a dollar. 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 [***45**] 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.

"When they rode down to Ballard High School that last time, I say they knew what they were up to. They knew they were there to commit a crime, to disrespect the gang, to fight, to shoot, to get that respect back. A fist didn't work, pushing didn't work. Shouting insults at them didn't work. Shooting was going to work. In for a dime, you're in for a dollar." *Id.*, at 123-124.

In the prosecutor's jumble of rules, one proposition is both clear and clearly erroneous: the statement of law, "in for a dime, in for a dollar." It unmistakably contradicts the construction for which Sarausad's counsel correctly argued, which would have required the jury to find that Sarausad understood that the object was killing in order to find him guilty as an accomplice to murder. *Id.*, at 83-84.

The point here is not to excoriate the prosecutor, who tried this case in the period between *Roberts* and *Davis* and could fairly assume that her expansive ("in for a dime . . . ") view of accomplice liability was good law in her State. The point is just the obvious one that cannot be evaded without playing make-believe [***46**] with the record: an uncertain instruction by the trial judge was combined with confounding prosecutorial argument incorporating what the state courts now acknowledge was a clearly-erroneous statement of law, in contrast to the view of the law argued by defense counsel. In these circumstances jury confusion is all but inevitable and jury error the reasonable likelihood.

If there were any doubt about that, one could simply look at the record of the jury's

deliberations, in the course of which the jurors repeatedly asked the court to clarify the law on accomplice liability. They began deliberating on Friday, October 21, 1994, and the following Tuesday, they asked (as to the instructions laying out the crime of first-degree murder and the required premeditation), "does the 'intent' apply to (the defendant only) or to (the defendant or his accomplice)?" App. 126. The judge replied, "Refer to instructions 46 and 47 and consider your instructions as a whole." *Ibid*. Three days later, October 28, this time in reference to the second-degree murder instructions, the jury enquired a second time about accomplice liability, asking whether "intentional appl[ies] to only [*47] the defendant or only his accomplice?" *Id.*, at 128. The judge's response was nearly identical to his first one: "Refer to instructions 45 & 46 and consider the instructions as a whole." *Ibid*. The following Monday, the jury returned to deliberations and requested help yet again, spelling out its confusion: "We are having difficulty agreeing on the legal definition and concept of 'accomplice.' . . . [W]hen a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?" *Id.*, at 129. Once again, the judge sent the jurors back to the written charge: "Refer to instructions . . . 45, 46, 47, and 48 and consider your instructions as a whole." *Ibid*.

The majority sidesteps the thrust of this record by suggesting that the jurors failed to let the court know of any confusion: it says the jurors' questions "involved different criminal charges, and implicated the interrelation of several different jury instructions." *Ante*, at 17. But this simply ignores the disclosure obviously common to all those questions: the jurors did not understand the state of mind the prosecution had to prove for accomplice liability. Their final question [*48] makes this unmistakable.

The majority says, in any case, that the judge's repeated references back to the written instructions were enough and that "it was not objectively unreasonable for the state court to conclude that [the] jury received the answers it needed to resolve its confusion." *Ante*, at 16. But after the jurors asked three times? In many trials, reference back to written instructions would be the best way to answer jurors' questions, which may reflect uncertain memory, not deficient instruction. But not in this case: the accomplice liability instruction was defective owing to the ambiguity of the statutory language it incorporated, and its deficiency was underscored by the prosecutor's erroneous argument. Telling the jurors to read an inadequate instruction three more times did nothing to improve upon it or enlighten the readers. The District Court and the Ninth Circuit drew the only conclusion reasonably possible on this record. I respectfully dissent.

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