

NO. _____

**IN THE SUPREME COURT OF
THE UNITED STATES**

DOUG WADDINGTON,

Petitioner,

v.

CESAR SARAUSAD,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ROBERT M. MCKENNA
Attorney General

William Berggren Collins
Jay D. Geck
Deputy Solicitors General

Paul D. Weisser
Senior Counsel

John J. Samson*
Assistant Attorney General
**Counsel of Record*

PO Box 40116
Olympia, WA 98504-0116
360-586-1445

QUESTION PRESENTED

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

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

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

PARTIES

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

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Doug Waddington, the Superintendent of the Washington Corrections Center, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Sarausad v. Porter*, 479 F.3d 671 (9th Cir. 2007) (Pet. App. 31a-124a). The order denying a timely petition for rehearing *en banc*, and the dissent from the denial of rehearing, is reported at 503 F.3d 822 (9th Cir. 2007) (Pet. App. 1a-30a). The order of the United States District Court for the Western District of Washington, and the report and recommendation of the United States Magistrate Judge are unpublished. Pet. App. 125a-133a, and Pet. App. 134a-188a. The opinion of the Washington Court of Appeals denying Sarausad's post-conviction collateral challenge is reported at *In re Sarausad*, 109 Wash. App. 824, 39 P.3d 308 (2001) (Pet. App. 195a-230a). The opinion of the Washington Court of Appeals affirming Sarausad's convictions on direct appeal is unpublished. Pet. App. 233a-267a.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

The fifth amendment to the United States Constitution provides, in relevant part:

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

The fourteenth amendment to the United States Constitution similarly provides, in part:

“. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. XIV.

28 U.S.C. § 2254(d) provides:

“(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

28 U.S.C. § 2254(e)(1) provides:

“In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”

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

“(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

...

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it. . . .”

STATEMENT

Respondent Cesar Sarausad drove a car filled with fellow gang members to a high school in order to retaliate against a rival gang. With knowledge that his front seat passenger, Brian Ronquillo, was armed and going to shoot, Sarausad drove towards a group of students standing outside the school, and slowed his car. Ronquillo fired several shots towards the students, killing one and wounding another student. A jury convicted Sarausad of second degree murder, second degree attempted murder, and second degree assault based upon accomplice liability. The jury instructions on accomplice liability, which mirrored the state statute, have been affirmed by the Washington courts as properly reflecting state law. The Ninth Circuit, over the dissent of one panel judge and the dissent of five judges who would have granted rehearing *en banc*, found the instruction ambiguous with regard to accomplice liability under state law. Finding a reasonable likelihood that the jury would apply the instructions in a manner that would relieve the prosecution of its obligation to prove all the elements of the crime, the Ninth Circuit affirmed the grant of habeas relief, vacating Sarausad's convictions.

1. The Events Of The Shooting

Sarausad was a member of a gang called the 23rd Street Diablos. On March 23, 1994, a fellow gang member, Jerome Reyes, told Sarausad and others that a few days earlier he had been chased away from Ballard high school by a rival gang. Sarausad considered the rival gang to be "his enemy." Sarausad, Reyes, Ronquillo and six other

“Diablos” drove in two cars to the high school to seek revenge against the rival gang, with Sarausad driving his car. After a brief encounter at the school involving shoving, “gang signs,” harsh words, and the display of a gun by one of the Diablos, the Diablos heard the police were coming and they left.

After leaving the school, Sarausad and his fellow Diablos went to the home of a friend. They were angry at what happened, and felt they had appeared “chicken” for leaving the school. Sarausad left the house to get Michael Vincencio, the gang member known as the keeper of the gun. Vincencio carried the murder weapon back to the house, and gave it to Ronquillo. The group then decided to return to the school. Sarausad again drove the lead car with Ronquillo, armed with the gun, sitting next to him. Reyes and two other Diablos sat in the back seat. Vincencio and four others gang members followed in Vincencio’s car.

On the return trip to the school, everyone in the car, including Sarausad, discussed the possibility of shooting. As the two cars neared the school, they moved side by side. Sarausad said, “Follow us,” “Are you ready?” or “Ready.” Sarausad then drove his car towards the students standing in front of the school. He drove quickly, “swooping down” on the kids, and slowed as the shots were fired. Sarausad admitted at trial that as he drove toward the students, he saw Ronquillo wearing a bandana tied over his nose and mouth, and saw him pull the gun out of a bag. Ronquillo aimed the gun out the window and fired between six to ten times, directly at the students. Two students ducked and avoided the shots, but a

bullet hit Melissa Fernandes in the head, killing her. Another student was injured by a bullet fragment.

Sarausad expressed no shock or surprise at Ronquillo's actions. Instead, once the shooting stopped, Sarausad sped away followed by the other vehicle. Sarausad and the others supported Ronquillo as they drove away. After some distance, Ronquillo transferred the gun to a hiding place in Vincencio's car. Sarausad then drove to a local mall to "lay low," and play video games. At the mall, Sarausad threw away a bullet shell from his car. Sarausad eventually went home, and tried to figure out an excuse for the police. When arrested later that day, Sarausad repeatedly lied to the police, denying he had even been at the school that day.

2. Accomplice Liability In Washington

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

The Washington Supreme Court addressed the knowledge element of accomplice liability, and the proper jury instruction for accomplice liability, in *State v. Roberts*, 142 Wash.2d 471, 512, 14 P.3d 713 (2000). *Roberts* held the accomplice statute does not impose strict liability on an alleged accomplice for

any crime that might be committed by a putative principal. *Id.* at 510. The statute imposes a mens rea requirement that the accused act with knowledge that he is facilitating “the crime,” which means the charged offense. *Roberts*, 142 Wash.2d at 510. However, the mens rea element of knowledge does not require that the accomplice share the same mental state as the principal. In Washington, the “long-standing rule [is] that an accomplice need not have specific knowledge of *every element* of the crime committed by the principal, provided he has general knowledge of that specific crime.” *Id.* at 512 (citing *State v. Sweet*, 138 Wash.2d 466, 479, 980 P.2d 1223 (1999); *State v. Hoffman*, 116 Wash.2d 51, 104, 804 P.2d 577 (1991)). “[W]here criminal liability is predicated on the accomplice liability statute, the State is required to prove only the accomplice’s *general knowledge of his coparticipant’s substantive crime.*” *Roberts*, 142 Wash.2d at 512 (emphasis in original) (quoting *State v. Rice*, 102 Wash.2d 120, 125, 683 P.2d 199 (1984)).

Applying these principles, *Roberts* disapproved an instruction which required only that the accomplice act with knowledge that he promoted or facilitated the commission of “a crime.” *Roberts*, 142 Wash.2d at 512-13. *Roberts* found the “a crime” instruction improperly departed from the language of the statute. *Id.* at 511. *Roberts* specifically approved an instruction with one significant difference. *Roberts* held an instruction is proper if it requires the jury to find “the accomplice acted ‘with knowledge that it will promote or facilitate the commission of *the crime*. . . .’” *Id.* at 512 (emphasis in original) (quoting jury instruction in *State v.*

Davis, 101 Wash.2d 654, 656, 682 P.2d 883 (1984)); see also *State v. Cronin*, 142 Wash.2d 568, 579, 14 P.3d 752 (2000). *Roberts* held the proper instruction would copy “exactly the language from the accomplice liability statute” found at Wash. Rev. Code § 9A.08.020(3). *Roberts*, 142 Wash.2d at 512.

3. Trial Court Proceedings

Sarausad was tried with Ronquillo and Reyes for the first degree murder of Melissa Fernandes, for the attempted first degree murders of two other students targeted during the shooting, and for the second degree assault on another injured student. Numerous witnesses, including experts on gangs, and many of the gang members themselves, testified to the events of the shooting. Ronquillo admitted to the shooting, but denied having premeditated intent to kill. Sarausad’s defense was that he returned to the school expecting only shoving or a fist fight; he denied knowing that Ronquillo had armed himself. Sarausad also denied any discussion of shooting on the return trip to the school, and he claimed he did not see Ronquillo tie on the bandana.

The court instructed the jury concerning accomplice liability by quoting almost verbatim from the accomplice liability statute, Wash. Rev. Code § 9A.08.020. Instruction number 45 provided:

“You are instructed that a person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.” Pet. App. 270a.

Instruction number 46 provided, in pertinent 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.”
Pet. App. 271a.

The jury convicted Ronquillo of premeditated first degree murder, and convicted Sarausad of the lesser-included offenses of one count of second degree (intentional) murder, two counts of attempted second degree murder, and second degree assault while armed with a firearm.

4. State Appellate Proceedings

The Washington Court of Appeals affirmed Sarausad’s convictions on direct appeal, rejecting, *inter alia*, Sarausad’s challenge to the accomplice liability instructions. Pet. App. 233a-267a. The court noted the instructions mirrored the accomplice liability statute. Pet. App. 256a-258a. But in rejecting the claim, the court also discussed too inclusive a standard for accomplice liability. In finding sufficient evidence to support the convictions, the court incorrectly stated that to convict Sarausad, the prosecution need not prove he knew Ronquillo had a gun, or that there was even a potential for gun play. Pet. App. 266a. The Washington Supreme

Court denied Sarausad's petition for review without comment. Pet. App. 231a-232a.

After the disposition of the direct appeal, the Washington Supreme Court issued *Roberts* and *Cronin*, addressing the mens rea element of accomplice liability, and reaffirming the proper instruction for accomplice liability under state law. *Roberts*, 142 Wash.2d at 509-13; *Cronin*, 142 Wash.2d at 579. Sarausad then filed a personal restraint petition, again challenging the accomplice liability instructions given at his trial. Recognizing that it had not correctly evaluated the issue on direct review, the Washington Court of Appeals again reviewed the jury instructions, this time applying *Roberts* and *Cronin*. Pet. App. 195a-230a.

The Washington Court of Appeals noted that to convict Sarausad as an accomplice, the jury had to find he acted with knowledge that his conduct would promote or facilitate "the crime" for which he was charged. Pet. App. 201a (citing *Roberts*, 142 Wn.2d at 513; *Cronin*, 142 Wn.2d at 579). The court noted that while the law does not impose strict liability for all crimes the principal might commit, "an accomplice need not have specific knowledge of every element of the crime committed by the principal, provided that he, the accomplice, has general knowledge of that specific crime." Pet. App. 202a. "The crime' means the charged crime, but because only general knowledge is required, even if the charged crime is aggravated, premeditated first degree murder as it was in *Roberts*, 'the crime' for purposes of accomplice liability is murder, regardless of degree." Pet. App. 202a-203a. Rejecting Sarausad's argument that he must have possessed

