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

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QUESTION PRESENTED

The Washington Supreme Court has repeatedly approved of the pattern accomplice liability jury instructions given in Sarausad's trial, which mirror the statutory language on accomplice liability under state law. The United States Court of Appeals for the Ninth Circuit found a violation of due process based 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

the same mental state as Ronquillo to act as an accomplice, the Washington Court of Appeals ruled,

> "the law of accomplice liability in Washington requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide, but need not have known that the principal had the kind of culpability required for any particular degree of murder." Pet. App. 204a.

The Washington Court of Appeals held the instructions given in Sarausad's trial complied with *Roberts* and the accomplice liability statute. Pet. App. 206a-207a. The instructions required the jury to find that Sarausad acted with knowledge that his conduct would promote or facilitate "the crime."

The state court also rejected Sarausad's claim that the prosecutor's "in for a dime, in for a dollar" argument had erroneously urged guilt based on lesser knowledge than required for accomplice liability, such as knowledge that the accused was facilitating a fist fight. Pet. App. 208a-209a. The state court found Sarausad misstated the record. Pet. App. 209a. The court found: "the prosecutor did *not* in fact argue that even if Sarausad drove to Ballard High School the second time having the purpose to facilitate only another shoving match or a fist fight, he nevertheless was guilty of murder." Pet. App. 213a. Instead, the prosecutor effectively argued that, in order to restore the gang's respect following the first confrontation, Sarausad and the other Diablos went to the high school on the second trip for

the purpose of shooting. Pet. App. 213a. Finally, the court found no prejudice even if the prosecutor's hypothetical scenarios were improper:

> "Sarausad was not prejudiced. This is *because the court properly instructed the jury as to the law of accomplice liability* and because the prosecutor made it crystal clear to the jury that the State wanted Sarausad found guilty of first degree murder, first degree attempted murder and second degree assault because he knowingly facilitated the drive-by shooting and for no other reason. Not once did the prosecutor suggest to the jury that it could or should convict Sarausad even if it believed that he returned to Ballard High School for the purpose of facilitating nothing more than another shoving match or a fistfight[.]" Pet. App. 214a-215a (emphasis added).

"[N]othing that the prosecutor argued to the jury required a remedial or supplemental instruction from the trial court." Pet. App. 215a. The Washington Supreme Court again denied review, this time expressly agreeing with the lower court's conclusion that the instructions correctly informed the jury of Washington law governing accomplice liability. Pet. App. 191a.

5. Federal Court Proceedings

Sarausad sought a writ of habeas corpus under 28 U.S.C. § 2254. The magistrate judge recommended the court grant relief on two grounds. The magistrate judge concluded the evidence was insufficient, and also believed the jury instructions, in combination with other factors, unconstitutionally

relieved the State of its burden of proof. Pet. App. 134a-188a. The district court granted the writ on both grounds. Pet. App. 125a-133a. The State appealed, and Sarausad cross-appealed.

A divided panel of the Ninth Circuit affirmed in part the grant of the writ. It reversed the district court's ruling that the evidence was insufficient to support the convictions. Pet. App. 39a-53a. However, the court affirmed that "ambiguous jury instructions on accomplice liability, in combination with other factors, unconstitutionally relieved the State of its burden of proof of an element of the crimes with which [Sarausad] was charged." Pet. App. 32a. The Ninth Circuit faulted the instructions for not containing "an explicit statement that an accomplice must have knowledge of the actual crime the principal intends to commit." Pet. App. 69a.

Ignoring the state court determination that the instructions were correct under *Roberts*, the Ninth Circuit found the instructions were comparable to the instruction found invalid in *Roberts*. Pet. App. 70a. The Ninth Circuit found the instructions and statute itself were ambiguous because they could be understood to impose accomplice liability under an "in for a dime, in for a dollar" theory, contrary to the knowledge requirement of Washington law. Pet. App. 70a-71a.

The Ninth Circuit described the instructions as:

> "no less confusing than the statute itself. We therefore conclude that the jury instructions were, at the very least, ambiguous on the question of whether Sarausad could be convicted of murder and attempted murder on a theory of accomplice liability without proof beyond a reasonable doubt that Sarausad knew that Ronquillo intended to commit murder." Pet. App. 74a.

After finding the instructions ambiguous, the Ninth Circuit concluded there was a reasonable likelihood the jury applied the instructions in a way that violates the Constitution. Pet. App. 74a-78a. The Ninth Circuit found a constitutional violation based on: (1) its conclusion that there was thin evidence that Sarausad knew that Ronquillo intended to commit murder on the return trip to the school; (2) its finding that the prosecutor had in fact argued for accomplice liability contrary to state law by referring to "in for a dime, in for a dollar", and rejecting the state court finding about the argument; (3) the fact that the jury has requested clarification concerning accomplice liability; and (4) its conclusion that the state court of appeals misstated the record regarding the prosecutor's "in for a dime, in for a dollar" argument. Pet. App. 74a-78a.

Judge Bybee dissented from the panel opinion, stating that clearly established federal law did not put the Washington courts on notice that the jury instructions were ambiguous or allowed a violation of due process. Pet. App. 99a-101a. Judge Bybee noted that the majority misread *Roberts* and misunderstood the "critical" distinction making Sarausad's instruction consistent with state law.

Pet. App. 101a-108a. "[T]he majority has no case law to support its proposition that an additional explicit statement is, or has ever been, required by Washington courts." Pet. App. 112a. Judge Bybee also noted the state courts had properly followed Supreme Court precedent because "the trial judge responded to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction." Pet. App. 111a (quoting *Weeks v. Angelone,* 528 U.S. 225, 234 (2000)).

The Ninth Circuit denied the State's petition for rehearing *en banc*. Pet. App. 1a. Judge Callahan wrote for the five judges who dissented from the denial of rehearing. Pet. App. 2a-30a. Judge Callahan noted the panel majority's failure to follow the Washington Supreme Court's binding precedent on state law resulted in the misinterpretation of Washington law. Pet. App. 3a-7a. Judge Callahan recognized that, by rejecting the very instructions approved by the Washington Supreme Court, the panel majority issued an opinion that directly conflicts with the decision of the Washington Supreme Court. Pet. App. 7a-14a. Judge Callahan also recognized that, after improperly disregarding the state court analysis of state law, the panel majority failed to give proper deference to the state court under the standards of 28 U.S.C. § 2254(d). Pet. App. 14a-30a. As Judge Callahan stated, the panel majority

> "not only misinterprets Washington law but also refuses to accord the Washington courts the required deference required by well established precedent and basic principles of

> federalism. By doing so, the panel majority elevates what it considers to be a Washington state court's mistake in interpreting Washington state law into a constitutional violation. As a result of our lack of deference, our court takes the unprecedented step of rejecting a standardized state jury instruction that the Washington Supreme Court has expressly approved as correctly stating the limits of accomplice liability under state law." Pet. App 2a.

REASONS FOR GRANTING THE PETITION

This Court should grant the writ of certiorari and reverse the decision of the Ninth Circuit for two reasons.

First, the Ninth Circuit disregarded the state court determination of state law that the instructions given in Sarausad's trial properly instructed the jury as to accomplice liability under Washington law. The state courts determined that the jury instructions in question, which mirrored the statute except for one word, fully and correctly set forth the elements of Washington's accomplice liability statute. The Ninth Circuit improperly rejected this state court determination of state law, and substituted its own judgment for that of the state court. Then, based on an erroneous view of state law, the Ninth Circuit found an ambiguity in the instructions that simply did not exist. As a result, the Ninth Circuit decision presents a substantial conflict with state court decisions addressing the identical statute and accomplice liability instruction.

Second, having misconstrued state law and the jury instructions, the Ninth Circuit compounded its error by failing to give proper deference to the state court adjudication of Sarausad's federal claim. Despite the fact that the jury instructions were correct under state law, the Ninth Circuit concluded the instructions were so ambiguous that there was a reasonable likelihood the jury misapplied the instructions so as to relieve the prosecution of the burden of proving every element of the crime. But the Ninth Circuit failed to recognize that the state court could reasonably apply federal law and reach a contrary conclusion. The Ninth Circuit failed to give the proper level of deference owed to the state court adjudication of Sarausad's claim under 28 U.S.C. § 2254(d). In this fashion, the Ninth Circuit decision conflicts in principle with controlling decisions of this Court and the rulings of other circuit courts.

A. THE NINTH CIRCUIT REJECTED THE STATE COURT DETERMINATION OF STATE LAW, AND REACHED A DECISION IN DIRECT CONFLICT WITH THE DECISION OF THE WASHINGTON SUPREME COURT.

The Ninth Circuit found ambiguous the jury instructions on accomplice liability. However, it reached this conclusion only by disregarding the state court determination that the judge had correctly instructed the jury by giving the instructions approved by the Washington Supreme Court. By rejecting this determination of state law, the Ninth Circuit entered a decision in direct conflict with the decision of the Washington Supreme Court.

1. The Court has repeatedly emphasized "that 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 (1991). "[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). The federal courts "are not at liberty to depart from the state appellate court's resolution of these issues of state law." *Hicks v. Feiock*, 485 U.S. 624, 629 (1988). A federal court errs if it disregards the state court's authoritative interpretation of state law. *Bradshaw*, 546 U.S. at 78.

The elements of state crimes are defined by state law. *See Patterson v. New York*, 432 U.S. 197, 210 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986); *Martin v. Ohio*, 480 U.S. 228, 232 (1987). As a result, "[s]tate judges are more familiar with the elements of state offenses than are federal judges." *Jackson v. Virginia*, 443 U.S. 307, 336 n.9 (1979) (Stevens, J., concurring in judgment). The federal courts "usually walk on treacherous ground when we explore state law, for state courts, state agencies, and state legislatures are its final expositors under our federal regime." *Brady v. Maryland*, 373 U.S. 83, 90 (1963) (footnote omitted). Since the elements of a state crime are established by state law, and the state courts are the ultimate expositors of state law, the state courts necessarily have the final word as to what constitutes the elements of a crime under a state statute. *Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975); *Martin*, 480 U.S. at 235. The state court determination that an

instruction correctly sets forth all the elements of a state crime is a determination of state law binding on federal courts. *Bradshaw*, 546 U.S. at 76-78; *Mullaney*, 421 U.S. at 691.

2. Here, the state courts determined that the instructions given in Sarausad's trial fully and correctly set forth all of the elements of accomplice liability. The instructions mirrored the accomplice liability statute. The instructions differed from the statute only in that the statute used the word "it," while the instructions used the words "the crime." Compare Pet. App. 270a-271a with 274a. The pattern instructions given in Sarausad's trial had been approved by the Washington Supreme Court prior to the trial in *Davis,* 101 Wash.2d at 656-59, and were cited with approval following the trial in *Roberts,* 142 Wash.2d at 509-13. In denying Sarausad's collateral challenge to his convictions, the state courts specifically determined the instructions given in Sarausad's trial were a correct statement of state law, that fully set forth all of the elements of accomplice liability. Pet. App. 190a-230a. As Judge Callahan noted in her dissenting opinion, "No Washington court has ever disapproved of a jury instruction that tracked the exact language of section 9A.08.020." Pet. App. 11a. "Every decision examining the jury instructions given in Sarausad's case, as well as [Wash. Rev. Code] § 9A.08.020, has determined that the instruction adequately and properly informs the jury of the intent necessary to find criminal liability under Washington law." Pet. App. 12a-13a. The instructions did not omit an element of the offense, create a presumption, reduce the burden of proof, or shift the burden to the

defendant. Pet. App. 15a. "Washington law clearly holds that the jury instruction in this case was a proper statement of Washington's accomplice liability law." Pet. App. 13a.

3. The panel, however, conducted its own analysis of Washington law. Misunderstanding state law and the decisions of the Washington Supreme Court, the panel opinion concluded that instructions 45 and 46 in Sarausad's trial were "very similar" to the instructions later held invalid by the Washington Supreme Court in *Roberts* because the instructions began with reference to "a crime." Pet. App. 69a-70a. This reasoning is deeply flawed because the *Roberts* court unambiguously approved of the pattern instructions, as given in Sarausad's trial. *See Roberts*, 142 Wash.2d at 513.

Contrary to the panel's reasoning, the term "a crime" in the introductory sentence of instructions 45 and 46 is correct under Washington law. The statute itself uses the term "a crime" in the introductory sentence of the definition of an accomplice. Wash. Rev. Code § 9A.08.020. The statute uses the term "a crime" because the statute has potential application to all crimes codified under Washington law. In other words, a person may potentially be an accomplice to any crime committed in the state of Washington if that person acted as an accomplice to the commission of "the crime." Wash. Rev. Code § 9A.08.020; *Roberts*, 142 Wash.2d at 509-13. To recognize application of accomplice liability to all crimes committed in Washington, the statute and the instructions necessarily state that a person can be guilty of "a crime" when he or she acts as an accomplice in the commission of "the crime." Wash.

Rev. Code § 9A.08.020(1), (2)(c), (3). Contrary to the Ninth Circuit's conclusion, the use of "a crime" in the introductory sentence on instructions 45 and 46 correctly set forth Washington law.

As Judge Bybee noted in his dissent to the panel's majority opinion, the erroneous use of the phrase "a crime" discussed in *Roberts*, 142 Wash.2d at 509-13, did not exist in Sarausad's instructions. As the Washington Supreme Court determined in denying review in Sarausad's collateral challenge, instructions 45 and 46 correctly set forth Washington law on accomplice liability because the instructions "correctly instructed the jury that it could convict Mr. Sarausad of murder or attempted murder as an accomplice only if it found he knowingly aided in the commission [of] 'the' crime charged." Pet. App. 191a. The conclusion that instructions 45 and 46 correctly instructed the jury as to accomplice liability under state law is binding on the federal courts. The Ninth Circuit erred by rejecting the state court determination of state law. *Estelle*, 502 U.S. at 68; *Bradshaw*, 546 U.S. at 76.

4. The misinterpretation of state law also shows the flaw in the panel's conclusions that the state court should have gone beyond the language of the statute. The Ninth Circuit believed the judge had to explicitly instruct the jury that "an accomplice must have knowledge of the actual crime the principal intends to commit." Pet. App. 69a. But the Washington courts have held the accomplice need not share the same mental state as the principal, or have specific knowledge of every element of the crime committed by the principal. Pet. App. 201a-202a (citing *Roberts*, 142 Wn.2d at 513; *Cronin*, 142 Wn.2d

at 579). The instruction proposed by the Ninth Circuit exceeds the elements of accomplice liability under state law. For that reason alone, the Ninth Circuit's reasoning is deeply flawed.

The Ninth Circuit mistakenly believed an explicit statement beyond the plain language of the statute was necessary in light of this Court's decisions in *Staples v. United States*, 511 U.S. 600 (1994), *Ratzlaf v. United States*, 510 U.S. 135 (1994), and *Liparota v. United States*, 471 U.S. 419 (1985). But these cases dealt with the proper construction of federal statutes, not with the requirements of constitutional due process. *Staples*, 511 U.S. at 604-09; *Ratzlaf*, 510 U.S. at 138-49; *Liparota*, 471 U.S. at 423-34. The cases did not clearly establish a rule of constitutional law, binding upon the state courts, that requires the explicit statement found lacking by the Ninth Circuit.

The burden to demonstrate a constitutional error entitling a petitioner to habeas relief is especially heavy where the claim of error is based not upon an erroneous instruction, but upon "the failure to give any explanation beyond the reading of the statutory language itself. . . ." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). Washington law did not require anything more than the instructions given at Sarausad's trial. Pet. App. 112a (Bybee, J., dissenting) ("the majority has no case law to support its proposition that an additional explicit statement is, or has ever been, required by Washington courts."). To convict Sarausad as an accomplice, Washington law required only that the jury find he acted with knowledge that his conduct would promote or facilitate "the crime" for which he was

charged. Pet. App. 201a-206a (citing *Roberts*, 142 Wash.2d at 513; *Cronin*, 142 Wash.2d at 579). The prosecution did not have to prove that Sarausad had specific knowledge of every element of the crime committed by the principal, Ronquillo. Pet. App. 202a. The prosecution did not have to prove Sarausad knew Ronquillo had the kind of culpability required for any particular degree of murder. Pet. App. 202a-204a. Washington law required only that Sarausad knew generally that he was facilitating a homicide. Pet. App. 204a-205a.

As the Washington courts determined, the instructions given in Sarausad's trial correctly informed the jury of the elements for determining accomplice liability. Nothing more was required. Because the Ninth Circuit disregarded the Washington courts' authoritative interpretation of Washington law, the petition for certiorari should be granted. *Bradshaw*, 546 U.S. at 78.

B. THE REFUSAL TO ACCEPT THE STATE COURT DETERMINATION OF STATE LAW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS.

A federal court sitting in habeas must accept as binding the state court determinations of state law. *Bradshaw*, 546 U.S. at 78. The Ninth Circuit has refused to accept the rulings of the Washington Court of Appeals and Washington Supreme Court that the jury instructions given in Sarausad's trial correctly set forth the elements of state law governing accomplice liability. The Ninth Circuit's decision conflicts with the approach taken by other circuit courts in similar situations.

1. In *Jamerson v. Secretary for the Dept. of Corrections*, 410 F.3d 682, 688-89 (11th Cir. 2005), the defendant was convicted in the beating death of a man outside a party. *Id.* at 684-86. Similar to Sarausad, Jamerson contended the jury instructions and the judge's answers to jury questions erroneously permitted the jury to convict him of second degree murder without a finding that he possessed the required state of mind. *Id.* at 688. Similar to Sarausad, Jamerson contended that the instructions incorrectly stated that if the jury found him guilty of *any* crime, the jury could find him guilty of second degree murder. *Id.* The Eleventh Circuit rejected this claim, concluding the instructions correctly stated the law, and therefore did not violate due process. *Id.* In reaching this conclusion, the Eleventh Circuit, unlike the Ninth Circuit, accepted the state court determination, and did not conduct its own independent review of the instructions and Florida law.

2. In *Priester v. Vaughn*, 382 F.3d 394, 402 (3rd Cir. 2004), the Third Circuit rejected a similar challenge to an accomplice liability instruction because the state court had determined the instruction correctly set forth state law. Similar to Sarausad, Priester and fellow gang members drove in two cars to a local park intending to confront individuals who had attacked one of their friends. *Id.* at 396. Like Sarausad, Priester drove one of the cars, and at one point along the way, Priester pulled alongside the other car containing his fellow gang members, and said, "When we get up there, no questions asked, start busting." *Id.* When Priester and his fellow gang members found their target, Priester handed a gun to another gang member. *Id.*