No. 07-772

No. 07-8829

IN THE SUPREME COURT
OF THE UNITED STATES

DOUG WADDINGTON,
Petitioner/Cross-Respondent,

v.

CESAR SARAUSAD,
Respondent/Cross-Petitioner.

SARAUSAD'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. RESTATEMENT OF QUESTION PRESENTED

Waddington's question presented assumes that the Ninth Circuit disagreed with the Washington courts on whether the accomplice liability instructions correctly stated Washington law. In fact, the Ninth Circuit accepted that the instructions tracked the language of the accomplice liability statute, and accepted the definitive interpretation of that statute provided by the Washington Supreme Court. Unfortunately, that interpretation came *after* Sarausad's trial and in a different case. The Ninth Circuit concluded that Sarausad's jury likely did not understand the law based on the following:

1. The prosecutor frankly argued an incorrect interpretation of accomplice liability to the jury, while the defense attempted to argue a correct interpretation.

2. The jury three times informed the trial court that it was confused on this critical issue, but the trial court refused to clarify the statutory language.

3. On direct appeal, the Washington Court of Appeals incorrectly interpreted the statutory language, leading it to conclude that the trial prosecutor's argument was correct.

4. Any evidence supporting conviction based on a valid theory of accomplice liability was either "thin" (according to the Ninth Circuit majority) or "nonexistent" (according to the concurrence).

On the unique facts of this case, the Ninth Circuit correctly found that relief was justified under 28 U.S.C. § 2254. Thus, there is no issue that could merit review by this Court.

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II. OPINIONS BELOW

Petitioner Waddington has correctly set out the opinions below.

III. JURISDICTION

Petitioner Waddington has correctly invoked this Court's jurisdiction.

IV. STATEMENT OF THE CASE

It is undisputed that Cesar Sarausad was driving his car when a passenger, Brian Ronquillo, suddenly pulled out a gun and shot into a group of students, killing one while attempting to kill two others. Waddington suggests that Sarausad drove to the scene "with knowledge" that Ronquillo "was armed and going to shoot." In fact, there was little or no evidence to support an inference that Sarausad knew of Ronquillo's intentions or even that Ronquillo was armed. Sarausad – and all of the State's witnesses – testified that the only plan was to confront a rival group of boys, yell at them, and perhaps engage in some pushing and shoving as they had done before. The facts are set out in detail in Sarausad v. Porter, 479 F.3d 671 (9th Cir. 2007), and in Sarausad's Conditional Cross-Petition. Judge Fletcher, writing for the Ninth Circuit majority, viewed the evidence that Sarausad knew of Ronquillo's murderous intentions as "thin." Pet. App. 52a. Judge Reinhardt, in concurrence, viewed it as "non-existent." Pet. App. 80a.

Sarausad's jury was instructed in the language of Washington's accomplice liability statute, Wash. Rev. Code § 9A.08.020:

> 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 trial prosecutor argued that, under this instruction, Sarausad was guilty even by his own testimony because he became Ronquillo's accomplice by agreeing to participate in *any* illegal activity. She repeatedly characterized this theory of accomplice liability as "in for a dime, in for a dollar." The defense argued that Sarausad could not be guilty of murder or attempted murder unless he knew that Ronquillo would commit those particular crimes.

Three times the jury sought clarification on this central issue. Although the defense asked the trial court to respond with further instructions, the court instead referred the jurors back to the instructions already given. The third question, which came on the *seventh* day of deliberations, reads as follows:

> We are having difficulty agreeing on the legal definition and concept of "accomplice."
>
> Question: When a person willing[ly] participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?

Pet. App. 60a-61a. Shortly after the trial court told the jurors to once again re-read their instructions, the jurors returned a verdict finding Sarausad guilty of second-degree murder, two attempted second-degree murders, and second-degree assault.

In his motion for a new trial, Sarausad attached statements from some of the jurors confirming that they were confused about accomplice liability and that they did not truly believe that Sarausad knew of Ronquillo's intentions. They described their own verdict as a "grave injustice."

On direct appeal, the Washington Court of Appeals considered "Sarausad's challenge to current judicial interpretation of Washington's accomplice liability statute . . . a theory of criminal liability that in Washington has been reduced to the maxim, 'in for a dime, in for a dollar.'" Pet. App. 234a-235a. It acknowledged that the trial prosecutor made such an argument. "During closing argument, the State labeled Sarausad a classic accomplice, and declared that the law in Washington is 'if you're in for a dime, you're in for a dollar.'" Pet. App. 256a. The Court rejected Sarausad's arguments, finding that the prosecutor correctly stated Washington law. Pet. App. 258a-263a. "[I]t was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gunplay that day." Pet. App. 266a.

Shortly thereafter, the Washington Supreme Court rejected this interpretation of the law, clarifying in two other cases that accomplice liability attaches only when the alleged accomplice knew he was promoting or facilitating the *same* crime for which he was charged. State v. Cronin, 142 Wn.2d 568, 14 P.3d 752, 758 (2000); State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000).[1]

Sarausad then filed a postconviction petition, relitigating the accomplice liability issue in view of Cronin and Roberts.

> Although Sarausad raised these same issues in the direct appeal, he points out, and correctly so, that this court decided that appeal on the premise that "in for a dime, in for a dollar" correctly characterized Washington accomplice liability law.

[1] There is no dispute that Sarausad may rely on the decisions in Cronin and Roberts. The Washington Supreme Court views those decisions as correctly stating the law as it existed ever since the accomplice liability statute was enacted. See In Re Domingo, 155 Wn.2d 356, 119 P.3d 816, 821 (2005).

Pet. App. 201a. In fact, Sarausad could not properly have been convicted of murder unless he knew that he was assisting in some form of homicide. Pet. App. 204a. Waddington concedes that to be a correct statement of Washington law. Petition at 10.

> Thus, when we concluded in the direct appeal that "it was not necessary for the State to prove Sarausad knew Ronquillo had a gun, or knew that there was a potential for gun play that day" we erred. Under Roberts, that is exactly what the State had to prove.

Pet. App. 205a. Nevertheless, the Court of Appeals somehow concluded that the State was not relieved of its burden of proof at trial. It managed this, in part, by coming up with a new interpretation of the trial prosecutor's "in for a dime, in for a dollar" argument. Pet. App. 208a-215a. The Court acknowledged that the jurors were confused about accomplice liability, but apparently viewed that as irrelevant since – in the Court's view – the confusion was not caused by incorrect instructions or improper argument. Pet. App. 215a. The Washington Supreme Court denied review of the Court of Appeals decisions in the direct appeal and in the postconviction proceedings.

On federal habeas review, the district court granted relief on two grounds: 1) the evidence was insufficient to support the convictions; and 2) the State was relieved of its burden of proving all elements of accomplice liability. Pet. App. 125a-133a. On appeal, the majority of the Ninth Circuit panel reversed as to the first ground but affirmed as to the second. Sarausad v. Porter, 479 F.3d 671 (9th Cir. 2007). Pet. App. 31a-124a.

The panel majority set out the standard of review under 28 U.S.C. § 2254 and discussed this Court's cases interpreting it. Pet. App. 37a-39a. Though the evidence in support of Sarausad's convictions "was somewhat thin" and "circumstantial," the majority rejected

Sarausad's sufficiency claim. Pet. App. 53a (the Washington court "was not 'objectively unreasonable' in concluding that the Jackson[2] standard was satisfied.").

The Ninth Circuit then turned to Sarausad's claim that the jury instructions, the prosecutor's closing argument, and the trial court's failure to address the jurors' expressed confusion, relieved the State of its burden of proof. As the panel recognized, this Court has clearly established that the Due Process Clause requires every element to be proved beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). This Court has applied that principle to jury instructions that have the effect of relieving the State of its burden of proof. Sandstrom v. Montana, 442 U.S. 510 (1979). The standard for reviewing ambiguous instructions is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Estelle v. McGuire, 502 U.S. 62 (1991) (citations and internal quotations omitted). This Court has noted that, while "arguments of counsel generally carry less weight with a jury than do instructions from the court," they may sometimes "have a decisive effect on the jury." Boyde v. California, 494 U.S. 370, 384 (1990). See Sarausad v. Porter, Pet. App. 53a-55a.

Tracking the requirements set out by this Court in Estelle, the Ninth Circuit first addressed whether the jury instructions in this case were ambiguous and, then, whether "in the context of the instructions as a whole and trial record" there was a "reasonable likelihood" that the jury applied the instructions in a way that violated the Constitution. Sarausad v. Porter, Pet. App. 68a.

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[2] Jackson v. Virginia, 443 U.S. 307, 318 (1979).

The Ninth Circuit found the instructions ambiguous for three reasons. First, the instructions never explicitly stated that the accomplice must have knowledge of the actual crime committed by the principal. The instructions stated that a person is guilty of "a crime" if he is an accomplice to "the crime" but nowhere specified whether the articles "the" and "a" referred to the crime of which the accomplice had knowledge or the crime that the principal happened to commit. Second, the Washington Supreme Court held that a very similar instruction in Roberts allowed the jury to improperly convict based on the "in for a dime, in for a dollar" theory. The panel recognized that the instruction in Roberts – unlike in Sarausad's case – differed slightly from the statutory language, but noted that changing a single word from "a" to "the" hardly cleared up the confusion. "Third, and perhaps most revealing, the Washington Court of Appeals on direct appeal held that the instructions given in Sarausad's case were consistent with the Washington statute, and that both the instructions and the statute were based on the 'in for a dime, in for a dollar' theory of accomplice liability." [3] If the judges on the Washington Court of Appeals could interpret the accomplice liability statute in Sarausad's case to permit conviction even if Sarausad did not know that Ronquillo planned to kill, then obviously the laypeople on the jury could do the same. The panel was "hard pressed to read the instructions as unambiguously instructing the jury to do precisely the opposite." Pet. App. 69a-72a.

> The Washington courts have had serious difficulty parsing the Washington accomplice liability statute's knowledge requirement, at times holding that it permits an "in for a dime, in for a dollar" theory, and at times holding the opposite. The jury instructions in Sarausad's case, which essentially tracked the statutory language, were no less confusing than the statute itself."

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[3] The Washington Court of Appeals confirmed in In re Smith, 117 Wn. App. 846, 857, 73 P.3d 386 (2003) that Cronin and Roberts changed its understanding of accomplice liability.

Pet. App. 74a.

The Ninth Circuit then found, for four reasons, a likelihood that this ambiguity led the jury to misapply the instruction in Sarausad's case. First, "the jury convicted Sarausad despite the thin evidence that Sarausad knew of Ronquillo's intent to commit murder," suggesting "that the jury incorrectly believed that such proof was not required." Second, "the prosecutor argued clearly and forcefully for the 'in for a dime, in for a dollar' theory of accomplice liability." Third, the jury expressed substantial confusion about accomplice liability in its questions to the trial court, yet the court provided no assistance. Fourth, after the Washington Supreme Court clarified the law in Roberts and Cronin, the Washington Court of Appeals was able to deny Sarausad's postconviction petition only by misstating the record. Pet. App. 74a-78a.

Because it was so obvious that Sarausad's jury was confused about the requirements for accomplice liability, the Ninth Circuit had little difficulty concluding that the state court's decision to the contrary was an unreasonable application of the U.S. Supreme Court's holdings in Winship, Sandstrom and Estelle. Pet. App. 79a. Further, because Sarausad's only defense was that he did not know that Ronquillo planned to commit murder, the error clearly had a "substantial or injurious effect or influence in determining the jury's verdict." Pet. App. 78a, quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

V. REASONS WHY THE PETITION SHOULD BE DENIED

A. THE NINTH CIRCUIT DID NOT REJECT THE WASHINGTON COURTS' INTERPRETATION OF ITS OWN LAW

Waddington's arguments all flow from the premise that 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." Petition at 17. In fact, as discussed above, the Ninth Circuit accepted that the instructions tracked the language of the relevant statute, and accepted the Washington Supreme Court's definitive interpretation of the statutory language.

Waddington interprets the Washington Supreme Court's analysis in Roberts and Cronin to turn solely on the jury instructions using the article "a" before the word "crime" whereas the accomplice liability statute used the article "the." See Petition at 20-21. In fact, the central issue before the Washington Supreme Court was whether the *statutory* language created strict liability for all crimes committed by the principal or only liability for crimes of which the accomplice had knowledge. See Roberts, 142 Wn.2d at 510-13; Cronin, 142 Wn.2d at 578-79.[4] In both cases, the King County Prosecutor (the same office that prosecuted Sarausad) argued to the Washington Supreme Court that the statute created strict liability. Roberts at 509; Cronin at 578 (in the prosecutor's view "accomplice liability attaches so long as the defendant knows that he or she is aiding in the commission of *any* crime"). Further, as in Sarausad's case, the trial prosecutors in Roberts and Cronin told the jury that they need not prove that the defendant knowingly assisted in the crime charged. Roberts at 506 (prosecutor argued that Roberts could be convicted even if he planned only to silence victim by tying him to a chair and taping his mouth, while Cronin decided to kill victim); Cronin at 576 (prosecutor argued that Cronin could be guilty of Roberts's murder if he agreed to aid in any "assaultive behavior;" Cronin was "in for a dime, in for a dollar").

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[4] Roberts and Cronin were codefendants in the same aggravated murder case. The two decisions issued on the same day.

Similarly, in In re Swenson, 154 Wn.2d 438, 452-55, 114 P.3d 627 (2005)[5], the *same* deputy King County prosecutor who tried Sarausad's case argued at trial that the defendant was guilty of his codefendant's murder if he agreed to assist in any crime, including theft. She repeatedly characterized that principle as "in for a dime, in for a dollar." Id. at 452. As in Sarausad's case, the Washington Court of Appeals rejected Swenson's claim because it did not have the benefit of Roberts and Cronin. See Swenson, 154 Wn.2d at 455-56. Unlike in Sarausad's case, the Washington Supreme Court took review and reversed. Swenson, 154 Wn.2d at 456.[6]

In Roberts, Cronin, and Swenson, the King County prosecutors argued an incorrect interpretation of accomplice liability at trial and on direct appeal. They made these arguments *after* convicting Sarausad. Ironically, the State now contends that Sarausad's jurors could not have interpreted the statutory language in the same way that the State itself did at the time.

As further evidence that the statutory language is ambiguous, four Justices of the Washington Supreme Court dissented in Cronin. In their view, the statute, and prior case law interpreting it, permitted an accomplice to be convicted of crimes other than those in which he knowingly participated. Cronin, 142 Wn.2d at 586-91.

To be sure, the fact that the jury instructions in Roberts and Cronin slightly altered the statutory language was *one* factor in deciding whether the jurors misunderstood the law. The Washington Supreme Court focused more, however, on the same factors at issue in this case: the

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[5] Consolidated with State v. Evans.

[6] The Washington Supreme Court did later note, however, that the Washington Court of Appeals' decision in Sarausad's case was inconsistent with the holdings in Roberts and Cronin. See In re Domingo, 155 Wn.2d at 367-68 n.7

prosecutor's arguments to the jury, questions send out by the jurors, and the trial court's inadequate response to the questions. See, e.g., Cronin, 142 Wn.2d at 580-81[7]. It is absurd to suggest that changing a single "a" to "the" will invariably clear up any confusion. As the discussion above shows, the meaning of the statutory language is hardly self-evident even when the correct article is used.

Waddington further misstates the Ninth Circuit's opinion by suggesting that it imposed some duty on the Washington courts to give, in all cases, further clarifying instructions beyond the statutory language. In fact, the Ninth Circuit merely noted in passing that the trial court could easily have cleared up the jurors' expressed confusion in this case with a brief, clarifying instruction. Sarausad v. Porter, Pet. App. 69a-70a. (Most likely, the trial court declined to clarify because it too was confused about the state of the law.)

Waddington contends that the Ninth Circuit's decision conflicts with Henderson v. Kibbe, 431 U.S. 145 (1977), but that case is readily distinguishable. In Henderson, the New York trial court instructed the jury that the defendant could be guilty of murder only if his reckless conduct caused the victim's death. The defense did not request further clarification regarding causation and the jury sent out no questions. Kibbe later sought habeas relief because the jury was not expressly told that, under New York case law, causation required forseeability. This Court declined to find constitutional error based on the failure to give an instruction that was not even requested. Id. at 154. Further, the petitioner's suggestion that an additional instruction could have affected the verdict was "too speculative" Id. at 157. It based that on "[a] fair evaluation of the omission in the context of the entire record." Id. at 156. Among other

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[7] All three of these factors applied to defendant Bui, whose case was consolidated with Cronin's.

things, the lawyers for both sides assumed that the State must prove forseeability and made appropriate arguments that the death was or was not foreseeable. Id. at 148-49. Sarausad, of course, is not contending that the instructions given in his case would, in and of themselves, give rise to a constitutional violation. He is relying on clear, non-speculative, evidence that the jurors did not understand the burden of proof.

B. THERE IS NO CONFLICT WITH OTHER CIRCUITS

Once again, Waddington begins with the mistaken premise that the Ninth Circuit refused to accept the state courts' interpretation of state law. Petition at 23. Had the Ninth Circuit truly done that, then obviously its decision would have conflicted not only with that of other circuits but also with controlling authority from this Court.

What Waddington has actually presented is a few cases from other circuits dealing with claims somewhat similar to Sarausad's but denying relief. There is no reason to believe, however, that the Ninth Circuit would have decided those cases any differently than did the Third, Tenth, or Eleventh Circuits. Each case dealt with factual and legal issues readily distinguishable from those is this case.

In Jamerson v. Secretary for the Dept. of Corrections, 410 F.3d 682 (11th Cir. 2005), the petitioner contended that the jury instructions, the juror's questions, and the trial court's answers to them, relieved the State of its burden of proving all elements of accomplice liability. Contrary to Waddington's summary, the Eleventh Circuit did *not* rule that such a claim was precluded whenever the instructions given were a correct statement of the law. Rather, after concluding that the instructions were correct, the Court went on to "consider the questions of the jury and the answers provided by the trial court." Id. at 689. When viewing the entire proceedings "as a

whole" and considering the challenged instructions "in context" the Court found no due process violation. Id. at 689-90. Unlike in Sarausad's case, the trial court in Jamerson did respond to the juror's questions with further clarification. Id. at 685. Further, there was no suggestion in Jamerson that the trial prosecutor argued an incorrect interpretation of the law or that the lower Florida courts misunderstood the law at the time of Jamerson's trial.

In Priester v. Vaughn, 382 F.3d 394 (3d Cir. 2004), the petitioner contended that his lawyer was ineffective in failing to object to the accomplice liability instructions. Priester maintained that the instructions misstated the elements under Pennsylvania law. That argument failed because the Pennsylvania Supreme Court held in another case that the same instructions did correctly state the elements. Id. at 401-02. Unlike Sarausad, Priester never contended that he was convicted on a theory *contrary* to the one ultimately approved by the state courts.

The remaining cases cited by Waddington all stand for the same unremarkable proposition: state courts are the final arbiters of the elements of state crimes. In Rael v. Sullivan, 918 F.2d 874 (10th Cir. 1990), for example, the petitioner claimed he was improperly convicted of extortion because the State never proved all the elements. Mr. Rael threatened to harm a mental health counselor unless she gave him a copy of his evaluation. Id. at 874-75. The State conceded that Rael had a right to the evaluation, id. at 875, a fact which would have precluded an extortion charge under the law of many jurisdictions, id. at 877. However, because New Mexico did not require the defendant's objective to be wrongful, Rael's claim failed. Id. at 876.

None of the cases cited by Waddington dealt with the issue presented here: a conviction based on a legal theory *inconsistent* with state law.

C. THE NINTH CIRCUIT DID NOT FAIL TO GIVE PROPER DEFERENCE TO THE STATE COURT ADJUDICATION OF FEDERAL LAW

It is true that "[T]he Ninth Circuit found a reasonable likelihood that the jury misapplied the jury instructions so as to relieve the prosecution of the burden of proving every element beyond a reasonable doubt." Petition at 26. Once again, however, Waddington assumes that the Ninth Circuit's decision was based *solely* on the wording of the jury instructions. Id. at 26-27.

The Ninth Circuit expressly acknowledged AEDPA's deferential standard of review. Sarausad v. Porter, Pet. App. 37a-39a. As this Court has emphasized, however, "deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

Waddington complains in particular that the Ninth Circuit substituted its judgment for that of the state courts about whether the trial prosecutor misstated the law in her closing argument. In Waddington's view, this was a determination of state law binding on the federal courts. Petition at 29-30. The question, however, is not whether a strict liability theory is correct under Washington law. Both sides agree that it is not. The question is whether the jury may have understood the prosecutor to be arguing for strict liability. Federal courts are free to consider whether a prosecutor's argument may have confused the jury. See Penry v. Johnson, 532 U.S. 782, 802 (2001) ("the prosecutor effectively neutralized defense counsel's argument" concerning interpretation of jury instruction); Simmons v. South Carolina, 512 U.S. 154, 162 (1994) (prosecutor's argument increased likelihood that jury would mistakenly interpret jury instruction's reference to a "life" sentence to include the possibility of parole); Richardson v. Marsh, 481 U.S. 200, 211 (1987) (although jury was properly instructed that it could not consider codefendant Williams's confession against Marsh, Marsh might be entitled to relief on

remand because "the prosecutor sought to undo the effect of the limiting instruction by urging the jury to use Williams's confession in evaluating respondent's case"). The state court's decision is entitled to deference but is not definitive.

Here, the Ninth Circuit had ample reason to conclude that the Washington Court of Appeals' ultimate interpretation of the prosecutor's argument was unreasonable. For one thing, the Ninth Circuit's interpretation was actually the *same* as that of the Court of Appeals during the direct appeal. It was also the same as the Washington Supreme Court's understanding of the phrase "in for a dime, in for a dollar." See In re Swenson, 154 Wn.2d at 452; State v. Cronin, 142 Wn.2d at 576. The Ninth Circuit disagreed only with the new, tortured interpretation of the prosecutor's argument given later by the Court of Appeals during the postconviction proceedings in Sarausad's case.[8]

Further, as the Ninth Circuit noted, the Court of Appeals' new interpretation was "flatly contradicted by the record." Pet. App. 67a. In fact, "the prosecutor argued clearly, emphatically, and repeatedly that Sarausad could be convicted of accomplice liability for murder even if he believed that Ronquillo intended merely to commit assault." Id. Among other things, the prosecutor's argument included the following:

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

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[8] As noted above, the same trial prosecutor made the impermissible "in for a dime, in for a dollar" arguments in the trials of Sarausad and Swenson. She was no doubt surprised to learn that the meaning of the phrase changed from one trial to the other.

Pet. App. 67a (quoting trial transcript). It is impossible to reconcile that argument with the legal standard set out in Roberts and Cronin.

Waddington also argues that the jurors' confusion was surely cleared up by the trial court's admonition to re-read the instructions. Petition at 32.[9] If the Washington Court of Appeals could misread the same instructions, however, then obviously the jurors could as well. Further, the jurors repeatedly asked for clarification after being referred back several times to the same instructions, demonstrating that the instructions themselves did not clear up the confusion.

For these reasons, Waddington's reliance on Weeks v. Angelone, 528 U.S. 225 (2000), is misplaced. In Weeks the jurors asked whether they were required to impose death if they found that the State had proved a sufficient aggravating factor. The judge referred the jurors to a specific and unambiguous paragraph of a jury instruction and the prosecutor did not argue an incorrect theory of the law. This Court concluded that the unambiguous instruction could be presumed to clear up the juror's confusion. Such reasoning cannot apply in this case when the prosecutor urged an incorrect interpretation of the instruction on the jury and a three-judge panel of the Washington Court of Appeals unanimously interpreted the instruction incorrectly as well.

Waddington's position seems to be that a petitioner can *never* raise a claim of juror confusion if the jury is instructed in the language of the relevant statute. That would be a novel and unfair rule. "Correct" jury instructions may nevertheless be confusing under some circumstances. See Simmons, 512 U.S. at 169-70 (although jury was correctly informed that alternative to death sentence was a sentence of "life," jury may not have understood that this

meant there was no possibility of release). As Washington's experience pointedly illustrates, the meaning of a statute is not always clear. In Sarausad's case, the trial prosecutor and three judges of the Washington Court of Appeals misinterpreted the statute. It is not surprising that the jurors could not understand it. It is true that the Washington Court of Appeals later corrected its interpretation of the law during the postconviction proceedings. But the issue here is not how the state appellate courts ultimately interpreted accomplice liability, but how the jurors may have understood it. See Sandstrom, 442 U.S. at 516-17 ("The Supreme Court of Montana is, of course, the final authority on the legal weight to be given a presumption under Montana law, but it is not the final authority on the interpretation which a jury could have given the instruction.").

Finally, Waddington argues that the Ninth Circuit improperly substituted its judgment for that of the State courts regarding the strength of the State's case. Petition at 30-31. However, "[a] federal court has the duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in state court." Jackson v. Virginia, 443 U.S. 307, 318 (1979). See also, Williams v. Taylor, 529 U.S. 362, 397-98 (2000) (finding state court's assessment of the strength of mitigating evidence to be unreasonable). As the Ninth Circuit carefully explained, many of the Washington Court of Appeals' comments about the facts of the case were simply not supported by any evidence in the record. See Sarausad v. Porter, Pet. App. 44a-50a.

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[9] Waddington knows that to be incorrect, since the jurors swore in affidavits that they did *not* understand accomplice liability and that their verdict was a mistake. Sarausad recognizes, as did the Ninth Circuit, that juror affidavits cannot be used to impeach a verdict. Waddington should not argue a position, however, that is factually false.

VI. CONCLUSION

The decision below presents no consideration that fits within the criteria set forth in Rule 10. The Ninth Circuit carefully applied this Court's precedent to the unique facts of Sarausad's case. There is no genuine split of authority between the circuits. Although Waddington contends that the Ninth Circuit erred, he does not suggest that this error would affect anything other than this particular case. Indeed, Waddington does not cite to any other jurisdiction that uses a similar jury instruction. The Ninth Circuit decision sets no controversial precedent, but merely requires the King County prosecutors to retry a single case. In view of the serious errors at Sarausad's trial, a retrial would hardly cause injustice.

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this ____ day of February, 2008.

_____

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