1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DOUG WADDINGTON, :

4 SUPERINTENDENT, :

5 WASHINGTON CORRECTIONS :

6 CENTER, :

7 Petitioner :

8 v. : No. 07-772

9 CESAR SARAUSAD. :

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11 Washington, D.C.

12 Wednesday, October 15, 2008

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14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 10:03 a.m.

17 APPEARANCES:

18 WILLIAM B. COLLINS, ESQ., Deputy Solicitor General,

19 Olympia, Wash.; on behalf of the Petitioner.

20 JEFFREY FISHER, ESQ., Stanford, Cal.; on behalf of the

21 Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first today in Case 07-772, Waddington v. Sarausad.

5 Mr. Collins.

6 ORAL ARGUMENT OF WILLIAM B. COLLINS

7 ON BEHALF OF THE PETITIONER

8 MR. COLLINS: Mr. Chief Justice, and may it

9 please the Court:

10 This case comes before the Court under the

11 deferential standard of review of the Antiterrorism and

12 Effective Death Penalty Act. The Ninth Circuit decision

13 should be reversed because the Washington court's

14 adjudication of this matter was not objectively

15 unreasonable. The Washington court concluded that the

16 instruction at issue properly informed the jury of the

17 elements of accomplice liability, and the prosecutor's

18 argument informed the jury that it could only convict

19 Sarausad if he acted with knowledge he was facilitating

20 the commission of a homicide.

21 The court also concluded that the trial

22 judge did not abuse his discretion in directing the jury

23 to reread the relevant instructions instead of giving

24 the supplemental instruction proposed by Sarausad. The

25 decision below was not an unreasonable application of

1 clearly established Federal law.

2 CHIEF JUSTICE ROBERTS: But you think it was

3 right?

4 MR. COLLINS: I do think it was right, Your

5 Honor, but I also believe that it was not objectively

6 unreasonable, which is the standard before this Court.

7 Turning to the PRP court's adjudication, the --

8 JUSTICE KENNEDY: First, is there some

9 constitutional minimum? Let's assume direct review. Is

10 there some constitutional minimum requirement for

11 scienter with reference to an accomplice?

12 MR. COLLINS: I believe there is, Your

13 Honor.

14 JUSTICE KENNEDY: What is it?

15 MR. COLLINS: You have to have knowledge

16 that you're facilitating -- you have to act and you have

17 to have knowledge, both those two points.

18 JUSTICE KENNEDY: Is that the same -- is

19 that the same as purpose?

20 MR. COLLINS: I think it is, Your Honor. I

21 think the model -- I think the Model Penal Code refers

22 -- uses the term "purpose" as opposed to "knowledge,"

23 but I don't think --

24 JUSTICE KENNEDY: Well, but you don't take

25 the position, do you, or do you, that Washington law

1 conforms to the Model Penal Code? I thought the Model
2 Penal Code was much more defendant-friendly than you're
3 stating.
4 MR. COLLINS: I believe that's correct, Your
5 Honor.
6 JUSTICE KENNEDY: So you're -- would --
7 would you say that the trial court in Washington states
8 law correctly if it says that being accomplice you have
9 to have a purpose to facilitate the commission of the
10 crime?
11 MR. COLLINS: I believe that you would have
12 to have -- you have to knowingly facilitate the crime,
13 Your Honor. That's the --
14 JUSTICE KENNEDY: But you agree there is a
15 difference in "knowing" and "purpose"?
16 MR. COLLINS: I'm not sure there is much of
17 a difference, Your Honor. Frankly, I haven't thought
18 about that question, but I think you have to have that
19 mental component. You have to either have purpose or
20 you have to do it with knowledge.
21 JUSTICE GINSBURG: But the question is
22 knowledge of what. And I thought it is now recognized
23 that in this State you have to know not just that a
24 crime -- you have to know in this case of the potential
25 for a homicide.

1 MR. COLLINS: That's right, Justice
2 Ginsburg. You have to know -- you have to act with
3 knowledge that you are facilitating a homicide.
4 JUSTICE SCALIA: Why just a homicide? What
5 was -- what was the indictment here? What was he tried
6 for?
7 MR. COLLINS: First degree -- a number of
8 counts, Your Honor. First degree murder, second degree
9 murder, attempted first degree murder, first degree
10 assault with a deadly weapon, because there was one
11 death and two people were shot -- wounded and then there
12 was --
13 JUSTICE SCALIA: Why wouldn't assault with a
14 deadly weapon suffice or, alternatively, why would you
15 have to know that it was first degree murder or second
16 degree murder? I don't know how you get from the text
17 of the Washington statute that all you have to know is
18 that it was a homicide?
19 MR. COLLINS: Because the statute refers to
20 "the crime," so you have to have knowledge that you're
21 facilitating a homicide, but you don't have to have
22 shared --
23 JUSTICE SCALIA: But -- but he wasn't
24 prosecuted for homicide. I mean, the crimes are much
25 more specific --

1 MR. COLLINS: Well --

2 JUSTICE SCALIA: -- first degree murder,

3 second degree murder.

4 MR. COLLINS: In Washington, you have to

5 have knowledge of the general crime that is homicide,

6 but you don't have to have the same knowledge as to

7 principle; therefore, you don't have to have knowledge

8 of premediation. You just have to have knowledge that

9 you're going to commit the general -- the general crime.

10 JUSTICE SCALIA: How does that appear from

11 the statute? If I read the statute, I would have

12 thought that you have to have knowledge that he was --

13 would negligent homicide suffice?

14 MR. COLLINS: You could be convicted of

15 manslaughter as an accomplice if you had knowledge of a

16 homicide. You have to have general knowledge of the

17 crime.

18 Let me give you another example. In the

19 Davis case, for example, this was a robbery case, and

20 the defendants agreed to do a robbery, but the person

21 who went into the store had a gun. The accomplice

22 didn't know that he had a gun, but still he was

23 convicted of armed robbery because he had a general

24 knowledge that robbery was going to be committed. On

25 the other hand, if the principal had shot the store

1 owner, the defendant would not be an accomplice to
2 murder if his only knowledge was that he was
3 facilitating the crime of robbery.
4 So you have to have knowledge that you're
5 facilitating the general crime charged. In this case
6 crimes charged were various kinds of homicides, first
7 degree murder, attempted murder. And in this case, the
8 record is very clear that the prosecutor argued that
9 Mr. Sarausad acted with knowledge that he was
10 facilitating a homicide. Therefore, the PRP court's
11 adjudication of that point is not objectively
12 unreasonable under the AEDPA standard.
13 JUSTICE GINSBURG: This is -- the
14 prosecutor's charge -- the prosecutor's charge was just
15 filled with the suggestion that as long as it was a
16 crime, that was sufficient. I don't find that what
17 you've said is an accurate description of the charge --
18 MR. COLLINS: Your Honor --
19 JUSTICE GINSBURG: -- of the prosecutor's
20 summation.
21 MR. COLLINS: Your Honor, the prosecutor
22 continually talked about the fact that they were going
23 there for the shooting. For example, in the -- the
24 joint appendix, the brown brief on page 123, the
25 prosecutor tells the jury when they rode down to Ballard

1 High School the last time, "I say they knew what they
2 were up to. Fists didn't work. Pushing didn't work.
3 Shouting insults didn't work. Shooting was going to
4 work. In for a dime, in for a dollar."
5 JUSTICE SOUTER: Yes, but isn't the problem
6 on your side of the case that there was another "in for
7 a dime, in for a dollar" argument and that was the
8 hypothetical holding the hands behind the back while
9 some third party slugged the victim? And on that
10 hypothetical, there was no reference to a definite
11 crime. In that hypothetical the victim was killed, and
12 under that hypothetical, there was no reference to the
13 crime, i.e., homicide, and so it seems to me that the
14 prosecutor's arguments, the dime-dollar arguments, went
15 both ways.
16 MR. COLLINS: I disagree, Your Honor. When
17 the prosecutor used the hypothetical, and in fact on
18 page 123 that I just quoted you, the prosecutor talks
19 about, in fact uses that dime for a dollar hypothetical,
20 and then immediately tells the jury that Mr. Sarausad
21 acted with knowledge that there was going to be a
22 homicide. They went --
23 JUSTICE SOUTER: Sure, in that case. But
24 there was another one in which the prosecutor didn't do
25 that.

1 MR. COLLINS: I'm sorry. Are you talking
2 about a different case, a case other than this, Justice
3 Souter?
4 JUSTICE SOUTER: I did -- maybe I dreamed
5 this. I thought the prosecutor also gave as a dime for
6 a dollar example the example of the individual, the
7 accomplice who holds a victim's hands while a third
8 party slugs the victim and in fact kills the victim.
9 And I thought in that hypothetical argument the
10 prosecutor was saying that the -- that the accomplice
11 was an accomplice to homicide, even though he didn't
12 know at the time the assault started that homicide was
13 intended or would result.
14 JUSTICE KENNEDY: It's toward the bottom of
15 page 123. And I have the same, I have the same, just
16 tieing onto Justice Souter's question, on the same
17 subject. It seems to me that that hypothetical is not
18 necessarily correct.
19 MR. COLLINS: The court, the PRP Court of
20 Appeals said that that hypothetical is problematic.
21 JUSTICE GINSBURG: What about the
22 instruction that follows the hypothetical, first the
23 statement that the person gets assaulted, gets killed,
24 in for a dime, in for a dollar? The law in the State of
25 Washington says if you're in for a dime you're in for a

1 dollar; if you're there or even if you're not there and
2 you're helping in some fashion to bring about this
3 crime, you are just as guilty, in some fashion. And
4 that was tied in to the person who thought he was
5 assisting in assault and it turns out that the victim
6 got killed.
7 MR. COLLINS: Justice Ginsburg, the
8 hypothetical may be problematic, but you have to
9 consider --
10 JUSTICE GINSBURG: But what about the
11 statement I just read, that the law of the State is you
12 don't even have to be there if you're helping in some
13 fashion.
14 JUSTICE SCALIA: Where is that? Is that in
15 the charge to the jury?
16 JUSTICE GINSBURG: Yes. It's in the same
17 paragraph, the paragraph with the example of the
18 accomplice who is --
19 JUSTICE SCALIA: It's not in the court's
20 charges.
21 JUSTICE GINSBURG: No. This is in the
22 summation.
23 MR. COLLINS: Justice Ginsburg, the
24 prosecutor's argument responds to the argument made by
25 Sarausad's counsel that you had to have shared intent,

1 that Mr. Sarausad had to have the same intent as the
2 principal. They do use the hypothetical about holding
3 the arms, but as soon as they finish the hypothetical
4 the court -- the prosecutor identifies what happened
5 here, which is that the intention was to facilitate a
6 homicide, and you have to take the argument as a whole
7 just looking at the hypothetical.
8 JUSTICE SOUTER: Well, if you take the
9 argument as a whole you've got at best an ambiguous
10 argument. You've got an argument that points to a "the
11 crime" interpretation and you've got an argument part of
12 which points to an "any crime" interpretation, and to
13 the extent that your case may ultimately turn on the
14 significance of the prosecutor's argument, it seems to
15 me that the benefit of the doubt goes to the defendant.
16 MR. COLLINS: Well, of course, Your Honor,
17 in this case my argument doesn't have to turn on that.
18 The question is whether this is an unreasonable
19 application and looking at the whole argument that the
20 prosecutor made, whenever the prosecutor used "dime for
21 a dollar" or that hypothetical, the prosecutor tied that
22 to shooting. Mr. Sarausad was going to --
23 JUSTICE SOUTER: Maybe I'm beating a dead
24 horse, but it seems to me that what we've brought in our
25 questions from the bench is that that is not correct.

1 In one instance the prosecutor clearly tied it to
2 shooting. If that's all we had before us we wouldn't
3 have an argument. But in the other iteration of the
4 dime-dollar argument, the prosecutor didn't tie it to
5 shooting.
6 MR. COLLINS: Your Honor, I believe the
7 prosecutor always tied it to shooting, and moreover
8 that's the way the defense counsel argued the case.
9 JUSTICE BREYER: Can you help me with this?
10 Suppose I'm a trial judge and I instruct the jury in a
11 technical matter, an important but technical matter, and
12 when they have questions about it I say read the
13 instruction. Suppose I'm right as far as the
14 instruction goes. But say the prosecutor gets everybody
15 mixed up. Now, I guess if the prosecutor gets people
16 mixed up enough, that could becomes a due process
17 violation. But I suspect that it has to be quite a lot
18 of mix-up, that intuitively is what I suspect. Are
19 there any cases I should look at, one that would tell me
20 how mixed up the prosecutor has to get everybody before
21 it's a due process violation?
22 MR. COLLINS: Well, Your Honor, Brown v.
23 Payton, which involved the Factor K in how you consider
24 mitigating evidence in the --
25 JUSTICE BREYER: In Brown, in that case did

1 they find that he did get them too mixed up or he
2 didn't?
3 MR. COLLINS: He didn't get them too mixed
4 up so.
5 JUSTICE BREYER: He did not. So unless in
6 this case the prosecutor got everybody more mixed up
7 than in the Brown case, we should just reverse.
8 MR. COLLINS: Exactly. Particularly --
9 JUSTICE GINSBURG: What about the appellate
10 court? I mean, the first time around the appellate
11 court was as mixed up, more so perhaps, than the
12 prosecutor.
13 MR. COLLINS: Well, Your Honor --
14 JUSTICE GINSBURG: Because the appellate
15 court the first time got it wrong and it thought it was
16 enough that the defendant knew that a crime was likely
17 to be committed, not the crime, crime specified in the
18 indictment, not -- not murder one, attempted murder, et
19 cetera, just a crime. And the second time around that
20 appellate court said, yeah, we got it wrong, now we know
21 we got it wrong because there has been an intervening
22 decision of the State's supreme court clarifying it.
23 But what the prosecutor said, at least as I
24 read it, more than once is exactly what the intermediate
25 appellate court said the first time around: Said he

1 didn't have to know that there was going to be a
2 shooting.
3 MR. COLLINS: Your Honor, the intermediate
4 appellate court did get it wrong the first time around.
5 But I think you have to consider the context, Your
6 Honor. The legal issue before the appellate court the
7 first time on accomplice liability was Mr. Sarausad's
8 claim that there had to be a shared intent, that is to
9 say you didn't have to know the crime. You had to have
10 --
11 JUSTICE GINSBURG: They say, the court
12 itself said: We got it wrong. We said go away
13 appellant because you knew that a crime was likely to be
14 committed.
15 MR. COLLINS: Your Honor, I think you have
16 to consider the context of the case. The argument that
17 the court of appeals was considering on direct review
18 was not the argument here. The question, the point that
19 you're looking at where the court said that it was not
20 necessary to prove shooting, the issue before the court
21 was Mr. Sarausad's claim that he was merely present,
22 that he didn't do anything. And the court of appeals
23 responded by saying no, there is evidence that you may
24 have known of the fight, you may have known of the
25 shooting. And then in what I would characterize as an

1 aside, the court said the State doesn't have to prove
2 shooting, but there is evidence of shooting.
3 JUSTICE SCALIA: Did -- hadn't other
4 Washington State courts made a similar error in their
5 interpretation of the Washington statutes?
6 MR. COLLINS: A few, a few court of appeals
7 decisions did misstate the standard, Justice Scalia,
8 that's correct.
9 JUSTICE SCALIA: And the same -- and hadn't
10 the prosecutors in Washington in misstating the standard
11 the same way and using "In for a dime, in for a dollar"
12 to mean precisely the wrong thing, namely that even if
13 you were in for beating him up that's enough for holding
14 you liable for homicide?
15 MR. COLLINS: Some prosecutors made that
16 argument, Justice Scalia.
17 JUSTICE SCALIA: Including this one in an
18 earlier case.
19 MR. COLLINS: That's right. But in Boyde
20 this Court pointed out that the fact that prosecutors in
21 other cases made improper arguments -- in Boyde
22 prosecutors were arguing about Factor K didn't allow
23 consideration of mitigation evidence.
24 JUSTICE SCALIA: The only reason I raise it
25 is, is to show that this jury was obviously perplexed on

1 the point. It asked for further instructions three
2 times on this precise point, what did -- did he have to
3 know. And all the trial judge did was say read, you
4 know, read my instructions, which essentially recited
5 the statute. And what all of what you've just
6 acknowledged shows is that reading the statute doesn't
7 help a whole lot. It doesn't clarify. It doesn't, it
8 doesn't correct any misimpression that the prosecutor
9 could have created.
10 MR. COLLINS: Justice Scalia, with respect,
11 I disagree that the same question was asked three times.
12 In fact, if you look at the progression of the
13 questions, you can see the progress of the
14 deliberations. The first question asks about intent
15 with regard to the two convict instructions 11 and 12.
16 JUSTICE SCALIA: Let's look at -- where is
17 that?
18 MR. COLLINS: That would be at JA 131 and
19 132.
20 JUSTICE SCALIA: In the white?
21 MR. COLLINS: I'm sorry. The brown joint
22 appendix 131, 132. And see "Request Clarification on
23 Instruction Nos. 11 and 12, Intent." Now, 11 and 12 are
24 the two "convict" instructions for first degree murder
25 for Mr. Recuenco and Mr. Sarausad. The next questions

1 that were asked -- this is on page 135 of the same
2 document -- they ask about Instruction No. 17.
3 JUSTICE STEVENS: Excuse me. Let's go back
4 to 131 for a minute. I thought that applied to the
5 "accomplice" instruction.
6 MR. COLLINS: The trial court directed the
7 --
8 JUSTICE STEVENS: That's a question
9 specifically applied to the defendant only for the
10 defendant or his accomplice.
11 MR. COLLINS: They asked about "accomplice,"
12 but the -- this was not a question about the meaning of
13 "accomplice liability." This question is different than
14 the third question.
15 CHIEF JUSTICE ROBERTS: It doesn't -- your
16 point is that it doesn't go to the "aiding" issue.
17 MR. COLLINS: Exactly, Your Honor.
18 JUSTICE SOUTER: Well, excuse me. "Intent"
19 is broad enough to go to the DA issue, isn't it?
20 MR. COLLINS: This question really goes to
21 if you look --
22 JUSTICE SOUTER: What's the answer to my
23 question? I mean "the" and "a" are references to what
24 the accomplice had in mind at the time of acting.
25 That's an intent issue.

1 MR. COLLINS: Your Honor -- it is an intent
2 question, Your Honor. But the question, if you look at
3 Instruction No. 12, which is on page -- page -- on page
4 9 of the brown book, this talks about the fact that in
5 paragraph 2, that the defendant or his accomplice acted
6 with intent to cause the death of another person. So
7 the question was: Did both -- do you have to have the
8 same intent as -- does the accomplice have to have the
9 same intent as the principal?
10 JUSTICE GINSBURG: Maybe so. Let's go to
11 the third question, when the jury asks: "When a person
12 willingly participates in a group activity, is that
13 person an accomplice to any crime committed by anyone in
14 the group?"
15 MR. COLLINS: Yes, Your Honor.
16 JUSTICE GINSBURG: How could the jury better
17 express its puzzlement? It wanted to know, if someone
18 participates in a group, but did not -- that that person
19 is -- is an accomplice to any crime by anyone?
20 MR. COLLINS: And that, Justice Ginsburg --
21 and that's the first time that the jury asked that
22 question. The trial court referred them to the
23 accomplice liability instruction and the knowledge --
24 and the knowledge instruction and --
25 JUSTICE GINSBURG: And the -- the counsel

1 for the defense says, tell them no.

2 MR. COLLINS: And that would have been

3 wrong, Your Honor. If -- if the trial judge -- there

4 are two things wrong with that -- wrong, Your Honor.

5 First of all, it would not have been accurate because

6 you don't know what the group activity is, and you don't

7 know what the knowledge is. If the knowledge of the

8 group activity was going back to the school to

9 facilitate a crime --

10 JUSTICE GINSBURG: It says "a group

11 activity." When a person willingly participates in "a

12 group activity," is that person an accomplice to any

13 crime committed by anyone in the group? I don't think

14 there is any ambiguity in that question.

15 MR. COLLINS: With respect, Your Honor, I

16 think you have to know what the group activity is. More

17 -- but the important point is: The jury got the answer

18 to the question and --

19 JUSTICE GINSBURG: They didn't get an

20 answer. They were told to read an instruction that they

21 had been told three times to read and obviously didn't

22 understand.

23 MR. COLLINS: Your Honor, I think in the

24 Weeks case this Court has held that it's proper to tell

25 a jury to reread instructions. They are not required to

1 give a supplemental instruction.
2 JUSTICE GINSBURG: But we already know that
3 many people, prosecutors, justices, misunderstood this
4 "a crime." Was it "a crime," or "any crime." Or "the
5 crime"?
6 So I think you can't avoid the confusing
7 nature of the statute and the charge, which repeated the
8 statute. It doesn't get clarified until the Washington
9 Supreme Court says it means "the crime," not "a crime,"
10 and not "any crime."
11 MR. COLLINS: Your Honor, we are not arguing
12 that there couldn't be some ambiguity, but what we are
13 saying is that the adjudication by the PRP court was not
14 objectively unreasonable. Because when you look at the
15 instructions as a whole and the argument as a whole and
16 the evidence as a whole, the PRP court's decision is not
17 objectively unreasonable.
18 JUSTICE SOUTER: Well, isn't -- isn't the
19 argument for objective unreasonableness, number one, to
20 begin with, what you just stated. Of course, there is
21 some ambiguity there. I'll be candid to say that if I
22 were stating it myself, I would say there is more than
23 some ambiguity here. It seems to be, if not misleading,
24 at least incapable of informing a jury of exactly what
25 the law is.

1 Number two, the -- the second point in the
2 argument is, the jury comes back repeatedly, and
3 although, as you point out, it is -- it may well be a
4 proper answer to a jury request for clarification to
5 say, go back and read the instruction; the answer is
6 there. When it has been demonstrated by repeated jury
7 questions that they are just not getting it, that they
8 still have perplexity, the court has got to do something
9 more than just say, oh, go back and do it again.
10 And number three, in this situation in which
11 there is ambiguity, there is a demonstration of jury
12 confusion. There is an argument by the prosecutor
13 which, in fact, is a two-part argument or a two-example
14 argument and it cuts both ways, isn't it objectively
15 reasonable to say under those circumstances that there
16 was an inadequate instruction to the jury in -- in the
17 correct Washington law?
18 MR. COLLINS: I would say no, Your Honor.
19 JUSTICE SOUTER: Then -- then what would it
20 take?
21 JUDGE SCALIA: You -- you know, you are
22 taking on more of a burden than you have to. And you
23 could say, yes, it would be reasonable to say that, but
24 it would also be reasonable to say -- to say otherwise,
25 right?

1 MR. COLLINS: It's not objectively
2 unreasonable.
3 JUSTICE SCALIA: It's not objectively
4 unreasonable to say the opposite.
5 MR. COLLINS: Exactly, Your Honor.
6 JUSTICE SOUTER: The -- the "opposite" in
7 this case would mean that the jury was properly
8 instructed and was in a position adequately to
9 understand Washington law correctly? That's the --
10 that's the opposite position.
11 MR. COLLINS: There is no question that in a
12 number of --
13 JUSTICE SOUTER: I want to know what you
14 mean. That's what you mean by the "opposite position"?
15 MR. COLLINS: I mean the "opposite position"
16 is it's possible that if you are --
17 JUSTICE SOUTER: Would you -- you are saying
18 you want -- why don't you answer my question? My
19 question is: I think you're telling me that it would be
20 objectively reasonable to say that on the scenario I
21 just laid out the jury probably understood Washington
22 law correctly.
23 MR. COLLINS: And I would say I think that's
24 correct, Your Honor.
25 CHIEF JUSTICE ROBERTS: But even, again, I

1 think you are taking on too high a burden. You don't
2 have to show that the jury properly understood it. You
3 don't even have to show that it's reasonable.
4 You have to show the opposite -- or your friend has to
5 show the opposite, that there is no way that the jury
6 could have understood this correctly or applied the
7 correct constitutional law. That is, if there is a way,
8 then it's -- it's not objectively unreasonable.
9 MR. COLLINS: That's exactly right, Chief
10 Justice Roberts.
11 JUSTICE SOUTER: And that way would be the
12 way we just set out, wasn't it: That the jury, if -- if
13 -- if, in fact, it's objectively reasonable to conclude
14 that the jury did understand Washington law correctly on
15 those circumstances, then -- then the -- the Respondent
16 here cannot win in -- in his collateral attack?
17 MR. COLLINS: We would say he cannot win
18 because the decision of the Washington court was not
19 objectively unreasonable.
20 I'd like to reserve the rest of my time.
21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Fisher.
23 ORAL ARGUMENT OF JEFFREY FISHER
24 ON BEHALF OF THE RESPONDENT
25 MR. FISHER: Mr. Chief Justice, and may it

1 please the Court:
2 The State is here today making what we think
3 is a rather extraordinary argument. It's arguing that
4 there is no reasonable likelihood that the jury in this
5 case interpreted the accomplice liability charge in the
6 same manner that the State itself urged the jury to
7 interpret it; that the State urged the Washington Court
8 of Appeals to interpret it on direct review in this case
9 and in many other cases, and how the Washington Court of
10 Appeals in fact interpreted it.
11 CHIEF JUSTICE ROBERTS: Well -- but is that
12 the standard? You said there is -- they are saying that
13 it's not reasonably likely, but that's not the standard.
14 They have -- you have to show that it's objectively
15 unreasonable to show that the -- to assume that the
16 State got it correct.
17 MR. FISHER: That's right, Your Honor. So
18 there is a constitutional violation, and then our
19 burden, which we believe we can carry on the
20 extraordinary record in this case, is to show that a
21 court, the Washington Court of Appeals, could not have
22 reasonably concluded that there was a reasonable
23 likelihood the jury understood the charge in this case.
24 JUSTICE ALITO: When I read the opinion of
25 the Washington Court of Appeals, it does not seem to me

1 that what they are doing is providing a literal
2 interpretation of the jury instruction, as I think we
3 have to presume the jury did when they got that
4 instruction.
5 Washington Court of Appeals is interpreting
6 Washington law. And they may be influenced by
7 Washington case law, which is what they cite. They
8 don't -- they quote the instruction but they don't say
9 "the crime" means "a crime". That's how we interpret
10 the language of the instruction.
11 So there is an overlay of Washington case
12 law, principles of accomplice liability that inform this
13 instruction. So I don't know that you can -- it's
14 reasonable to argue that because they misinterpreted
15 Washington law, they were misinterpreting the literal
16 language of the jury instruction.
17 MR. FISHER: Well, Justice Alito, we think
18 it is fair to say that, because in the Washington Court
19 of Appeals decision, they start by laying out the
20 statutory language of Washington accomplice liability.
21 And remember, the jury instruction in this case simply
22 tracks that language. That's, in fact, one of the
23 State's argument.
24 Now, our response to that argument is, just
25 as you said, Justice Alito, when a State supreme court,

1 as the Washington court later did in this case, steps in
2 and applies a gloss to that language and interprets it,
3 as this Court has said many times, it's as though that
4 language is written into the statute.
5 JUSTICE KENNEDY: The gloss that the
6 Washington Supreme Court ended up with was exactly the
7 same as the instruction that was, that the judge gave in
8 this case -- to be as a -- the trial judge, whatever the
9 state of the law was, got it right.
10 MR. FISHER: Got it right insofar as
11 regurgitated the language of the statute. But the
12 Washington law that would apply to this case -- and I
13 think there is an agreement on this, Justice Kennedy, is
14 that Mr. Sarausad has to know that he was promoting or
15 facilitating a homicide. That's what he has to know.
16 That's theory one of the State's --
17 JUSTICE BREYER: That's exactly what the
18 instruction said. My problem is, I guess different
19 people, I understand, can read the same words and come
20 to different conclusions. But I have read the
21 instruction and the statute, probably over a dozen times
22 by now, and I can't find the slightest ambiguity.
23 It seems to be absolutely clear. What it
24 says is you're instructed that a person is guilty -- I
25 would say what crime is the jury considering -- of a

1 crime. Namely, second-degree murder crime, if it is
2 committed by another person for which he is legally
3 accountable.
4 Then it says you're an accomplice -- an
5 accomplice -- it says a person is an accomplice with
6 certain knowledge when he aids another person in
7 planning or committing a crime; the crime, second-degree
8 murder.
9 What is the problem?
10 MR. FISHER: The problem, Your Honor, is it
11 starts with this Court recognized him void. Juries are
12 lay people, and they understand things in terms of
13 common sense.
14 JUSTICE BREYER: That's a different
15 argument. I want to know first -- in my mind in two
16 different categories. Category one: Is there an
17 ambiguity in this instruction? And my answer so far,
18 which is what I was asking you, is zero. Why not?
19 And then the second question is, could the
20 prosecution get people so mixed up about something, a
21 typical thing like this, that it would violate due
22 process? That's why I asked the question before. And I
23 said, obviously the answer is sometimes they could.
24 And then the question is, did they here?
25 And what he referred me to was Brown, which I've looked

1 at, in which I said the prosecutorial and problem in
2 that case did not rise to a federal due process
3 question. So, I guess -- though it's only one person --
4 you would have to convince me that this is somehow worse
5 prosecutorial conduct than existed in Brown.
6
7 MR. FISHER: Let me take your question in
8 two steps, Justice Breyer.
9 JUSTICE BREYER: All my questions from the
10 whole case.
11 MR. FISHER: Thank you. First I want to
12 emphasize we are not alleging prosecutorial misconduct
13 in this case in any way. The problem is --
14 JUSTICE BREYER: No. But what I mean by
15 that is that the prosecution would have had to have
16 gotten the jury more mixed up than -- I was using
17 shorthand for that --
18 MR. FISHER: Right.
19 JUSTICE BREYER: -- more mixed up than they
20 did in Brown, where I thought it was pretty bad.
21 MR. FISHER: That's right. Let me -- all I
22 meant to say was the prevailing view in the State at the
23 time of this trial was that any crime was sufficient,
24 and so that's why the prosecutor was entitled to make
25 that argument.

1 Let me take your question in two steps,
2 first the ambiguity in the language. As the Washington
3 courts themselves and as the States themselves argue at
4 page 38 and 39 of the appendix of our red brief, you can
5 interpret the language in the statute, when you get to
6 words "the crime", to mean one of two things:
7 One, it could mean as you said, Justice
8 Breyer, that the particular crime the principal
9 committed; or it could mean one could understand it to
10 mean simply the principal's criminal conduct. And in
11 Washington --
12 JUSTICE BREYER: In my -- it it doesn't mean
13 either. It means jury you are instructed that the
14 person is guilty of a crime -- in other words, the jury
15 is sitting there and they are asked the question: Is
16 the person guilty of second-degree murder?
17 Now they are to apply the instruction. A
18 person is guilty of second-degree murder if da, da, da,
19 da. And when it gets to "the crime", it is referring to
20 second-degree murder. I don't know how -- anything else
21 it could be referring to.
22 MR. FISHER: Well, maybe the best that I can
23 do, Justice Breyer, is refer you to empirical evidence
24 from the State itself, from the State of Washington, and
25 if you need one further thing to look at, I commend to

1 you the Supreme Court decision of the Supreme Court of
2 Colorado that cited in the actual brief -- there was
3 language exactly like this that comes to a textual
4 analysis and comes to the conclusion.
5 JUSTICE BREYER: You're convincing me that
6 different people can reach different conclusions. What
7 I'd like you to say is something that would change my
8 mind on my initial conclusion that there is no
9 ambiguity. I think you could say something like that,
10 because as you quite rightly point out, other people
11 have reached other conclusions.
12 MR. FISHER: Because the articles "a" and
13 "the" are simply not definite enough. And you can read
14 the words "the crime" to simply mean criminal conduct.
15 Now, let me talk about the prosecutor's
16 argument.
17 CHIEF JUSTICE ROBERTS: You might be able to
18 and you might -- as I understood you to say earlier, you
19 could read it one way or you could say it another way.
20 And if that's the case, it's hard to say that reading it
21 one way is objectively unreasonable when the State court
22 reads it that way.
23 MR. FISHER: I think if that's all we had,
24 Mr. Chief Justice, you would be exactly right. So let
25 me turn now --

1 CHIEF JUSTICE ROBERTS: So it is not
2 objectively unreasonable for the State to instruct
3 jurors as they did? If that's all you had, then that
4 would be the point.
5 MR. FISHER: Right. Right. Because the
6 test that this Court has repeated many times is whether
7 there is a reasonable likelihood that this jury
8 misapplied the instruction.
9 Now, let me turn to the prosecutor's
10 argument, because there was a lot of discussion about
11 that in the first half an hour.
12 There is two places in the joint appendix
13 that you might want to pay attention to, and I think we
14 might have been referring to two different places
15 earlier. In joint appendix page 38, the prosecutor
16 makes her opening argument and says -- and uses the
17 assault analogy of holding somebody's arms behind their
18 back. And she tells the jury this is -- as Justice
19 Ginsburg was reading -- this is the law of the State of
20 Washington.
21 And again, in direct rebuttal at page 123 of
22 the joint appendix, the prosecutor again says very
23 specifically -- specifically to the jury, let me talk to
24 you about the accomplice liability instruction.
25 JUSTICE KENNEDY: Was there an objection?

1 MR. FISHER: There were objections both
2 before and after.
3 JUSTICE KENNEDY: The objection was based on
4 the defense proffer of an instruction which was, namely,
5 close to the model penal code that says you have to have
6 the same -- is anterior principle, and that's not
7 necessarily the law in every state.
8 So the defense bears some responsibility for
9 not -- for -- number one, it didn't have a coherent
10 theory either.
11 MR. FISHER: There were times where
12 Mr. Sarausad's counsel, you're right, did ask for a
13 little more than he was entitled to. But Mr. Reyes'
14 counsel made objections directly on point, which
15 Mr. Sarausad joined, and as Justice Ginsburg noted
16 earlier, when the jury comes back with the third
17 question that is precisely on point, it's precisely the
18 question on which that whole entire case turns -- and I
19 might add there would be no reason for the jury to ask
20 that third question, what kind of knowledge is required
21 in this case, if they had decided, as the State argues,
22 that Mr. Sarausad knew a homicide was going to be
23 committed.
24 CHIEF JUSTICE ROBERTS: I don't think that
25 your reading of question three is definitive. I think

1 it's like the instruction, the jury could read it one of
2 two ways. If you look at question three, the issue
3 could be whether others could have had an intent, in
4 other words, others in the group, not simply -- it
5 doesn't show that the accomplice doesn't have to have
6 the requisite intent.
7 MR. FISHER: Well, we think it's pretty
8 clear, Mr. Chief Justice. I think the more important
9 sentence may be the one that precedes that question,
10 which is the jury tells the court, after seven days of
11 deliberations: We are having difficulty agreeing on the
12 legal definition and concept of accomplice.
13 Now, that is the question -- and let me
14 return to the prosecutor's argument --
15 CHIEF JUSTICE ROBERTS: That's not the
16 question. There are a number of areas, and I think the
17 first two questions point in the opposite direction.
18 They do not say we don't know whether it's "the crime"
19 or "a crime". Their questions, neither one, two or
20 three focus on that.
21 It's a more general question that we could
22 read the opposite way. Perhaps you can read it the way
23 you are, even though it doesn't say is it "the crime" or
24 "a crime".
25 But there again, I think it's incorrect to

1 say it's quite clear that the question -- and certainly
2 not questions one and two, I mean question three is your
3 strongest one -- but it's still not clear that they are
4 focusing on the "the/a" issue.
5 MR. FISHER: Well, I think the best we can
6 do, because we have to make reasonable inferences from
7 the record and he we can't go back and ask the jurors
8 what we thought, is we have to make, as the court has
9 done many times, reasonable inferences as to what they
10 are doing. And I think the fairest reading of this
11 record, even if it's not absolutely clear, is that the
12 jury was honing in progressively on the central issue in
13 this case, and that was Mr. Sarausad's mens rea.
14 JUSTICE BREYER: So, then, what I take is
15 authoritative on that are two sentences from the
16 Washington Supreme Court opinion, though people -- other
17 judges have been all over the lot. The first sentence
18 it says: The trial court correctly instructed the jury
19 that it could convict Mr. Sarausad of murder -- they
20 mean second-degree murder -- as an accomplice only if it
21 found he knowingly aided in commission of "the crime"
22 charged, which was second-degree murder. That's their
23 interpretation, which I could understand.
24 Then the second thing is, it does not offend
25 the principles of accomplice liability to hold

1 responsible one who knowingly aids such conduct; namely,
2 conduct that creates a substantial risk of death when
3 the substantial risk of death results in actual death.
4 So that would seem to be hornbook law. If
5 you engage in conduct that might well cause substantial
6 or -- substantial risk of death and you know it, you
7 know, you know you're engaging in this conduct, that's
8 the Washington view, that's it. You've had it.
9 And here they go on to say that he knew
10 there was plenty of evidence that he knew that he was
11 engaged in a drive-by shooting. And then to put every
12 dot on every "I", they say a drive-by shooting does run
13 a substantial risk of death. Okay.
14 Now that's what I read and at that point, I
15 said I'll ask you that, because then I can hear the best
16 answer.
17 MR. FISHER: Your Honor, we are not
18 challenging -- or this Court does not have authorities
19 the sufficiency of the evidence in this case, so there
20 might be enough evidence in the record for the jury to
21 have found that. But the question is, did the jury find
22 that? And we can't know from the instructions given in
23 light of the arguments made to the jury by the
24 prosecutor and the jury's own questions trying to sort
25 through them, this case -- whether the jury actually

1 found that. And so if the State wanted -- this goes
2 again to the prosecutor's argument.
3 There is two things that I think we might be
4 conflating improperly here. There is the first question
5 of what the prosecutor argued to the jury Washington law
6 meant. And I suggest to you if you look at JA 38 and JA
7 123, there is no doubt what the prosecutor was arguing
8 to the jury Washington law meant. It meant as she said,
9 "in or a dime, in for a dollar." If you hold somebody's
10 arms behind their back thinking that an assault is going
11 to occur and the person dies, you can be found guilty of
12 murder.
13 JUSTICE KENNEDY: No objection from defense
14 counsel.
15 MR. FISHER: Both before and after, Justice
16 Kennedy.
17 But I would add that another reason the
18 defense counsel may not have interposed yet another
19 objection at that instance was because that was the
20 prevailing view of Washington law at the time.
21 JUSTICE ALITO: Could I ask you this
22 question about the jury's question where they say we are
23 having difficulty agreeing on a legal definition and
24 concept of accomplice; when a person willingly
25 participates in a group activity, is that person an

1 accomplice to any crime committed by anyone in the
2 group?
3 Suppose that the judge had answered that
4 question by saying a person who participates in group
5 activity is guilty of the crime of second degree murder
6 if the person acts with knowledge that his or her
7 conduct will promote or facilitate the commission of the
8 crime of second degree murder. Would you have a case if
9 that answer was given?
10 MR. FISHER: I don't think so, Justice
11 Alito. That would have cleared up the ambiguity in the
12 case.
13 JUSTICE ALITO: That's almost a direct quote
14 from the instruction that was given.
15 MR. FISHER: No, it's not because what you
16 did is you inserted the name of the crime in there.
17 JUSTICE ALITO: I put in crime of second
18 degree murder rather than the crime.
19 MR. FISHER: That's exactly what defendants
20 even still in the State of Washington are asking courts
21 to do in the --
22 JUSTICE ALITO: That poses a difference
23 enough to make A, a constitutional violation and B, make
24 it unreasonable for the Washington Court of Appeals to
25 say that there was no constitutional violation?

1 MR. FISHER: Yes, under the particular
2 circumstances in this case, because the jury expressed
3 confusion. So we know the jury was confused. We know
4 the only reason they would have asked that is if they
5 had not found the facts the State alleges, at least at
6 that point, that Mr. Sarausad knew a murder was going to
7 occur, and also because we know the prosecutor argued
8 the exact opposite to them. They were actually asking
9 the question -- another way to put it, I think which is
10 a fair characterization is, is what the prosecutor told
11 us correct? That --
12 JUSTICE BREYER: The prosecutor, I mean I
13 thought, though I'm not -- this really is ambiguous, I
14 think, but if you do hold somebody's arms behind his
15 back and punch him in the stomach, that does perhaps --
16 at least might run -- I can see a person saying that
17 that runs a substantial risk of death. I mean Houdini
18 died that way, apparently. So maybe hitting somebody in
19 the stomach does create a substantial risk of death. Do
20 you know anything about -- one way or the other on that?
21 MR. FISHER: I'm sorry, Justice Breyer. You
22 need more than that in this case. Second degree murder
23 is intentional. So --
24 JUSTICE BREYER: They intentionally hit
25 somebody in the stomach, you say, knowing all about --

1 MR. FISHER: Intentionally killing is what
2 the State says.
3 JUSTICE BREYER: I realize that but what the
4 State supreme court holds. I think correctly, that if
5 the person conscious of the risk knows that a particular
6 individual is engaging in certain conduct for whom he is
7 responsible, he is -- he is guilty of the -- if the
8 event that you know there is a substantial risk of comes
9 about. I would be amazed that a State would say the
10 contrary.
11 JUSTICE KENNEDY: And your answer to Justice
12 Breyer incorporated the -- the principle that the
13 defense counsel had been arguing for from the outset of
14 this case, that you must have the same scienter as the
15 principal, and that's not necessarily the law.
16 MR. FISHER: I think that --
17 JUSTICE KENNEDY: It can go on in some
18 States but not -- it doesn't have to be the law as I
19 understand it.
20 MR. FISHER: The defendant didn't have to
21 have premedication, Justice Kennedy. I think the best
22 answer I can give and I -- is that we agree with the
23 State on this. We agree with what the State said at
24 page 31 of its brief, that it had to prove that
25 Mr. Sarausad knew he was aiding or facilitating a

1 homicide. That he knew, and it was argued to this case,
2 Justice -- as it was argued to the jury, Justice Breyer,
3 the defense agreed that if Mr. Sarausad knew there was a
4 gun in his car, or if he knew that the fellows were
5 planning on killing somebody, that he could have been
6 found guilty.
7 That was the very -- that was the central
8 issue in this case; and when the State stands up and
9 says the prosecutor argued -- didn't make -- didn't make
10 a misleading argument, what they are talking about are
11 the prosecutor's arguments on the facts. After telling
12 the jury had is what Washington law is, the prosecutor
13 argued in various ways that Mr. Sarausad knew that a
14 fight was going to happen, or -- or that a gun was --
15 JUSTICE BREYER: Washington -- in the State
16 of Washington you think the law is that if Joe Jones
17 helps Dead Eye Dick shoot his gun right at somebody's
18 leg and then accidental -- then, you know, he doesn't
19 aim quite right, the guy dies; then it's a good defense
20 to say well, I knew he was Dead Eye Dick. I thought
21 he'd just hit him in the leg. I mean, that -- we know
22 that isn't a good defense in Washington because the
23 Supreme Court of Washington tells us that.
24 MR. FISHER: That's right. But I think you
25 don't --

1 JUSTICE BREYER: What's the difference
2 between that and punching him in the stomach?
3 MR. FISHER: Because when somebody is
4 punched in the stomach there is no reasonable belief
5 that the person is going to be put in grave risk of
6 death. And so as I said, the issue of this case, that
7 the whole entire case was about, and that the jury was
8 demonstrably perplexed about, was what did Mr. Sarausad
9 know.
10 And when the State says, well -- the
11 prosecutor argued to the jury that he knew their
12 shooting was going to happen or that he knew a gun was
13 in the car, if the jury had believed that they could
14 have come back with a guilty verdict in 30 minutes; but
15 instead they asked a series of questions culminating in
16 the one after seven days of deliberation which can only
17 be interpreted as suggesting that we don't believe that
18 Mr. Sarausad knew that the worst was going to happen
19 here, and we are struggling to figure out what kind of
20 verdict we have to render in light of that.
21 JUSTICE ALITO: With the jury -- was the
22 jury told that the arguments of counsel are not the law,
23 that I, the judge, will tell you what the law is?
24 MR. FISHER: I think a standard statement to
25 that effect was made. But remember two things, Justice

1 Alito. First, the prosecutor herself kept telling the
2 jury this is what the State of Washington law requires.
3 And as this Court has recognized in other cases, the
4 prosecutor isn't just any old lawyer standing in front
5 of a jury. The prosecutor carries with her the
6 imprimatur of the government; and so we think it's
7 perfectly reasonable for the jury to have understood the
8 prosecutor to be arguing this is what the law is, and at
9 the very least to have created a question in their
10 minds.
11 And if I contrast this case with Brown
12 against Payton, because Justice Breyer has asked about
13 that case and it is another case where the prosecutor
14 made what this Court found was a misleading argument to
15 the jury, there you have a very different situation.
16 Not only do you have no jury questions at all coming in
17 that case to demonstrate to the Court that the jury was
18 in fact confused and likely to follow the prosecutor's
19 advice, but you have a very different scenario in Brown,
20 where this Court said that in light of the way that case
21 was actually argued, the prosecutor was really making
22 more of an argument on the facts, that these arguments
23 the defendant has made shouldn't really be considered
24 mitigating evidence in your deliberations; and as this
25 Court said the jury must have taken it as a factual

1 argument because otherwise the whole mitigation hearing
2 would have been totally unnecessary.
3 Now, under the -- under the facts of this
4 case, the way this case was tried -- and again I want to
5 emphasize that at the time this case was tried, the
6 prosecutor had the better of the argument as to what
7 Washington law is.
8 This case is only before you because it's
9 the oddball case, and the only one I can think of that's
10 like it is when this Court had in about 2000, or decided
11 in 2001, called Fiore v White, when in Pennsylvania the
12 State brought a prosecution and obtained a conviction
13 for discharging hazardous waste without a permit, and
14 then the Pennsylvania Supreme Court later said that not
15 having a permit is required under the statute. It's not
16 enough to prove to the jury that he so deviated from the
17 permit that -- that no permit existed. And then this
18 Court said once we know that clarification under State
19 law, we look back and it's clear as day that the jury
20 didn't find that element.
21 Now the only difference between that case
22 and this case is that in Fiore it was absolutely certain
23 the jury didn't find the element and the prosecution
24 didn't argue otherwise. Here you have enough ambiguous
25 evidence and ambiguity in the jury instructions that the

1 State was trying to backfill after it has lost the case
2 in the Washington Supreme Court and say no, the jury in
3 this case even though we told them they didn't have to
4 find it, did go ahead and find it.
5 JUSTICE ALITO: But the only difference
6 between that case, which I know very well, and this case
7 is that in that case there was no issue about jury
8 instructions.
9 MR. FISHER: Well, not directly.
10 JUSTICE ALITO: So what's the relevance of
11 it?
12 MR. FISHER: Right. So, the relevance --
13 JUSTICE ALITO: Has to do with the
14 retroactivity whether a State can -- whether
15 Pennsylvania had changed the interpretation of its
16 statute, or whether what they said it meant was what it
17 always had meant.
18 MR. FISHER: That's right, Justice Alito and
19 I know that you know that case. The -- you're right.
20 So we are on all fours with Fiore in the sense that the
21 later decision from the State Supreme Court applies
22 retroactively, and in Fiore what you would have had, the
23 court didn't need to talk about jury instructions,
24 because I take it that the jury was instructed in Fiore
25 that deviating substantially from a permit satisfies the

1 no-permit element of that defense, and so the jury was
2 given there, simply an instruction that was simply
3 wrong.
4 And here our contention is that the -- that
5 the jury charge taken in light of the case was
6 ambiguous, but that distinction doesn't matter because
7 as this Court has said in Boyde and Estelle and many
8 other cases, all you have to show is a reasonable
9 likelihood that the jury misunderstood the charge.
10 Now we have to show an additional layer of
11 unreasonableness because we are on habeas now and no
12 longer on direct review, but for all the reasons that
13 are apparent on the face of this record this is the
14 extraordinary case.
15 JUSTICE STEVENS: Mr. Fisher, can I just ask
16 you a question? Is it your view that the question that
17 is troubling the jury was whether they had to find that
18 the driver of the car knew that there was a gun in the
19 car.
20 MR. FISHER: There's two ways to think about
21 it. Yes, that could be one way to think about it. The
22 other way that they might have been thinking about it
23 was whether he knew that a murder was going to happen
24 and that a killing was going to happen.
25 JUSTICE STEVENS: Assume proof of the gun in

1 the car was enough to prove --
2 MR. FISHER: That's the way the case was
3 presented to the jury.
4 JUSTICE STEVENS: It wouldn't -- and that's
5 what presumably may have taken a lot of time
6 deliberating whether or not he knew there was a gun.
7 MR. FISHER: That's right, Justice Stevens.
8 The defendant --
9 JUSTICE STEVENS: And in one theory it makes
10 a difference; in another theory it doesn't.
11 MR. FISHER: Precisely. And the defense
12 counsel -- the defense counsel admitted in argument that
13 if you find he knew there was a gun in the car, then we
14 lose. And, remember, the jury earlier -- we've talk
15 about the three jury questions about what the law meant.
16 Remember the jury earlier asked to have Mr. Sarausad's
17 testimony reread back to them. So, again, every
18 indication is you have a jury really trying very, very
19 hard to do their job.
20 CHIEF JUSTICE ROBERTS: Counsel, AEDPA of
21 course requires that this be an unreasonable application
22 of clearly established Federal law. What is the clearly
23 established Federal law that was unreasonably applied?
24 MR. FISHER: It's the rule that is stated --
25 again, at page 32 of the State's brief with which we

1 agree -- that if there is a reasonable likelihood that
2 the jury applied instructions so as to violate the
3 Constitution, then that violates due process.
4 CHIEF JUSTICE ROBERTS: So that's
5 articulated at a fairly general level.
6 MR. FISHER: That's right.
7 CHIEF JUSTICE ROBERTS: In Yarborough, we've
8 said that the more general the rule, the more leeway
9 courts have in reaching outcomes in a case-by-case
10 determination. So you have a very general rule, and to
11 find an unreasonable application, the court has broad
12 leeway because it is a general rule. And you've already
13 said that the instruction does not establish
14 unreasonable application.
15 Given that, isn't it pertinent, although
16 people have objected -- you've objected to the idea
17 that, well, all they did was send them back with the
18 instruction. So they sent them back with something that
19 you said could be reasonably interpreted correctly. So
20 why isn't that -- why doesn't that -- given the leeway
21 the State court has because this is a general rule, why
22 isn't that sufficient to refute the idea of unreasonable
23 objective? Yes.
24 MR. FISHER: The State would have a better
25 argument if nothing else had happened in this trial

1 other than simply the jury had been given that
2 instruction, but our point is, and then this Court
3 recognizes as much, I think, in Brown against Payton,
4 that the prosecutor's arguments do matter. They are to
5 be considered in the calculus. And this Court said in
6 Estelle that instructions cannot be considered in
7 isolation. They have to be considered in the totality
8 of the way the case was tried.
9 And so my point, Mr. Chief Justice, is the
10 reason why the State cannot show that the State court of
11 appeals decision was reasonable is because it's not just
12 the instruction that had perplexed the State and
13 Washington courts over the years; it's the fact that the
14 prosecutor asked the jury to adopt the wrong
15 interpretation of the instruction and that the jury came
16 back and told the court -- I think -- maybe it helps to
17 think about the case this way: After seven days of
18 deliberation -- now I understand that we can dispute a
19 little bit what the jury was asking, but I think a fair
20 statement is that after seven days of deliberation, the
21 jury was telling the court at a minimum there's a
22 reasonable likelihood we don't understand accomplice
23 liability in this case and that we are going to find
24 that as long as Sarausad was a member of this gang and
25 willingly participated in gang activity, that that's

1 enough to hold him liable for accomplice murder. And
2 that's what the State had argued alternatively, Your
3 Honor.
4 So after seven days, there's no guesswork
5 that's even required. We know the jury was confused and
6 going down the wrong path. And so the only way the
7 State can rescue that is to say that, upon being told to
8 read the same charge that it been told to read three
9 previous times, that suddenly the light bulb went off so
10 dramatically that it reduced its confusion below the
11 50/50 level. Now that's what this Court said in Brown
12 against Payton. The reasonable likelihood test is below
13 50/50.
14 So we think if you were the Washington Court
15 of Appeals -- and I think this is another way to ask
16 yourselves the question you have to decide in this case.
17 If you were the Washington Court of Appeals on this
18 record, would it be reasonable for you to say that this
19 jury was not even reasonably likely to misunderstand the
20 accomplice liability instruction in this case?
21 CHIEF JUSTICE ROBERTS: You've already said
22 that the instruction doesn't get you there. And I just
23 heard you say that, with respect to the questions, we
24 can dispute what the jury was asking. So it's hard for
25 me to see where you get the objectively unreasonableness

1 if you can read the instruction correctly, if it's -- if
2 you can't tell what the jury was asking, you don't know
3 that they were reflecting the confusion you have here.
4 So is all you're left with the prosecutor's statements?
5 MR. FISHER: Well, we have all three, but I
6 don't want to give away too much. I think it is fair to
7 say that the jury's third question is perfectly clear.
8 I hedged a minute to be frank so that I could
9 acknowledge the Court's earlier questions and get -- and
10 get my statement out, but in all honesty, I think that
11 the third jury question makes it clear that the jury is
12 confused. But we have -- again, unlike Brown against
13 Payton, unlike Weeks against Angelone, we have this
14 amazing constellation of all these mutually --
15 JUSTICE BREYER: This argument -- I'm
16 beginning to get your argument. The statement is -- the
17 prosecutor never suggested Mr. Sarausad could be found
18 guilty if he had no knowledge that a shooting was to
19 occur. You're saying that's absolutely wrong. There's
20 no support for that in the record. In fact what the
21 prosecutor was arguing is that, even if a shooting
22 didn't occur, he's still guilty because of other gang
23 activity, and when we read the record, we find that's so
24 wrong the statement in the supreme court opinion, that
25 habeas was right. Is that the argument?

1 MR. FISHER: That's a fair characterization,
2 Justice Breyer. If you look at the hypothetical that
3 the State gives the jury as to what Washington law
4 means, it is clear that's the argument they're making.
5 On the facts they made alternative arguments.
6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 MR. FISHER: Thank you very much.
8 CHIEF JUSTICE ROBERTS: Mr. Collins, you
9 have four minutes.
10 REBUTTAL ARGUMENT OF WILLIAM B. COLLINS
11 ON BEHALF OF THE PETITIONER
12 MR. COLLINS: Thank you, Mr. Chief Justice.
13 I want to just focus for a moment on the
14 third question because Respondent focuses on that. To
15 begin with, you have to understand what was going on in
16 this trial. There was deliberation for seven-plus days
17 but it was a 10-day trial, I mean the jury heard
18 testimony for 10 days. There were three defendants
19 being tried together. Each defendant was being tried on
20 five counts. It was a complicated trial. The fact that
21 the deliberations took seven days is not extraordinary
22 at all.
23 Mr. Sarausad assumes that the third question
24 is directed at him. I suggest -- of course we don't
25 know what was going on in the jury room, but I suggest

1 as likely an explanation is that question went to
2 Mr. Reyes because Mr. Reyes was not driving, was sitting
3 in the back seat. The question is, if you're just
4 sitting in the back seat when your gang is going to do
5 an activity, are you guilty? And they were told to
6 reread the instruction. They did reread the
7 instruction, and they deliberated. So the third
8 question came on the seventh day of deliberation. After
9 they got the answer to reread the instruction, they
10 deliberated about 45 minutes. They took a break for the
11 night. They came back, deliberated about another hour
12 and a half, and then they pronounced their verdict,
13 convicted Mr. Ronquillo of first degree murder,
14 Mr. Sarausad of second degree murder. They hung on
15 Mr. Reyes.
16 It seems to me that the third question does
17 not -- is not some kind of a smoking gun. When you look
18 at the trial --
19 JUSTICE GINSBURG: They didn't say anything
20 at all about Mr. Reyes. They asked the question about
21 an accomplice, a crime.
22 MR. COLLINS: Exactly right, Justice
23 Ginsburg, but Mr. Sarausad assumes that that's a
24 question about him. We suggest it's just as likely that
25 it's a question about Mr. Reyes.

1 JUSTICE BREYER: But what he's saying, I
2 think now, is if there was no gun in the car -- suppose
3 the jury thinks there's no gun in the car, then he
4 didn't even know there was going to be a shooting, but
5 that the prosecutor in the context of the trial had
6 given the jury the impression that they could convict
7 this person even if the person did not know there was
8 going to be a drive-by shooting.
9 And he's saying that the finding to the
10 contrary, the statement to the contrary in the Supreme
11 Court of Washington is wrong. When I look at that, I
12 will find, he says, that the prosecutor gave the
13 impression, as I just said, that even without a gun your
14 involvement with this gang is enough to convict him of
15 murder. What is your response to that? You know the
16 record. I don't.
17 MR. COLLINS: My response, Your Honor, is
18 you will not find that when you look through the record.
19 The prosecutor -- and the PRP court stated the
20 prosecutor never argued that if the only knowledge was
21 some kind of a fight, that you could convict him,
22 because the defendants in this case testified that they
23 were going to go fight. And you never had the
24 prosecutor saying: This is an easy case; I win. The
25 defendants have all testified that they were going to go

1 fight. In for a dime, in for a dollar. If they were
2 going to go fight, they're guilty. Never argued that.
3 You will not find that in the transcript or
4 in the materials, Justice Breyer. What you will find is
5 the prosecutor consistently arguing they knew they were
6 going to facilitate a homicide, a shooting, a murder.
7 And given that this is a case brought under AEDPA and
8 the question is whether the PRP court's decision is an
9 unreasonable application of Federal law, I don't think
10 there's any doubt that it's not an unreasonable
11 application, and, therefore, this Court should reverse
12 the Ninth Circuit.
13 If there are no more questions.
14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 The case is submitted.
16 (Whereupon, at 11:03 a.m., the case in the
17 above entitled matter was submitted.)
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