No. 07-772

IN THE
Supreme Court of the United States

DOUG WADDINGTON,
Petitioner,
v.
CESAR SARAUSAD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether it was objectively unreasonable for the state court to conclude that there was no reasonable likelihood the jury misunderstood the level of *mens rea* needed to find Cesar Sarausad guilty as an accomplice to murder.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged by the parties with the Clerk of the Court pursuant to Rule 37.3.

members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; to promote the proper and fair administration of criminal justice; and to emphasize the continued recognition and adherence to the Bill of Rights that is necessary to sustain the quality of the American system of justice.

SUMMARY OF ARGUMENT

This Court has emphasized repeatedly that the jury plays a critical and central role in the American system of criminal justice, the "historical foundation" for which "extends down centuries into the common law." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *see also United States v. Booker*, 543 U.S. 220, 230 (2005); *Carella v. California*, 491 U.S. 263, 268 (1989); *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). Repeated decisions of this Court establish that the jury-trial guarantee—rooted in two constitutional provisions "of surpassing importance," the Fourteenth Amendment and the Sixth Amendment, *Apprendi*, 530 U.S. at 476-77—entitles a criminal defendant to "a jury

determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *see also Booker*, 543 U.S. at 230 ("the Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged" (internal quotation omitted)); *Neder v. United States*, 527 U.S. 1, 12 (1999) ("an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee"); *In re Winship*, 397 U.S. 358, 364 (1970).

This guarantee requires that the judge must comprehensibly instruct the jury on the applicable law. *Bollenbach v. United States*, 326 U.S. 607, 612 (1946); *Cap. Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899); *see also Starr v. United States,* 153 U.S. 614, 626 (1894) ("the influence of the trial judge on the jury is necessarily and properly of great weight"). "Jurors are not experts in legal principles; to function effectively and justly, they must be accurately instructed in the law," and the trial judge "has an affirmative constitutional obligation to use" substantively correct jury instructions "when a defendant seeks [their] employment." *Carter v. Kentucky*, 450 U.S. 288, 299 (1981).

Although jurors are presumed to follow instructions, where jury instructions are ambiguous, there is no longer any guarantee that the jurors can knowledgeably apply the law—their only source of which is the instructions themselves—to the facts

they have found. As a consequence, this Court consistently has held that when there is a reasonable likelihood that a jury misunderstood the law, as stated in the instructions, and then applied its erroneous understanding in a manner that violates the defendant's constitutional rights (*e.g.*, by failing to appreciate the distinct elements of the charged crime), reversal of the defendant's conviction is warranted. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Boyde v. California*, 494 U.S. 370, 380 (1990).

It is therefore no answer to a claim of instructional ambiguity that the challenged instruction quoted verbatim from the statute defining a crime. *See* Petitioner's Brief ("Pet'r Br.") at 27-28. Nor does it suffice that the instruction is a formally correct statement of state law in that it contains all the elements of the charged crime. *Id.* Defendants are constitutionally entitled not merely to a formally correct statement of the law, but rather to an instruction reasonably calculated to afford the jury a substantively accurate understanding of what the governing law is: in particular, a substantively accurate understanding of the discrete elements of the charged offense under state law. *See Boyde*, 494 U.S. at 380; *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979).

A federal court thus remains well within the limits prescribed by the Antiterrorism and Effective Death Penalty Act ("AEDPA") when it inquires—not whether a challenged instruction contained an error

of state law (that is beside the point)—but rather, whether the jury applied the instruction in a manner that violated federal law. Any lesser inquiry would, at the expense of the constitutional jury-trial guarantee, wrongly insulate from review formally correct, but substantively ambiguous, instructions on state law. To be sure, "a mere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas. Some erroneous state law instructions, however, may violate due process and hence form the basis for relief, even in a noncapital case." *Gilmore v. Taylor*, 508 U.S. 333, 348-49 (1993) (O'Connor, J., concurring in judgment) (emphasis added).

In the circumstances of this case, the state courts unreasonably adjudicated Respondent's claim that the jury was hopelessly confused as to a required element of accomplice liability. The Ninth Circuit correctly concluded that there is a reasonable likelihood that the jury did not find the requisite "knowledge" under state law, which violated Respondent's jury-trial guarantee.

ARGUMENT

I. GIVEN THE IMPORTANCE OF JURY INSTRUCTIONS, AN AMBIGUOUS STATUTE, WITHOUT MORE, CANNOT BE THE BASIS FOR A CONSTITUTIONALLY SUFFICIENT INSTRUCTION.

A. Jury Instructions Are Critical To Safeguard the Constitutional Right to a Jury that Understands Every Element of the Charged Crime.

The jury-trial guarantee, "the only one to appear in both the body of the Constitution and the Bill of Rights," *Neder*, 527 U.S. at 30 (Scalia, J. concurring in part and dissenting in part), presupposes that a jury will be instructed precisely and comprehensibly as to each element of the law it must apply to a given set of facts. *See id.* at 12; *Bollenbach*, 326 U.S. at 612-14.

The trial judge functions as an influential intermediary between the jury and the law as it exists on the books. Rather than simply providing jurors with copies of relevant criminal provisions, and instructing them to apply that law to the evidence, the judge must explain with clarity each element of the conduct that would constitute a crime. *See Bollenbach*, 326 U.S. at 612-13 ("Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the

jury the required guidance by a lucid statement of the relevant legal criteria."); *Tavoulareas v. Piro*, 817 F.2d 762, 808 (D.C. Cir. 1987) (Ginsburg, J., concurring) ("To arm the jury with the information needed for the intelligent performance of its task, the judge might first endeavor to speak the language of the jurors, and avoid the jargon of the legal profession."); Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 Tenn. L. Rev. 701, 708 (2000) ("The essence of the instructional process is that specialized knowledge from one domain (law) is communicated to another domain (the laity, the 'ordinary, reasonable people,' the fact-finders)."); *see also* Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 Brook. L. Rev. 1081, 1084 (2001) ("[C]ases and statutes are written primarily for an audience of lawyers and, thus, have never been intended to be read and understood by the lay public."). The goal of the instructional process is "to ensure that the applicable law is stated accurately and completely." Dumas, *supra*, at 708.

Particularly in complex areas of law, and as to complex issues such as knowledge and intent, courts have recognized that the judge must be careful to instruct the jury in a way that ensures jurors' accurate understanding of the legal principles involved. *See, e.g.*, *Tavoulareas*, 817 F.2d at 809 (Ginsburg, J., concurring) (observing, in libel action, that "[c]areful efforts by judges to make the legal rules genuinely accessible to jurors may reduce some

of the turbulence in this unsettling area of the law"); *State v. Alexander*, 643 A.2d 996, 1000 (N.J. 1994) (observing, in context of state's "unusually-constructed criminal statute," that "[a] court's obligation properly to instruct and to guide a jury includes the duty to clarify statutory language that prescribes the elements of a crime when clarification is essential to ensure that the jury will fully understand and actually find those elements in determining the defendant's guilt").

The judge's "affirmative constitutional obligation" to instruct the jury, *Carter*, 450 U.S. at 299, is amplified when the jury, after being instructed, asks questions about the governing law, because the jury thereby displays its lack of understanding regarding the pertinent legal principles. *See Bollenbach*, 326 U.S. at 612-13 ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."); *see also Weeks v. Angelone*, 528 U.S. 225, 242 (2000) (Stevens, J., dissenting) ("The fact that the jurors asked this question about that instruction demonstrates beyond peradventure that the instruction had confused them."). Here, the jury asked three questions—including one on its seventh day of deliberations—related to the *mens rea* for accomplice liability, but the judge did no more than refer the jury back to the same instructions it had already asked about.

This Court has noted the "duty of special care" that attaches when the jury displays its confusion

about any aspect of the instructions. *Bollenbach*, 326 U.S. at 612. It is for this very reason that the Court's clearly established test for juror confusion inquires into whether there is a "reasonable likelihood," based on the totality of circumstances, that the jury misunderstood and "applied the challenged instruction in a way that violates the Constitution." *Estelle*, 502 U.S. at 72 (emphasis added); *see also Boyde*, 494 U.S. at 380. "The proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it." *Victor v. Nebraska*, 511 U.S. 1, 6 (1994) (citing *Estelle*, 502 U.S. at 72 & n.4).

B. The Constitutional Sufficiency of Jury Instructions Is Not Purely a Question of State Law.

Based on the above principles, the State's attempt to characterize Respondent's challenge as purely a question of state law, Pet'r Br. at 33, should be rejected. It is wrong to suggest that federal courts have no jurisdiction to inquire into the adequacy of instructions to inform jurors of the law. *See* Pet'r Br. at 25-32. Although Washington state courts have ruled that the instructions here conform to the elements of state accomplice-liability law, that does not determine the federal question whether the instructions were constitutionally sufficient to ensure the jury's understanding of the law.

Indeed, because the prevailing test under *Estelle* and *Boyde* inquires into whether the jury may have misunderstood its instructions, the State's argument that federal courts cannot "conduct[] an independent examination" of the impact of an instruction on the jury has no merit. Pet'r Br. at 26-28. The constitutional inquiry requires precisely that reviewing courts, both on direct appeal and in habeas proceedings, assess the likelihood that the jury has misapplied the challenged instruction. Notwithstanding the deference to state-court decisions owed under AEDPA, therefore, a state-court's findings on whether a jury could have misread and applied an instruction in a way that violates the Constitution (to the extent it makes any such findings) are not binding on federal courts sitting in habeas if they are unreasonable. Those findings are not determinations of state law, but instead are determinations of whether the defendant's federal constitutional rights have been upheld. "A mere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas. Some erroneous state law instructions, however, may violate due process and hence form the basis for relief, even in noncapital cases." *Gilmore*, 508 U.S. at 348-49 (O'Connor, J., concurring).

This Court's jurisprudence is clear on this point: the "federal constitutional question" is "not what the [state court] declares the meaning of the charge to be, but rather" "whether a reasonable juror could have understood" the challenged instruction in

a way that violated the defendant's jury-trial guarantee. *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985); *see also Sandstrom*, 442 U.S. at 514 ("[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."). The Washington appellate court "is not the final authority on the interpretation which a jury could have given the instruction." *Sandstrom*, 442 U.S. at 516-17. Instead, because Respondent's challenge was that the jury could have applied the accomplice-liability instruction in a way that violated his constitutional right to have every element of the charged crime submitted to the jury and proven beyond a reasonable doubt, the Ninth Circuit was correct in assessing, with reference to the trial record, whether (i) the Washington appellate court unreasonably decided the constitutional question raised, or (ii) the Washington appellate court unreasonably did not address the constitutional question at all. *See, e.g.*, *Smith v. Horn*, 120 F.3d 400, 413 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998) ("[W]here an allegedly faulty jury charge implicates a habeas petitioner's federal constitutional rights, . . . we have an independent duty to ascertain how a reasonable jury would have interpreted the instructions at issue.").

C. It Is No Answer to a Claim of Instructional Ambiguity that the Challenged Instruction Mirrored the Words of the Criminal Statute or that It Contained a Formally Correct Statement of State Law.

The foregoing discussion leads to two critical, and related, points.

First, although in many cases, instructing the jury in the bare words of a statute may be adequate, in many other cases the statutory language is not sufficient to ensure the jury's comprehension of the charged offense. Accordingly, it is no answer to a claim of instructional ambiguity that the challenged instruction tracked verbatim the words of the criminal statute. The Washington appellate court, the dissenting opinion in the Ninth Circuit, and the State have all advanced this misguided argument. *See Sarausad II v. State*, 39 P.3d 308, 313 (Wash. Ct. App. 2001) ("[T]he accomplice liability instructions here mirrored the statute and thus did not suffer from the fatal flaw in *State v. Roberts*."); *Sarausad v. Porter*, 479 F.3d 671, 707 (9th Cir. 2007) (Bybee, J., dissenting) ("There is no question that the jury in Sarausad's case was properly instructed. The instruction mimicked the statute itself."); Pet'r Br. at 27 ("The instructions mirrored the state's accomplice liability statute, differing only in using the word 'it,' while the instructions used the words 'the crime.'").

Merely because the instructions "mirrored" the text of the underlying criminal statute does not mean that the statute itself (and hence the instructions) is not reasonably susceptible of being interpreted in more than one way.[2] This purported defense of the jury instructions thus does not respond to Respondent's constitutional challenge, which is that the jury applied an incorrect interpretation of the statute in a manner that deprived him of his right to a jury determination on every element of accomplice liability under state law.

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[2] Many commentators have observed that judges often use instructions that quote verbatim from statutes—not out of any respect for defendants' constitutional rights or any desire to clarify the law—but rather to avoid reversal by appellate courts. *See* Dumas, *supra*, at 708 ("In carrying out the instructional task, . . . [t]here are subsidiary goals, in particular the goal of avoiding appellate reversal. The importance of this goal is reflected in the great reliance in most jurisdictions on pattern instructions . . . that . . . are written in the dense, complex language favored by lawyers in their written documents."); Lawrence M. Solan, *Jurors As Statutory Interpreters*, 78 Chi.-Kent L. Rev. 1281, 1305 (2003) ("[S]tatutory language can offer a safe harbor for trial courts concerned about being reversed. . . . State courts typically . . . approve instructions that track a statute's exact words, regardless of how comprehensible they are."); Tiersma, *supra*, at 1084 ("The philosophy of much of the original pattern jury instruction movement was to search for language to which a court or legislature had given its stamp of approval. . . . Copying verbatim the language of statutes—and, to a somewhat lesser extent, judicial opinions—was a virtually foolproof method of insulating the instructions from legal attack on appeal.").

Under *Estelle* and *Boyde*, the source of jury instructions (statute or otherwise) has no bearing on whether instructions are proper in a given case.

In addition, there is no requirement that Washington's accomplice-liability statute be deemed unconstitutionally vague for Respondent to obtain habeas relief, as the dissenting opinion below suggested. *Sarausad*, 479 F.3d at 711 (Bybee, J., dissenting) ("More revealing is the step the majority does not take. While claiming that the Washington statute is ambiguous, the majority stops well short of claiming that the statute is unconstitutionally vague."). It is axiomatic that criminal statutes are construed via jury instructions, and a statute may therefore be in need of clarification for the jury without being unconstitutionally vague. *See, e.g.*, *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) (invalidating instructions that quoted terms of the state capital-sentencing statute but gave "no guidance concerning the meaning of any of [those] terms" while upholding constitutionality of the statute itself because "'this language need not be construed in this way'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 201 (1976))); *see also Virginia v. Black*, 538 U.S. 343, 376 & 377 n.5 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("I am aware of no case—and the plurality cites none—in which we have facially invalidated an ambiguous statute on the basis of a constitutionally troubling jury instruction. . . . To be sure, a [constitutionally infirm] jury instruction could never support a

constitutionally valid conviction, but that is quite different from holding the ordinance to be facially invalid."); *cf. Alexander*, 643 A.2d at 1000 ("Courts commonly clarify statutory language to give more precise meaning to statutory terms to effect the legislative intent and to make sure that juries carry out that intent in determining criminal culpability.").[3]

Second, a defendant is constitutionally entitled to instructions that not only provide a formally correct statement of the law, but also convey to the jury a comprehensible substantive understanding of the applicable law. Petitioner, by failing to acknowledge this distinction, Pet'r Br. at 27-28, has confused the AEDPA-deference question.

This Court repeatedly has held that the jury's understanding of the challenged instructions is key. *Estelle*, 502 U.S. at 72; *Boyde*, 494 U.S. at 380; *Francis*, 471 U.S. at 315-16. It is not enough that a challenged instruction contained all the elements of the charged offense. Even if the instruction checked all the boxes, as it were, that does not have any bearing on the jurors' actual understanding of the law, and it is not dispositive of whether, in this case, the instructions proved unconstitutionally

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[3] *See also Godfrey*, 446 U.S. at 437 (Marshall, J., concurring) ("[I]t is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute.").

ambiguous. The Ninth Circuit therefore was not precluded from reaching the merits of Respondent's constitutional challenge. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("[D]eference [under AEDPA] does not imply abandonment or abdication of judicial review.").

II. THE NINTH CIRCUIT CORRECTLY DETERMINED THAT THE INSTRUCTIONS DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A JURY DETERMINATION ON EVERY ELEMENT OF THE CHARGED OFFENSE.

The test for challenged jury instructions that mirror the text of the underlying criminal statute is therefore clear. If (i) a criminal statute is reasonably susceptible of more than one interpretation, only one of which is correct under state law, (ii) the challenged jury instruction does nothing more than mirror the words of the statute, and (iii) the defendant's challenge is that the jury applied an incorrect interpretation of the statute in a way that violated the Constitution (*e.g.*, by its not considering a required element of the crime), then a reviewing court, either on direct appeal or in habeas proceedings, must independently assess the impact of the challenged instruction on the jury. And the deference properly due under AEDPA to the state court's determination does not preclude analyzing in detail whether the state court unreasonably resolved the federal claim that the defendant's constitutional

rights were violated. At the very least, the state court here should have addressed each ground raised by Respondent.

In this case, the Ninth Circuit correctly resolved the constitutional challenge in Respondent's favor. As Petitioner repeatedly points out, the challenged jury instruction "mirrored the state's accomplice-liability statute." Pet'r Br. at 27. It is apparent that the accomplice-liability statute is reasonably susceptible of more than one interpretation, only one of which is correct under state law: Washington's courts and prosecutors for many years advanced the wrong interpretation of the statute until (and even after) the Washington Supreme Court clarified the law.[4] *See State v. Cronin*, 14 P.3d 752, 757 (Wash. 2000) (en banc); *State v. Roberts*, 14 P.3d 713, 734-36 (Wash. 2000) (en banc); *see also State v. Shott*, No. 54359-8-I, 2006 Wash. App. LEXIS 1033, at *11 (May 22, 2006); *State v. Wolff*, No. 30381-1-II, 2005 Wash. App. LEXIS 517, at *10 (Mar. 30, 2005). Indeed, on direct appeal in Respondent's case, the state court applied the wrong interpretation of the statute and concluded that knowledge of a potential homicide was not a required element. *Sarausad II*, 39 P.3d at 315. If judges and prosecutors, well-versed in

[4] Ironically, it is Petitioner's argument to the contrary—not the Ninth Circuit's opinion— that "'fails to give proper deference to state courts,'" Pet'r Br. at 24, because it suggests that Washington's courts for many years adopted an objectively unreasonable interpretation of the accomplice-liability statute.

interpreting the state's criminal statutes, could repeatedly misconstrue the law, plainly a lay jury could adopt the same incorrect understanding of accomplice liability.[5]

Constitutional errors in jury instructions that quote verbatim from criminal statutes likely will arise in only a small number of cases. *See Neder*, 527 U.S. at 39 (Scalia, J., concurring in part and dissenting in part) ("I doubt that the criminal cases in which instructions omit or misdescribe elements of the offense over the objection of the defendant are so numerous as to present a massive problem. (If they are, the problem of vagueness in our criminal laws, or of incompetence in our judges, makes the problem under discussion here seem insignificant by

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[5] Tellingly, other state courts have interpreted materially indistinguishable statutory language not to require that an accomplice have knowledge of the specific crime the principal is charged with. For example, Colorado's accomplice liability statute provides: "A person is legally accountable as a principal for the behavior of another constituting a criminal offense if, with the intent to promote to facilitate the commission of the offense, he aids, abets or advises the other person in planning or committing the offense." Colo. Rev. Stat. § 18-1-603 (1986) (emphasis added). In *People v. Wheeler*, 772 P.2d 101, 103-04 (Colo. 1989) (en banc), the Colorado Supreme Court held that "[t]his language only requires knowledge by the complicitor that the principal is engaging in, or about to engage in, criminal conduct"—an interpretation identical to the incorrect view of accomplice liability that was rejected by the Washington Supreme Court. It is at least reasonable that a lay jury, when presented with the bare words of a materially identical statute, could adopt a similar (and incorrect) understanding of Washington accomplice-liability law.

comparison.)"). This limited set of cases nevertheless represents "the occasional abuse that the federal writ of habeas corpus stands ready to correct." *Jackson v. Virginia*, 443 U.S. 307, 322 (1979).

The accomplice-liability law applicable to Respondent's case did not change with the *Cronin* and *Roberts* decisions. The Washington Supreme Court merely clarified the statute. *In re Domingo*, 119 P.3d 816, 819-21 (Wash. 2005). Washington law has always required, as an element of accomplice liability, that an accomplice must have "knowledge that his or her conduct would promote or facilitate the crime for which he or she is eventually charged." *Cronin*, 14 P.3d at 757. Under clearly established federal law, as determined by this Court, that element must have been understood, and found by, the jury beyond a reasonable doubt. *Booker*, 543 U.S. at 230; *Apprendi*, 530 U.S. at 477; *Neder*, 527 U.S. at 12; *Gaudin*, 515 U.S. at 510; *In re Winship*, 397 U.S. at 364.[6] Although "States possess primary authority for defining and enforcing the criminal

[6] Petitioner's suggestion that this rule is not clearly established has no merit. *See* Pet'r Br. at 39 ("Under the Court's holdings, the state court could reasonably conclude the instructions correctly setting forth state law did not violate due process by relieving the State of the burden of proof. The instructions did not omit an element of the offense, did not create a presumption of fact, and did not shift the burden of proof to the defendant."). Petitioner's unduly narrow reading of the Court's previous decisions effectively writes Respondent's constitutional jury-trial guarantee out of this case altogether.

law," Pet'r Br. at 30, "once the state has defined the elements of an offense, the federal Constitution imposes constraints upon the state's authority to convict a person of that offense." *Horn*, 120 F.3d at 415.[7]

It is true that relief is available under AEDPA only if the state court unreasonably applied federal law to Respondent's case. *See* Pet'r Br. at 24. But the record here indicates that the Washington Court of Appeals' decision on Respondent's personal restraint petition ("PRP") was, in fact, objectively unreasonable. The PRP panel should have assessed whether there is a reasonable likelihood that the jury, at the time of the trial, believed it could convict Respondent without finding that he had knowledge of a potential homicide. If so, then the instructions unconstitutionally omitted or misdescribed one of the elements of accomplice liability under state law.

Given the pin-balling in Washington's courts on the definition of accomplice liability, the PRP panel was well aware that the statute requires a jury finding that Respondent had knowledge of a potential homicide. Petitioner's protestations to the contrary notwithstanding, the PRP panel was also "on notice," Pet'r Br. at 39-40, as surely every court

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[7] Petitioner's argument—that "'[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation,'" Pet'r Br. at 37—is unhelpful because the jury-trial guarantee does appear in the Bill of Rights: in the Sixth Amendment. *See* pp. 2-3, *supra*.

in the country is, that the Constitution requires every element of a charged crime to be submitted to a jury. When confronted with Respondent's argument that the jury did not find the "knowledge" element, the PRP panel should therefore have examined, in the totality of circumstances, whether the instructions created a reasonable likelihood that the jury misunderstood the "knowledge" element of accomplice liability.

Instead, the PRP panel cut off its inquiry too soon. Once the panel had concluded that the accomplice-liability instruction was "sufficient" because it copied the words of the statute and had been approved by appellate courts as a correct statement of the law, it substantially failed to address any of Respondent's arguments that the jury was hopelessly confused. *See Sarausad II*, 39 P.3d at 316-17 ("whatever the basis for the jury's confusion may have been, the accomplice liability instructions were sufficient"). That, in itself, was a violation of clearly established federal law under *Estelle* and *Boyde* because the PRP panel did not conduct the necessary constitutional inquiry.

Respondent pointed out that the jury had asked about the *mens rea* component of accomplice liability three separate times—including after it had already deliberated for seven days. Each time, the judge merely referred the jurors back to the same instructions that had them confused in the first place. The PRP panel did not assess whether the judge's responses were adequate to inform the jury

that it must find the "knowledge" element of accomplice liability.[8] These repeated questions, in the face of a statute so ambiguous that state courts interpreted it wrongly for over fifteen years (including in Respondent's own appeal), required more of a constitutional inquiry than the panel made. It was unreasonable for the PRP panel not to consider whether the jurors' confusion about a required element of the charged crime had, in fact, been eliminated by the trial judge's responses.

To the extent the PRP panel addressed any of Respondent's claims, it focused only on his argument that the prosecutor forcefully advanced the wrong interpretation of the law during her closing statement. *See Sarausad II*, 39 P.3d at 316-19. The panel concluded that she had not. *Id.* at 319. But this partial analysis of the record is neither constitutionally sufficient, nor reasonable, under *Estelle* and *Boyde*. Whether or not the prosecutor's closing argument was a contributing factor, the jury was obviously confused about the *mens rea* for accomplice liability during its deliberations: It asked three times for clarification. It was not enough for the PRP panel to state that in its view, "whatever the basis for the jury's confusion may have been, the

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[8] The PRP panel acknowledged that the jury asked these three questions, which were "essentially the same," but never explained why it had concluded that the jurors' apparent confusion as to accomplice liability had been eliminated by the time of the verdict. *See Sarausad II*, 39 P.3d at 316-17. The panel's decision is not entitled to deference on a question it did not decide. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

accomplice liability instructions were sufficient," *id.*, without also examining whether that confusion had been eliminated by the time of the verdict. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (holding that state court's analysis was "objectively unreasonable" where it "did not conduct an assessment" of petitioner's claim that counsel's investigation was adequate, but "merely assumed" that it was). Because of the reasonable likelihood that this confusion persisted, the Ninth Circuit correctly concluded that Respondent is entitled to habeas relief.

CONCLUSION

For the foregoing reasons, amicus curiae National Association of Criminal Defense Lawyers supports Respondent Sarausad's request that this Court affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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