IN THE SUPREME COURT OF THE UNITED STATES

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DOUG WADDINGTON,

SUPERINTENDENT,

WASHINGTON CORRECTIONS

CENTER,

Petitioner

v. : No. 07-772

CESAR SARAUSAD.

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Washington, D.C.

Wednesday, October 15, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

WILLIAM B. COLLINS, ESQ., Deputy Solicitor General, Olympia, Wash.; on behalf of the Petitioner.

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

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 07-772, Waddington v. Sarausad.

Mr. Collins.

ORAL ARGUMENT OF WILLIAM B. COLLINS

ON BEHALF OF THE PETITIONER

MR. COLLINS: Mr. Chief Justice, and may it please the Court:

This case comes before the Court under the deferential standard of review of the Antiterrorism and Effective Death Penalty Act. The Ninth Circuit decision should be reversed because the Washington court's adjudication of this matter was not objectively unreasonable. The Washington court concluded that the instruction at issue properly informed the jury of the elements of accomplice liability, and the prosecutor's argument informed the jury that it could only convict Sarausad if he acted with knowledge he was facilitating the commission of a homicide.

The court also concluded that the trial judge did not abuse his discretion in directing the jury to reread the relevant instructions instead of giving the supplemental instruction proposed by Sarausad. The decision below was not an unreasonable application of

clearly established Federal law.

CHIEF JUSTICE ROBERTS: But you think it was right?

MR. COLLINS: I do think it was right, Your Honor, but I also believe that it was not objectively unreasonable, which is the standard before this Court. Turning to the PRP court's adjudication, the --

JUSTICE KENNEDY: First, is there some constitutional minimum? Let's assume direct review. Is there some constitutional minimum requirement for scienter with reference to an accomplice?

MR. COLLINS: I believe there is, Your Honor.

JUSTICE KENNEDY: What is it?

MR. COLLINS: You have to have knowledge that you're facilitating -- you have to act and you have to have knowledge, both those two points.

JUSTICE KENNEDY: Is that the same -- is that the same as purpose?

MR. COLLINS: I think it is, Your Honor. I think the model -- I think the Model Penal Code refers -- uses the term "purpose" as opposed to "knowledge," but I don't think --

JUSTICE KENNEDY: Well, but you don't take the position, do you, or do you, that Washington law

conforms to the Model Penal Code? I thought the Model Penal Code was much more defendant-friendly than you're stating.

MR. COLLINS: I believe that's correct, Your Honor.

JUSTICE KENNEDY: So you're -- would -- would you say that the trial court in Washington states law correctly if it says that being accomplice you have to have a purpose to facilitate the commission of the crime?

MR. COLLINS: I believe that you would have to have -- you have to knowingly facilitate the crime, Your Honor. That's the --

JUSTICE KENNEDY: But you agree there is a difference in "knowing" and "purpose"?

MR. COLLINS: I'm not sure there is much of a difference, Your Honor. Frankly, I haven't thought about that question, but I think you have to have that mental component. You have to either have purpose or you have to do it with knowledge.

JUSTICE GINSBURG: But the question is knowledge of what. And I thought it is now recognized that in this State you have to know not just that a crime -- you have to know in this case of the potential for a homicide.

MR. COLLINS: That's right, Justice Ginsburg. You have to know -- you have to act with knowledge that you are facilitating a homicide.

JUSTICE SCALIA: Why just a homicide? What was -- what was the indictment here? What was he tried for?

MR. COLLINS: First degree -- a number of counts, Your Honor. First degree murder, second degree murder, attempted first degree murder, first degree assault with a deadly weapon, because there was one death and two people were shot -- wounded and then there was --

JUSTICE SCALIA: Why wouldn't assault with a deadly weapon suffice or, alternatively, why would you have to know that it was first degree murder or second degree murder? I don't know how you get from the text of the Washington statute that all you have to know is that it was a homicide?

MR. COLLINS: Because the statute refers to "the crime," so you have to have knowledge that you're facilitating a homicide, but you don't have to have shared --

JUSTICE SCALIA: But -- but he wasn't prosecuted for homicide. I mean, the crimes are much more specific --

MR. COLLINS: Well --

JUSTICE SCALIA: -- first degree murder, second degree murder.

MR. COLLINS: In Washington, you have to have knowledge of the general crime that is homicide, but you don't have to have the same knowledge as to principle; therefore, you don't have to have knowledge of premediation. You just have to have knowledge that you're going to commit the general -- the general crime.

JUSTICE SCALIA: How does that appear from the statute? If I read the statute, I would have thought that you have to have knowledge that he was -- would negligent homicide suffice?

MR. COLLINS: You could be convicted of manslaughter as an accomplice if you had knowledge of a homicide. You have to have general knowledge of the crime.

Let me give you another example. In the Davis case, for example, this was a robbery case, and the defendants agreed to do a robbery, but the person who went into the store had a gun. The accomplice didn't know that he had a gun, but still he was convicted of armed robbery because he had a general knowledge that robbery was going to be committed. On the other hand, if the principal had shot the store

owner, the defendant would not be an accomplice to murder if his only knowledge was that he was facilitating the crime of robbery.

So you have to have knowledge that you're facilitating the general crime charged. In this case crimes charged were various kinds of homicides, first degree murder, attempted murder. And in this case, the record is very clear that the prosecutor argued that Mr. Sarausad acted with knowledge that he was facilitating a homicide. Therefore, the PRP court's adjudication of that point is not objectively unreasonable under the AEDPA standard.

JUSTICE GINSBURG: This is -- the prosecutor's charge -- the prosecutor's charge was just filled with the suggestion that as long as it was a crime, that was sufficient. I don't find that what you've said is an accurate description of the charge --

MR. COLLINS: Your Honor --

JUSTICE GINSBURG: -- of the prosecutor's summation.

MR. COLLINS: Your Honor, the prosecutor continually talked about the fact that they were going there for the shooting. For example, in the -- the joint appendix, the brown brief on page 123, the prosecutor tells the jury when they rode down to Ballard

High School the last time, "I say they knew what they were up to. Fists didn't work. Pushing didn't work. Shouting insults didn't work. Shooting was going to work. In for a dime, in for a dollar."

JUSTICE SOUTER: Yes, but isn't the problem on your side of the case that there was another "in for a dime, in for a dollar" argument and that was the hypothetical holding the hands behind the back while some third party slugged the victim? And on that hypothetical, there was no reference to a definite crime. In that hypothetical the victim was killed, and under that hypothetical, there was no reference to the crime, i.e., homicide, and so it seems to me that the prosecutor's arguments, the dime-dollar arguments, went both ways.

MR. COLLINS: I disagree, Your Honor. When the prosecutor used the hypothetical, and in fact on page 123 that I just quoted you, the prosecutor talks about, in fact uses that dime for a dollar hypothetical, and then immediately tells the jury that Mr. Sarausad acted with knowledge that there was going to be a homicide. They went --

JUSTICE SOUTER: Sure, in that case. But there was another one in which the prosecutor didn't do that.

MR. COLLINS: I'm sorry. Are you talking about a different case, a case other than this, Justice Souter?

JUSTICE SOUTER: I did -- maybe I dreamed this. I thought the prosecutor also gave as a dime for a dollar example the example of the individual, the accomplice who holds a victim's hands while a third party slugs the victim and in fact kills the victim. And I thought in that hypothetical argument the prosecutor was saying that the -- that the accomplice was an accomplice to homicide, even though he didn't know at the time the assault started that homicide was intended or would result.

JUSTICE KENNEDY: It's toward the bottom of page 123. And I have the same, I have the same, just tieing onto Justice Souter's question, on the same subject. It seems to me that that hypothetical is not necessarily correct.

MR. COLLINS: The court, the PRP Court of Appeals said that that hypothetical is problematic.

JUSTICE GINSBURG: What about the instruction that follows the hypothetical, first the statement that the person gets assaulted, gets killed, in for a dime, in for a dollar? The law in the State of Washington says if you're in for a dime you're in for a

dollar; if you're there or even if you're not there and you're helping in some fashion to bring about this crime, you are just as guilty, in some fashion. And that was tied in to the person who thought he was assisting in assault and it turns out that the victim got killed.

MR. COLLINS: Justice Ginsburg, the hypothetical may be problematic, but you have to consider --

JUSTICE GINSBURG: But what about the statement I just read, that the law of the State is you don't even have to be there if you're helping in some fashion.

JUSTICE SCALIA: Where is that? Is that in the charge to the jury?

JUSTICE GINSBURG: Yes. It's in the same paragraph, the paragraph with the example of the accomplice who is --

JUSTICE SCALIA: It's not in the court's charges.

JUSTICE GINSBURG: No. This is in the summation.

MR. COLLINS: Justice Ginsburg, the prosecutor's argument responds to the argument made by Sarausad's counsel that you had to have shared intent,

that Mr. Sarausad had to have the same intent as the principal. They do use the hypothetical about holding the arms, but as soon as they finish the hypothetical the court -- the prosecutor identifies what happened here, which is that the intention was to facilitate a homicide, and you have to take the argument as a whole just looking at the hypothetical.

JUSTICE SOUTER: Well, if you take the argument as a whole you've got at best an ambiguous argument. You've got an argument that points to a "the crime" interpretation and you've got an argument part of which points to an "any crime" interpretation, and to the extent that your case may ultimately turn on the significance of the prosecutor's argument, it seems to me that the benefit of the doubt goes to the defendant.

MR. COLLINS: Well, of course, Your Honor, in this case my argument doesn't have to turn on that. The question is whether this is an unreasonable application and looking at the whole argument that the prosecutor made, whenever the prosecutor used "dime for a dollar" or that hypothetical, the prosecutor tied that to shooting. Mr. Sarausad was going to --

JUSTICE SOUTER: Maybe I'm beating a dead horse, but it seems to me that what we've brought in our questions from the bench is that that is not correct.

In one instance the prosecutor clearly tied it to shooting. If that's all we had before us we wouldn't have an argument. But in the other iteration of the dime-dollar argument, the prosecutor didn't tie it to shooting.

MR. COLLINS: Your Honor, I believe the prosecutor always tied it to shooting, and moreover that's the way the defense counsel argued the case.

JUSTICE BREYER: Can you help me with this? Suppose I'm a trial judge and I instruct the jury in a technical matter, an important but technical matter, and when they have questions about it I say read the instruction. Suppose I'm right as far as the instruction goes. But say the prosecutor gets everybody mixed up. Now, I guess if the prosecutor gets people mixed up enough, that could becomes a due process violation. But I suspect that it has to be quite a lot of mix-up, that intuitively is what I suspect. Are there any cases I should look at, one that would tell me how mixed up the prosecutor has to get everybody before it's a due process violation?

MR. COLLINS: Well, Your Honor, Brown v. Payton, which involved the Factor K in how you consider mitigating evidence in the --

JUSTICE BREYER: In Brown, in that case did

they find that he did get them too mixed up or he didn't?

MR. COLLINS: He didn't get them too mixed up so.

JUSTICE BREYER: He did not. So unless in this case the prosecutor got everybody more mixed up than in the Brown case, we should just reverse.

MR. COLLINS: Exactly. Particularly --

JUSTICE GINSBURG: What about the appellate court? I mean, the first time around the appellate court was as mixed up, more so perhaps, than the prosecutor.

MR. COLLINS: Well, Your Honor --

JUSTICE GINSBURG: Because the appellate court the first time got it wrong and it thought it was enough that the defendant knew that a crime was likely to be committed, not the crime, crime specified in the indictment, not -- not murder one, attempted murder, et cetera, just a crime. And the second time around that appellate court said, yeah, we got it wrong, now we know we got it wrong because there has been an intervening decision of the State's supreme court clarifying it.

But what the prosecutor said, at least as I read it, more than once is exactly what the intermediate appellate court said the first time around: Said he

didn't have to know that there was going to be a shooting.

MR. COLLINS: Your Honor, the intermediate appellate court did get it wrong the first time around. But I think you have to consider the context, Your Honor. The legal issue before the appellate court the first time on accomplice liability was Mr. Sarausad's claim that there had to be a shared intent, that is to say you didn't have to know the crime. You had to have --

JUSTICE GINSBURG: They say, the court itself said: We got it wrong. We said go away appellant because you knew that a crime was likely to be committed.

MR. COLLINS: Your Honor, I think you have to consider the context of the case. The argument that the court of appeals was considering on direct review was not the argument here. The question, the point that you're looking at where the court said that it was not necessary to prove shooting, the issue before the court was Mr. Sarausad's claim that he was merely present, that he didn't do anything. And the court of appeals responded by saying no, there is evidence that you may have known of the fight, you may have known of the shooting. And then in what I would characterize as an

aside, the court said the State doesn't have to prove shooting, but there is evidence of shooting.

JUSTICE SCALIA: Did -- hadn't other Washington State courts made a similar error in their interpretation of the Washington statutes?

MR. COLLINS: A few, a few court of appeals decisions did misstate the standard, Justice Scalia, that's correct.

JUSTICE SCALIA: And the same -- and hadn't the prosecutors in Washington in misstating the standard the same way and using "In for a dime, in for a dollar" to mean precisely the wrong thing, namely that even if you were in for beating him up that's enough for holding you liable for homicide?

MR. COLLINS: Some prosecutors made that argument, Justice Scalia.

JUSTICE SCALIA: Including this one in an earlier case.

MR. COLLINS: That's right. But in Boyde this Court pointed out that the fact that prosecutors in other cases made improper arguments -- in Boyde prosecutors were arguing about Factor K didn't allow consideration of mitigation evidence.

JUSTICE SCALIA: The only reason I raise it is, is to show that this jury was obviously perplexed on

the point. It asked for further instructions three times on this precise point, what did -- did he have to know. And all the trial judge did was say read, you know, read my instructions, which essentially recited the statute. And what all of what you've just acknowledged shows is that reading the statute doesn't help a whole lot. It doesn't clarify. It doesn't, it doesn't correct any misimpression that the prosecutor could have created.

MR. COLLINS: Justice Scalia, with respect, I disagree that the same question was asked three times. In fact, if you look at the progression of the questions, you can see the progress of the deliberations. The first question asks about intent with regard to the two convict instructions 11 and 12.

JUSTICE SCALIA: Let's look at -- where is that?

MR. COLLINS: That would be at JA 131 and 132.

JUSTICE SCALIA: In the white?

MR. COLLINS: I'm sorry. The brown joint appendix 131, 132. And see "Request Clarification on Instruction Nos. 11 and 12, Intent." Now, 11 and 12 are the two "convict" instructions for first degree murder for Mr. Recuenco and Mr. Sarausad. The next questions

that were asked -- this is on page 135 of the same document -- they ask about Instruction No. 17.

JUSTICE STEVENS: Excuse me. Let's go back to 131 for a minute. I thought that applied to the "accomplice" instruction.

MR. COLLINS: The trial court directed the --

JUSTICE STEVENS: That's a question specifically applied to the defendant only for the defendant or his accomplice.

MR. COLLINS: They asked about "accomplice," but the -- this was not a question about the meaning of "accomplice liability." This question is different than the third question.

CHIEF JUSTICE ROBERTS: It doesn't -- your point is that it doesn't go to the "aiding" issue.

MR. COLLINS: Exactly, Your Honor.

JUSTICE SOUTER: Well, excuse me. "Intent" is broad enough to go to the DA issue, isn't it?

MR. COLLINS: This question really goes to if you look --

JUSTICE SOUTER: What's the answer to my question? I mean "the" and "a" are references to what the accomplice had in mind at the time of acting. That's an intent issue.

MR. COLLINS: Your Honor -- it is an intent question, Your Honor. But the question, if you look at Instruction No. 12, which is on page -- page -- on page 9 of the brown book, this talks about the fact that in paragraph 2, that the defendant or his accomplice acted with intent to cause the death of another person. So the question was: Did both -- do you have to have the same intent as -- does the accomplice have to have the same intent as the principal?

JUSTICE GINSBURG: Maybe so. Let's go to the third question, when the jury asks: "When a person willingly participates in a group activity, is that person an accomplice to any crime committed by anyone in the group?"

MR. COLLINS: Yes, Your Honor.

JUSTICE GINSBURG: How could the jury better express its puzzlement? It wanted to know, if someone participates in a group, but did not -- that that person is -- is an accomplice to any crime by anyone?

MR. COLLINS: And that, Justice Ginsburg -- and that's the first time that the jury asked that question. The trial court referred them to the accomplice liability instruction and the knowledge -- and the knowledge instruction and --

JUSTICE GINSBURG: And the -- the counsel

for the defense says, tell them no.

MR. COLLINS: And that would have been wrong, Your Honor. If -- if the trial judge -- there are two things wrong with that -- wrong, Your Honor.

First of all, it would not have been accurate because you don't know what the group activity is, and you don't know what the knowledge is. If the knowledge of the group activity was going back to the school to facilitate a crime --

JUSTICE GINSBURG: It says "a group activity." When a person willingly participates in "a group activity," is that person an accomplice to any crime committed by anyone in the group? I don't think there is any ambiguity in that question.

MR. COLLINS: With respect, Your Honor, I think you have to know what the group activity is. More -- but the important point is: The jury got the answer to the question and --

JUSTICE GINSBURG: They didn't get an answer. They were told to read an instruction that they had been told three times to read and obviously didn't understand.

MR. COLLINS: Your Honor, I think in the Weeks case this Court has held that it's proper to tell a jury to reread instructions. They are not required to

give a supplemental instruction.

JUSTICE GINSBURG: But we already know that many people, prosecutors, justices, misunderstood this "a crime." Was it "a crime," or "any crime." Or "the crime"?

So I think you can't avoid the confusing nature of the statute and the charge, which repeated the statute. It doesn't get clarified until the Washington Supreme Court says it means "the crime," not "a crime," and not "any crime."

MR. COLLINS: Your Honor, we are not arguing that there couldn't be some ambiguity, but what we are saying is that the adjudication by the PRP court was not objectively unreasonable. Because when you look at the instructions as a whole and the argument as a whole and the evidence as a whole, the PRP court's decision is not objectively unreasonable.

JUSTICE SOUTER: Well, isn't -- isn't the argument for objective unreasonableness, number one, to begin with, what you just stated. Of course, there is some ambiguity there. I'll be candid to say that if I were stating it myself, I would say there is more than some ambiguity here. It seems to be, if not misleading, at least incapable of informing a jury of exactly what the law is.

Number two, the -- the second point in the argument is, the jury comes back repeatedly, and although, as you point out, it is -- it may well be a proper answer to a jury request for clarification to say, go back and read the instruction; the answer is there. When it has been demonstrated by repeated jury questions that they are just not getting it, that they still have perplexity, the court has got to do something more than just say, oh, go back and do it again.

And number three, in this situation in which there is ambiguity, there is a demonstration of jury confusion. There is an argument by the prosecutor which, in fact, is a two-part argument or a two-example argument and it cuts both ways, isn't it objectively reasonable to say under those circumstances that there was an inadequate instruction to the jury in -- in the correct Washington law?

MR. COLLINS: I would say no, Your Honor.

JUSTICE SOUTER: Then -- then what would it take?

JUDGE SCALIA: You -- you know, you are taking on more of a burden than you have to. And you could say, yes, it would be reasonable to say that, but it would also be reasonable to say -- to say otherwise, right?

MR. COLLINS: It's not objectively unreasonable.

JUSTICE SCALIA: It's not objectively unreasonable to say the opposite.

MR. COLLINS: Exactly, Your Honor.

JUSTICE SOUTER: The -- the "opposite" in this case would mean that the jury was properly instructed and was in a position adequately to understand Washington law correctly? That's the -- that's the opposite position.

MR. COLLINS: There is no question that in a number of --

JUSTICE SOUTER: I want to know what you mean. That's what you mean by the "opposite position"?

MR. COLLINS: I mean the "opposite position" is it's possible that if you are --

JUSTICE SOUTER: Would you -- you are saying you want -- why don't you answer my question? My question is: I think you're telling me that it would be objectively reasonable to say that on the scenario I just laid out the jury probably understood Washington law correctly.

MR. COLLINS: And I would say I think that's correct, Your Honor.

CHIEF JUSTICE ROBERTS: But even, again, I

think you are taking on too high a burden. You don't have to show that the jury properly understood it. You don't even have to show that it's reasonable.
You have to show the opposite -- or your friend has to show the opposite, that there is no way that the jury could have understood this correctly or applied the correct constitutional law. That is, if there is a way, then it's -- it's not objectively unreasonable.

MR. COLLINS: That's exactly right, Chief Justice Roberts.

JUSTICE SOUTER: And that way would be the way we just set out, wasn't it: That the jury, if -- if -- if, in fact, it's objectively reasonable to conclude that the jury did understand Washington law correctly on those circumstances, then -- then the -- the Respondent here cannot win in -- in his collateral attack?

MR. COLLINS: We would say he cannot win because the decision of the Washington court was not objectively unreasonable.

I'd like to reserve the rest of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY FISHER

ON BEHALF OF THE RESPONDENT

MR. FISHER: Mr. Chief Justice, and may it

please the Court:

The State is here today making what we think is a rather extraordinary argument. It's arguing that there is no reasonable likelihood that the jury in this case interpreted the accomplice liability charge in the same manner that the State itself urged the jury to interpret it; that the State urged the Washington Court of Appeals to interpret it on direct review in this case and in many other cases, and how the Washington Court of Appeals in fact interpreted it.

CHIEF JUSTICE ROBERTS: Well -- but is that the standard? You said there is -- they are saying that it's not reasonably likely, but that's not the standard. They have -- you have to show that it's objectively unreasonable to show that the -- to assume that the State got it correct.

MR. FISHER: That's right, Your Honor. So there is a constitutional violation, and then our burden, which we believe we can carry on the extraordinary record in this case, is to show that a court, the Washington Court of Appeals, could not have reasonably concluded that there was a reasonable likelihood the jury understood the charge in this case.

JUSTICE ALITO: When I read the opinion of the Washington Court of Appeals, it does not seem to me

that what they are doing is providing a literal interpretation of the jury instruction, as I think we have to presume the jury did when they got that instruction.

Washington Court of Appeals is interpreting Washington law. And they may be influenced by Washington case law, which is what they cite. They don't -- they quote the instruction but they don't say "the crime" means "a crime". That's how we interpret the language of the instruction.

So there is an overlay of Washington case law, principles of accomplice liability that inform this instruction. So I don't know that you can -- it's reasonable to argue that because they misinterpreted Washington law, they were misinterpreting the literal language of the jury instruction.

MR. FISHER: Well, Justice Alito, we think it is fair to say that, because in the Washington Court of Appeals decision, they start by laying out the statutory language of Washington accomplice liability. And remember, the jury instruction in this case simply tracks that language. That's, in fact, one of the State's argument.

Now, our response to that argument is, just as you said, Justice Alito, when a State supreme court,

as the Washington court later did in this case, steps in and applies a gloss to that language and interprets it, as this Court has said many times, it's as though that language is written into the statute.

JUSTICE KENNEDY: The gloss that the Washington Supreme Court ended up with was exactly the same as the instruction that was, that the judge gave in this case -- to be as a -- the trial judge, whatever the state of the law was, got it right.

MR. FISHER: Got it right insofar as regurgitated the language of the statute. But the Washington law that would apply to this case -- and I think there is an agreement on this, Justice Kennedy, is that Mr. Sarausad has to know that he was promoting or facilitating a homicide. That's what he has to know. That's theory one of the State's --

JUSTICE BREYER: That's exactly what the instruction said. My problem is, I guess different people, I understand, can read the same words and come to different conclusions. But I have read the instruction and the statute, probably over a dozen times by now, and I can't find the slightest ambiguity.

It seems to be absolutely clear. What it says is you're instructed that a person is guilty -- I would say what crime is the jury considering -- of a

crime. Namely, second-degree murder crime, if it is committed by another person for which he is legally accountable.

Then it says you're an accomplice -- an accomplice -- it says a person is an accomplice with certain knowledge when he aids another person in planning or committing a crime; the crime, second-degree murder.

What is the problem?

MR. FISHER: The problem, Your Honor, is it starts with this Court recognized him void. Juries are lay people, and they understand things in terms of common sense.

JUSTICE BREYER: That's a different argument. I want to know first -- in my mind in two different categories. Category one: Is there an ambiguity in this instruction? And my answer so far, which is what I was asking you, is zero. Why not?

And then the second question is, could the prosecution get people so mixed up about something, a typical thing like this, that it would violate due process? That's why I asked the question before. And I said, obviously the answer is sometimes they could.

And then the question is, did they here? And what he referred me to was Brown, which I've looked

at, in which I said the prosecutorial and problem in that case did not rise to a federal due process question. So, I guess -- though it's only one person -- you would have to convince me that this is somehow worse prosecutorial conduct than existed in Brown.

MR. FISHER: Let me take your question in two steps, Justice Breyer.

JUSTICE BREYER: All my questions from the whole case.

MR. FISHER: Thank you. First I want to emphasize we are not alleging prosecutorial misconduct in this case in any way. The problem is --

JUSTICE BREYER: No. But what I mean by that is that the prosecution would have had to have gotten the jury more mixed up than -- I was using shorthand for that --

MR. FISHER: Right.

JUSTICE BREYER: -- more mixed up than they did in Brown, where I thought it was pretty bad.

MR. FISHER: That's right. Let me -- all I meant to say was the prevailing view in the State at the time of this trial was that any crime was sufficient, and so that's why the prosecutor was entitled to make that argument.

Let me take your question in two steps, first the ambiguity in the language. As the Washington courts themselves and as the States themselves argue at page 38 and 39 of the appendix of our red brief, you can interpret the language in the statute, when you get to words "the crime", to mean one of two things:

One, it could mean as you said, Justice Breyer, that the particular crime the principal committed; or it could mean one could understand it to mean simply the principal's criminal conduct. And in Washington --

JUSTICE BREYER: In my -- it it doesn't mean either. It means jury you are instructed that the person is guilty of a crime -- in other words, the jury is sitting there and they are asked the question: Is the person guilty of second-degree murder?

Now they are to apply the instruction. A person is guilty of second-degree murder if da, da, da, da. And when it gets to "the crime", it is referring to second-degree murder. I don't know how -- anything else it could be referring to.

MR. FISHER: Well, maybe the best that I can do, Justice Breyer, is refer you to empirical evidence from the State itself, from the State of Washington, and if you need one further thing to look at, I commend to

you the Supreme Court decision of the Supreme Court of Colorado that cited in the actual brief -- there was language exactly like this that comes to a textual analysis and comes to the conclusion.

JUSTICE BREYER: You're convincing me that different people can reach different conclusions. What I'd like you to say is something that would change my mind on my initial conclusion that there is no ambiguity. I think you could say something like that, because as you quite rightly point out, other people have reached other conclusions.

MR. FISHER: Because the articles "a" and "the" are simply not definite enough. And you can read the words "the crime" to simply mean criminal conduct.

Now, let me talk about the prosecutor's argument.

CHIEF JUSTICE ROBERTS: You might be able to and you might -- as I understood you to say earlier, you could read it one way or you could say it another way. And if that's the case, it's hard to say that reading it one way is objectively unreasonable when the State court reads it that way.

MR. FISHER: I think if that's all we had, Mr. Chief Justice, you would be exactly right. So let me turn now --

CHIEF JUSTICE ROBERTS: So it is not objectively unreasonable for the State to instruct jurors as they did? If that's all you had, then that would be the point.

MR. FISHER: Right. Right. Because the test that this Court has repeated many times is whether there is a reasonable likelihood that this jury misapplied the instruction.

Now, let me turn to the prosecutor's argument, because there was a lot of discussion about that in the first half an hour.

There is two places in the joint appendix that you might want to pay attention to, and I think we might have been referring to two different places earlier. In joint appendix page 38, the prosecutor makes her opening argument and says -- and uses the assault analogy of holding somebody's arms behind their back. And she tells the jury this is -- as Justice Ginsburg was reading -- this is the law of the State of Washington.

And again, in direct rebuttal at page 123 of the joint appendix, the prosecutor again says very specifically -- specifically to the jury, let me talk to you about the accomplice liability instruction.

JUSTICE KENNEDY: Was there an objection?

MR. FISHER: There were objections both before and after.

JUSTICE KENNEDY: The objection was based on the defense proffer of an instruction which was, namely, close to the model penal code that says you have to have the same -- is anterior principle, and that's not necessarily the law in every state.

So the defense bears some responsibility for not -- for -- number one, it didn't have a coherent theory either.

MR. FISHER: There were times where Mr. Sarausad's counsel, you're right, did ask for a little more than he was entitled to. But Mr. Reyes' counsel made objections directly on point, which Mr. Sarausad joined, and as Justice Ginsburg noted earlier, when the jury comes back with the third question that is precisely on point, it's precisely the question on which that whole entire case turns -- and I might add there would be no reason for the jury to ask that third question, what kind of knowledge is required in this case, if they had decided, as the State argues, that Mr. Sarausad knew a homicide was going to be committed.

CHIEF JUSTICE ROBERTS: I don't think that your reading of question three is definitive. I think

it's like the instruction, the jury could read it one of two ways. If you look at question three, the issue could be whether others could have had an intent, in other words, others in the group, not simply -- it doesn't show that the accomplice doesn't have to have the requisite intent.

MR. FISHER: Well, we think it's pretty clear, Mr. Chief Justice. I think the more important sentence may be the one that precedes that question, which is the jury tells the court, after seven days of deliberations: We are having difficulty agreeing on the legal definition and concept of accomplice.

Now, that is the question -- and let me return to the prosecutor's argument --

CHIEF JUSTICE ROBERTS: That's not the question. There are a number of areas, and I think the first two questions point in the opposite direction. They do not say we don't know whether it's "the crime" or "a crime". Their questions, neither one, two or three focus on that.

It's a more general question that we could read the opposite way. Perhaps you can read it the way you are, even though it doesn't say is it "the crime" or "a crime".

But there again, I think it's incorrect to

say it's quite clear that the question -- and certainly not questions one and two, I mean question three is your strongest one -- but it's still not clear that they are focusing on the "the/a" issue.

MR. FISHER: Well, I think the best we can do, because we have to make reasonable inferences from the record and he we can't go back and ask the jurors what we thought, is we have to make, as the court has done many times, reasonable inferences as to what they are doing. And I think the fairest reading of this record, even if it's not absolutely clear, is that the jury was honing in progressively on the central issue in this case, and that was Mr. Sarausad's mens rea.

JUSTICE BREYER: So, then, what I take is authoritative on that are two sentences from the Washington Supreme Court opinion, though people -- other judges have been all over the lot. The first sentence it says: The trial court correctly instructed the jury that it could convict Mr. Sarausad of murder -- they mean second-degree murder -- as an accomplice only if it found he knowingly aided in commission of "the crime" charged, which was second-degree murder. That's their interpretation, which I could understand.

Then the second thing is, it does not offend the principles of accomplice liability to hold

responsible one who knowingly aids such conduct; namely, conduct that creates a substantial risk of death when the substantial risk of death results in actual death.

So that would seem to be hornbook law. If you engage in conduct that might well cause substantial or -- substantial risk of death and you know it, you know, you know you're engaging in this conduct, that's the Washington view, that's it. You've had it.

And here they go on to say that he knew there was plenty of evidence that he knew that he was engaged in a drive-by shooting. And then to put every dot on every "I", they say a drive-by shooting does run a substantial risk of death. Okay.

Now that's what I read and at that point, I said I'll ask you that, because then I can hear the best answer.

MR. FISHER: Your Honor, we are not challenging -- or this Court does not have authorities the sufficiency of the evidence in this case, so there might be enough evidence in the record for the jury to have found that. But the question is, did the jury find that? And we can't know from the instructions given in light of the arguments made to the jury by the prosecutor and the jury's own questions trying to sort through them, this case -- whether the jury actually

found that. And so if the State wanted -- this goes again to the prosecutor's argument.

There is two things that I think we might be conflating improperly here. There is the first question of what the prosecutor argued to the jury Washington law meant. And I suggest to you if you look at JA 38 and JA 123, there is no doubt what the prosecutor was arguing to the jury Washington law meant. It meant as she said, "in or a dime, in for a dollar." If you hold somebody's arms behind their back thinking that an assault is going to occur and the person dies, you can be found guilty of murder.

JUSTICE KENNEDY: No objection from defense counsel.

MR. FISHER: Both before and after, Justice Kennedy.

But I would add that another reason the defense counsel may not have interposed yet another objection at that instance was because that was the prevailing view of Washington law at the time.

JUSTICE ALITO: Could I ask you this question about the jury's question where they say we are having difficulty agreeing on a legal definition and concept of accomplice; when a person willingly participates in a group activity, is that person an

accomplice to any crime committed by anyone in the group?

Suppose that the judge had answered that question by saying a person who participates in group activity is guilty of the crime of second degree murder if the person acts with knowledge that his or her conduct will promote or facilitate the commission of the crime of second degree murder. Would you have a case if that answer was given?

MR. FISHER: I don't think so, Justice Alito. That would have cleared up the ambiguity in the case.

JUSTICE ALITO: That's almost a direct quote from the instruction that was given.

MR. FISHER: No, it's not because what you did is you inserted the name of the crime in there.

JUSTICE ALITO: I put in crime of second degree murder rather than the crime.

MR. FISHER: That's exactly what defendants even still in the State of Washington are asking courts to do in the --

JUSTICE ALITO: That poses a difference enough to make A, a constitutional violation and B, make it unreasonable for the Washington Court of Appeals to say that there was no constitutional violation?

MR. FISHER: Yes, under the particular circumstances in this case, because the jury expressed confusion. So we know the jury was confused. We know the only reason they would have asked that is if they had not found the facts the State alleges, at least at that point, that Mr. Sarausad knew a murder was going to occur, and also because we know the prosecutor argued the exact opposite to them. They were actually asking the question -- another way to put it, I think which is a fair characterization is, is what the prosecutor told us correct? That --

JUSTICE BREYER: The prosecutor, I mean I thought, though I'm not -- this really is ambiguous, I think, but if you do hold somebody's arms behind his back and punch him in the stomach, that does perhaps -- at least might run -- I can see a person saying that that runs a substantial risk of death. I mean Houdini died that way, apparently. So maybe hitting somebody in the stomach does create a substantial risk of death. Do you know anything about -- one way or the other on that?

MR. FISHER: I'm sorry, Justice Breyer. You need more than that in this case. Second degree murder is intentional. So --

JUSTICE BREYER: They intentionally hit somebody in the stomach, you say, knowing all about --

MR. FISHER: Intentionally killing is what the State says.

JUSTICE BREYER: I realize that but what the State supreme court holds. I think correctly, that if the person conscious of the risk knows that a particular individual is engaging in certain conduct for whom he is responsible, he is -- he is guilty of the -- if the event that you know there is a substantial risk of comes about. I would be amazed that a State would say the contrary.

JUSTICE KENNEDY: And your answer to Justice Breyer incorporated the -- the principle that the defense counsel had been arguing for from the outset of this case, that you must have the same scienter as the principal, and that's not necessarily the law.

MR. FISHER: I think that --

JUSTICE KENNEDY: It can go on in some States but not -- it doesn't have to be the law as I understand it.

MR. FISHER: The defendant didn't have to have premedication, Justice Kennedy. I think the best answer I can give and I -- is that we agree with the State on this. We agree with what the State said at page 31 of its brief, that it had to prove that Mr. Sarausad knew he was aiding or facilitating a

homicide. That he knew, and it was argued to this case, Justice -- as it was argued to the jury, Justice Breyer, the defense agreed that if Mr. Sarausad knew there was a gun in his car, or if he knew that the fellows were planning on killing somebody, that he could have been found guilty.

That was the very -- that was the central issue in this case; and when the State stands up and says the prosecutor argued -- didn't make -- didn't make a misleading argument, what they are talking about are the prosecutor's arguments on the facts. After telling the jury had is what Washington law is, the prosecutor argued in various ways that Mr. Sarausad knew that a fight was going to happen, or -- or that a gun was --

JUSTICE BREYER: Washington -- in the State of Washington you think the law is that if Joe Jones helps Dead Eye Dick shoot his gun right at somebody's leg and then accidental -- then, you know, he doesn't aim quite right, the guy dies; then it's a good defense to say well, I knew he was Dead Eye Dick. I thought he'd just hit him in the leg. I mean, that -- we know that isn't a good defense in Washington because the Supreme Court of Washington tells us that.

MR. FISHER: That's right. But I think you don't --

JUSTICE BREYER: What's the difference between that and punching him in the stomach?

MR. FISHER: Because when somebody is punched in the stomach there is no reasonable belief that the person is going to be put in grave risk of death. And so as I said, the issue of this case, that the whole entire case was about, and that the jury was demonstrably perplexed about, was what did Mr. Sarausad know.

And when the State says, well -- the prosecutor argued to the jury that he knew their shooting was going to happen or that he knew a gun was in the car, if the jury had believed that they could have come back with a guilty verdict in 30 minutes; but instead they asked a series of questions culminating in the one after seven days of deliberation which can only be interpreted as suggesting that we don't believe that Mr. Sarausad knew that the worst was going to happen here, and we are struggling to figure out what kind of verdict we have to render in light of that.

JUSTICE ALITO: With the jury -- was the jury told that the arguments of counsel are not the law, that I, the judge, will tell you what the law is?

MR. FISHER: I think a standard statement to that effect was made. But remember two things, Justice

Alito. First, the prosecutor herself kept telling the jury this is what the State of Washington law requires. And as this Court has recognized in other cases, the prosecutor isn't just any old lawyer standing in front of a jury. The prosecutor carries with her the imprimatur of the government; and so we think it's perfectly reasonable for the jury to have understood the prosecutor to be arguing this is what the law is, and at the very least to have created a question in their minds.

And if I contrast this case with Brown against Payton, because Justice Breyer has asked about that case and it is another case where the prosecutor made what this Court found was a misleading argument to the jury, there you have a very different situation. Not only do you have no jury questions at all coming in that case to demonstrate to the Court that the jury was in fact confused and likely to follow the prosecutor's advice, but you have a very different scenario in Brown, where this Court said that in light of the way that case was actually argued, the prosecutor was really making more of an argument on the facts, that these arguments the defendant has made shouldn't really be considered mitigating evidence in your deliberations; and as this Court said the jury must have taken it as a factual

argument because otherwise the whole mitigation hearing would have been totally unnecessary.

Now, under the -- under the facts of this case, the way this case was tried -- and again I want to emphasize that at the time this case was tried, the prosecutor had the better of the argument as to what Washington law is.

This case is only before you because it's the oddball case, and the only one I can think of that's like it is when this Court had in about 2000, or decided in 2001, called Fiore v White, when in Pennsylvania the State brought a prosecution and obtained a conviction for discharging hazardous waste without a permit, and then the Pennsylvania Supreme Court later said that not having a permit is required under the statute. It's not enough to prove to the jury that he so deviated from the permit that -- that no permit existed. And then this Court said once we know that clarification under State law, we look back and it's clear as day that the jury didn't find that element.

Now the only difference between that case and this case is that in Fiore it was absolutely certain the jury didn't find the element and the prosecution didn't argue otherwise. Here you have enough ambiguous evidence and ambiguity in the jury instructions that the

State was trying to backfill after it has lost the case in the Washington Supreme Court and say no, the jury in this case even though we told them they didn't have to find it, did go ahead and find it.

JUSTICE ALITO: But the only difference between that case, which I know very well, and this case is that in that case there was no issue about jury instructions.

MR. FISHER: Well, not directly.

JUSTICE ALITO: So what's the relevance of it?

MR. FISHER: Right. So, the relevance --

JUSTICE ALITO: Has to do with the retroactivity whether a State can -- whether Pennsylvania had changed the interpretation of its statute, or whether what they said it meant was what it always had meant.

MR. FISHER: That's right, Justice Alito and I know that you know that case. The -- you're right. So we are on all fours with Fiore in the sense that the later decision from the State Supreme Court applies retroactively, and in Fiore what you would have had, the court didn't need to talk about jury instructions, because I take it that the jury was instructed in Fiore that deviating substantially from a permit satisfies the

no-permit element of that defense, and so the jury was given there, simply an instruction that was simply wrong.

And here our contention is that the -- that the jury charge taken in light of the case was ambiguous, but that distinction doesn't matter because as this Court has said in Boyde and Estelle and many other cases, all you have to show is a reasonable likelihood that the jury misunderstood the charge.

Now we have to show an additional layer of unreasonableness because we are on habeas now and no longer on direct review, but for all the reasons that are apparent on the face of this record this is the extraordinary case.

JUSTICE STEVENS: Mr. Fisher, can I just ask you a question? Is it your view that the question that is troubling the jury was whether they had to find that the driver of the car knew that there was a gun in the car.

MR. FISHER: There's two ways to think about it. Yes, that could be one way to think about it. The other way that they might have been thinking about it was whether he knew that a murder was going to happen and that a killing was going to happen.

JUSTICE STEVENS: Assume proof of the gun in

the car was enough to prove --

MR. FISHER: That's the way the case was presented to the jury.

JUSTICE STEVENS: It wouldn't -- and that's what presumably may have taken a lot of time deliberating whether or not he knew there was a gun.

MR. FISHER: That's right, Justice Stevens. The defendant --

JUSTICE STEVENS: And in one theory it makes a difference; in another theory it doesn't.

MR. FISHER: Precisely. And the defense counsel -- the defense counsel admitted in argument that if you find he knew there was a gun in the car, then we lose. And, remember, the jury earlier -- we've talk about the three jury questions about what the law meant. Remember the jury earlier asked to have Mr. Sarausad's testimony reread back to them. So, again, every indication is you have a jury really trying very, very hard to do their job.

CHIEF JUSTICE ROBERTS: Counsel, AEDPA of course requires that this be an unreasonable application of clearly established Federal law. What is the clearly established Federal law that was unreasonably applied?

MR. FISHER: It's the rule that is stated -- again, at page 32 of the State's brief with which we

agree -- that if there is a reasonable likelihood that the jury applied instructions so as to violate the Constitution, then that violates due process.

CHIEF JUSTICE ROBERTS: So that's articulated at a fairly general level.

MR. FISHER: That's right.

CHIEF JUSTICE ROBERTS: In Yarborough, we've said that the more general the rule, the more leeway courts have in reaching outcomes in a case-by-case determination. So you have a very general rule, and to find an unreasonable application, the court has broad leeway because it is a general rule. And you've already said that the instruction does not establish unreasonable application.

Given that, isn't it pertinent, although people have objected -- you've objected to the idea that, well, all they did was send them back with the instruction. So they sent them back with something that you said could be reasonably interpreted correctly. So why isn't that -- why doesn't that -- given the leeway the State court has because this is a general rule, why isn't that sufficient to refute the idea of unreasonable objective? Yes.

MR. FISHER: The State would have a better argument if nothing else had happened in this trial

other than simply the jury had been given that instruction, but our point is, and then this Court recognizes as much, I think, in Brown against Payton, that the prosecutor's arguments do matter. They are to be considered in the calculus. And this Court said in Estelle that instructions cannot be considered in isolation. They have to be considered in the totality of the way the case was tried.

And so my point, Mr. Chief Justice, is the reason why the State cannot show that the State court of appeals decision was reasonable is because it's not just the instruction that had perplexed the State and Washington courts over the years; it's the fact that the prosecutor asked the jury to adopt the wrong interpretation of the instruction and that the jury came back and told the court -- I think -- maybe it helps to think about the case this way: After seven days of deliberation -- now I understand that we can dispute a little bit what the jury was asking, but I think a fair statement is that after seven days of deliberation, the jury was telling the court at a minimum there's a reasonable likelihood we don't understand accomplice liability in this case and that we are going to find that as long as Sarausad was a member of this gang and willingly participated in gang activity, that that's

enough to hold him liable for accomplice murder. And that's what the State had argued alternatively, Your Honor.

So after seven days, there's no guesswork that's even required. We know the jury was confused and going down the wrong path. And so the only way the State can rescue that is to say that, upon being told to read the same charge that it been told to read three previous times, that suddenly the light bulb went off so dramatically that it reduced its confusion below the 50/50 level. Now that's what this Court said in Brown against Payton. The reasonable likelihood test is below 50/50.

So we think if you were the Washington Court of Appeals -- and I think this is another way to ask yourselves the question you have to decide in this case. If you were the Washington Court of Appeals on this record, would it be reasonable for you to say that this jury was not even reasonably likely to misunderstand the accomplice liability instruction in this case?

CHIEF JUSTICE ROBERTS: You've already said that the instruction doesn't get you there. And I just heard you say that, with respect to the questions, we can dispute what the jury was asking. So it's hard for me to see where you get the objectively unreasonableness

if you can read the instruction correctly, if it's -- if you can't tell what the jury was asking, you don't know that they were reflecting the confusion you have here. So is all you're left with the prosecutor's statements?

MR. FISHER: Well, we have all three, but I don't want to give away too much. I think it is fair to say that the jury's third question is perfectly clear. I hedged a minute to be frank so that I could acknowledge the Court's earlier questions and get -- and get my statement out, but in all honesty, I think that the third jury question makes it clear that the jury is confused. But we have -- again, unlike Brown against Payton, unlike Weeks against Angelone, we have this amazing constellation of all these mutually --

JUSTICE BREYER: This argument -- I'm beginning to get your argument. The statement is -- the prosecutor never suggested Mr. Sarausad could be found guilty if he had no knowledge that a shooting was to occur. You're saying that's absolutely wrong. There's no support for that in the record. In fact what the prosecutor was arguing is that, even if a shooting didn't occur, he's still guilty because of other gang activity, and when we read the record, we find that's so wrong the statement in the supreme court opinion, that habeas was right. Is that the argument?

MR. FISHER: That's a fair characterization, Justice Breyer. If you look at the hypothetical that the State gives the jury as to what Washington law means, it is clear that's the argument they're making. On the facts they made alternative arguments.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. FISHER: Thank you very much.

CHIEF JUSTICE ROBERTS: Mr. Collins, you have four minutes.

REBUTTAL ARGUMENT OF WILLIAM B. COLLINS

ON BEHALF OF THE PETITIONER

MR. COLLINS: Thank you, Mr. Chief Justice.

I want to just focus for a moment on the third question because Respondent focuses on that. To begin with, you have to understand what was going on in this trial. There was deliberation for seven-plus days but it was a 10-day trial, I mean the jury heard testimony for 10 days. There were three defendants being tried together. Each defendant was being tried on five counts. It was a complicated trial. The fact that the deliberations took seven days is not extraordinary at all.

Mr. Sarausad assumes that the third question is directed at him. I suggest -- of course we don't know what was going on in the jury room, but I suggest

as likely an explanation is that question went to Mr. Reyes because Mr. Reyes was not driving, was sitting in the back seat. The question is, if you're just sitting in the back seat when your gang is going to do an activity, are you guilty? And they were told to reread the instruction. They did reread the instruction, and they deliberated. So the third question came on the seventh day of deliberation. After they got the answer to reread the instruction, they deliberated about 45 minutes. They took a break for the night. They came back, deliberated about another hour and a half, and then they pronounced their verdict, convicted Mr. Ronquillo of first degree murder, Mr. Sarausad of second degree murder. They hung on Mr. Reyes.

It seems to me that the third question does not -- is not some kind of a smoking gun. When you look at the trial --

JUSTICE GINSBURG: They didn't say anything at all about Mr. Reyes. They asked the question about an accomplice, a crime.

MR. COLLINS: Exactly right, Justice Ginsburg, but Mr. Sarausad assumes that that's a question about him. We suggest it's just as likely that it's a question about Mr. Reyes.

JUSTICE BREYER: But what he's saying, I think now, is if there was no gun in the car -- suppose the jury thinks there's no gun in the car, then he didn't even know there was going to be a shooting, but that the prosecutor in the context of the trial had given the jury the impression that they could convict this person even if the person did not know there was going to be a drive-by shooting.

And he's saying that the finding to the contrary, the statement to the contrary in the Supreme Court of Washington is wrong. When I look at that, I will find, he says, that the prosecutor gave the impression, as I just said, that even without a gun your involvement with this gang is enough to convict him of murder. What is your response to that? You know the record. I don't.

MR. COLLINS: My response, Your Honor, is you will not find that when you look through the record. The prosecutor -- and the PRP court stated the prosecutor never argued that if the only knowledge was some kind of a fight, that you could convict him, because the defendants in this case testified that they were going to go fight. And you never had the prosecutor saying: This is an easy case; I win. The defendants have all testified that they were going to go

fight. In for a dime, in for a dollar. If they were going to go fight, they're guilty. Never argued that.

You will not find that in the transcript or in the materials, Justice Breyer. What you will find is the prosecutor consistently arguing they knew they were going to facilitate a homicide, a shooting, a murder. And given that this is a case brought under AEDPA and the question is whether the PRP court's decision is an unreasonable application of Federal law, I don't think there's any doubt that it's not an unreasonable application, and, therefore, this Court should reverse the Ninth Circuit.

If there are no more questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above entitled matter was submitted.)