

NO. 07-772

**IN THE SUPREME COURT OF
THE UNITED STATES**

DOUG WADDINGTON,

Petitioner,

v.

CESAR SARAUSAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Waddington seeks review of the Ninth Circuit's decision that affirmed the grant of habeas relief vacating Sarausad's convictions for murder and attempted murder. The Ninth Circuit held the accomplice liability instructions in Sarausad's trial were so ambiguous that there was a reasonable likelihood the jury misapplied the instructions so as to relieve the prosecution of the burden of proving all of the elements of the crime. In so holding, the panel majority disregarded the state court ruling that the instructions correctly set forth the elements of accomplice liability under state law, and the majority failed to give proper deference to the state court adjudication of the federal claim.

Sarausad argues the panel majority accepted the state court rulings on state law, but still properly found constitutional error. Sarausad contends the court correctly found the instructions ambiguous because the instructions did not sufficiently explain accomplice liability, the Washington Supreme Court found a "similar" instruction allowed for an improper conviction, and the state appellate court had initially found the instructions appropriate based upon that court's misunderstanding of state law. Br. Opp. at 7. Sarausad argues the Ninth Circuit properly held that the instructions violated due process, and found the state court decision to the contrary was objectively unreasonable, because the jury likely misapplied the accomplice liability instructions so as to relieve the prosecution of the burden of proving the elements of the crime beyond a reasonable doubt. Br. Opp. at 14-17. Sarausad's defense of the panel majority's decision is untenable.

The panel majority disregarded the state court rulings on state law, and conducted their own analysis of state law to find the instructions did not sufficiently explain accomplice liability. The circuit court then concluded the state court decision was objectively unreasonable even though this Court has never found a due process violation arising from an instruction correct under state law that required proof beyond a reasonable doubt, did not create a presumption, and did not shift the burden of proof.

ARGUMENT

1. Sarausad Mischaracterizes The Decision By Arguing The Ninth Circuit Accepted The State Court Rulings On State Law.

Waddington's petition demonstrated how the panel majority disregarded the state court determination that the jury instructions properly set forth the elements of accomplice liability under Washington law. Pet. at 17-23. Waddington's petition further demonstrated how the Ninth Circuit's decision conflicts with the decisions of the Third, Tenth, and Eleventh Circuits because those circuit courts accepted the state court determination of state law in reviewing a claim of instruction error. Pet. App. 23-26. Sarausad agrees a circuit court's refusal to accept the state court determination of state law would create a conflict. Br. Opp. at 12 ("Had the Ninth Circuit truly done that, then obviously its decision would have conflicted not only with that of other circuits but also with controlling authority from this Court."). Recognizing that a conflict exists, Sarausad seeks to avoid certiorari by mischaracterizing the Ninth Circuit's decision.

