

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.

Sarausad claims “the Ninth Circuit accepted that the instructions tracked the language of the relevant statute, and accepted the Washington Supreme Court’s definitive interpretation of the statutory language.” Br. Opp. at 9. But Sarausad mischaracterizes the Ninth Circuit’s decision.

Rejecting the state court ruling that the instructions properly set forth the elements of accomplice liability under Washington law, the Ninth Circuit concluded the instructions were defective because they did not clearly set forth the elements of accomplice liability. Pet. App. 70a-71a. The panel majority held:

“Because it uses the words ‘the crime’ where Instruction 7 in *Roberts* used the words ‘a crime,’ Instruction 45 in Sarausad’s case does not invite an erroneous construction to the same degree as the flawed instruction in *Roberts*. Indeed, using the words ‘the crime,’ Instruction 45 tracks the wording in the Washington accomplice liability statute more closely than Instruction 7. *But the simple change from ‘a crime’ to ‘the crime’ in Instruction 45 does not, in our view, make the jury instructions in Sarausad’s case unambiguous, for the basic problem identified above remains: There is no sentence in the instructions specifically instructing the jury that a person can be guilty of ‘a crime’ as an accomplice only if that persons knows that ‘a crime’ is ‘the crime’ the principal intends to commit.*” Pet. App. 71a (emphasis added).

Contrary to Sarausad's argument, the panel majority did not simply note "in passing that the trial court could easily have cleared up the jurors' expressed confusion in this case with a brief, clarifying instruction." Br. Opp. at 11. Rather, the panel majority found the instruction was improper because there was "*no sentence in the instructions specifically instructing the jury that a person can be guilty of 'a crime' as an accomplice only if that persons knows that 'a crime' is 'the crime' the principal intends to commit.*" Pet. App. 71a (emphasis added).

The dissenting judges recognized that the panel majority disregarded the state court determination of state law. Dissenting from the panel's decision, Judge Bybee stated:

"Of course, the majority has no case law to support its proposition that an additional explicit statement is, or has ever been, required by Washington courts. In fact, the Washington Supreme Court's express approval of the *Davis* instruction belies the existence of such a requirement. *See Roberts*, 142 Wash.2d at 511-12, 14 P.3d at 736. Contrary to the majority's argument, the corrected instruction alone in *Davis*, as here, sufficiently cured the defective language without any further explanation." Pet. App. 112a.

Judge Callahan, writing for the five judges who dissented from the denial of rehearing *en banc*, agreed the panel majority ignored the state court ruling on state law. Pet. App. 5a-14a. Judge Callahan stated:

This is fundamentally a case about Washington state's right to define the parameters of accomplice liability under its own state law. The panel majority not only misinterprets Washington law but also refuses to accord the Washington courts the required deference required by well established precedent and basic principles of federalism. By doing so, the panel majority elevates what it considers to be a Washington state court's mistake in interpreting Washington state law into a constitutional violation. As a result of our lack of deference, our court takes the unprecedented step of rejecting a standardized state jury instruction that the Washington Supreme Court has expressly approved as correctly stating the limits of accomplice liability under state law." Pet. App. 2a.

Thus, contrary to Sarausad's argument, the panel majority refused to accept the state court determination that the jury instructions correctly set forth accomplice liability under Washington law.¹ For this reason, the Ninth Circuit's decision conflicts with the decisions of other circuit courts and of this Court, and even Sarausad agrees that this conflict exists. Br. Opp. at 12. This Court should grant the writ to resolve this conflict.

¹ Sarausad himself continues to assert that the state court erred in analyzing Washington law. Arguing that he was convicted based upon a legal theory inconsistent with Washington law, Sarausad implies that the Washington Court of Appeals erroneously analyzed state law in his personal restraint petition proceeding. Br. Opp. at 10 n.7.

2. Sarausad's Re-characterization Of The Decision Does Not Provide An Alternative Basis To Support The Result Reached By The Ninth Circuit.

Sarausad mischaracterizes the Ninth Circuit's decision to support his argument that certiorari should be denied. This mischaracterization comes in two parts. First, Sarausad incorrectly claims the circuit court accepted the state court determination of state law. Br. Opp. at 9. As Waddington explained above, this characterization is inaccurate. Second, Sarausad argues that "[c]orrect' jury instructions may nevertheless be confusing under some circumstances." Br. Opp. at 16. However, this Court has never found a due process violation arising from a jury instruction that correctly set forth state law, did not omit an element of the offense, did not create a presumption, and did not shift the burden of proof. Since this Court has not found a constitutional error in such a situation, the state court decision that the instructions did not violate due process cannot be an objectively unreasonable application of clearly established federal law. *Carey v. Musladin*, 127 S. Ct. 649, 654 (2006).

Sarausad admits the "jury was instructed in the language of Washington's accomplice liability statute," see Br. Opp. at 2-3, and he declares he "is not contending that the instructions given in his case would, in and of themselves, give rise to a constitutional violation." Br. Opp. at 12. These concessions necessarily beg the question: how can a state court adjudication of a claim of instructional error be an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1)

where the Court has never found constitutional error in an instruction that did not omit an element, create a presumption, or shift the burden of proof?

The Ninth Circuit relied on this Court's decisions in *In re Winship*, 397 U.S. 358 (1970), *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Estelle v. McGuire*, 502 U.S. 62 (1991) to find the state court adjudication of the claim was an unreasonable application of clearly established federal law. Pet. App. 53a-55a. However, these decisions do not compel the conclusion reached by the Ninth Circuit. *Winship* held the "beyond a reasonable doubt" standard applies to juvenile adjudication proceedings that are the equivalent of a criminal proceeding. *Winship*, 397 U.S. at 359-68. *Sandstrom* held as an unconstitutional presumption an instruction that "the law presumes a person intends the ordinary consequences of his voluntary acts." *Sandstrom*, 442 U.S. at 512-26. And *Estelle* held an instruction, even though allegedly erroneous under California law, did not so infect the entire trial with unfairness as to violate due process. *Estelle*, 502 U.S. at 70-75. The holdings in these cases did not put the state courts on notice that the instructions given in Sarausad's trial violated due process. Pet. App. 100a-101a and 115a-116a (Bybee, J., dissenting); see also *Smith v. Horn*, 120 F.3d 400, 425 (3rd Cir. 1997) (Alito, J., dissenting) ("No Supreme Court case . . . has held that the Due Process Clause is violated whenever a state trial judge, in instructing the jury on the elements of state law, uses ambiguous language that prejudices the defendant."). The holdings in these cases do not compel the grant of habeas relief.

To avoid certiorari, Sarausad argues the Ninth Circuit tracked the requirements of *Estelle* when the court found a constitutional error and granted habeas relief notwithstanding the state court ruling that the instructions in his trial correctly set forth Washington law. Br. Opp. at 6. But *Estelle* involved the narrow issue of whether an instruction, allegedly erroneous under state law, “by itself so infected the entire trial that the resulting conviction violates due process.” *Estelle*, 502 U.S. at 72. Noting that the Court has narrowly defined the category of infractions that violate “fundamental fairness,” the *Estelle* Court held that the allegedly erroneous instruction did not render Estelle’s trial so fundamentally unfair so as to violate due process. *Id.* at 72-75. Since *Estelle* held that an allegedly erroneous instruction did not violate due process, it was not an objectively unreasonable application of *Estelle* for the Washington courts to conclude that instructions which correctly set forth state law also did not violate due process.

Sarausad also defends the grant of relief on the claim of jury instruction error by arguing the Ninth Circuit’s decision was not based solely on the language of the instructions. Br. Opp. at 14. Sarausad cites *Penry v. Johnson*, 532 U.S. 782 (2001), *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Richardson v. Marsh*, 481 U.S. 200 (1987) for the principle that even a correct instruction may violate due process under certain circumstances. Br. Opp. at 14-16. But these cases do not clearly establish the principle that instructions on criminal liability, correct under state law, violate due process.

Penry and *Simmons* concerned the proper instructions for issues unique to capital trials. *Penry* held that instructions in a death penalty case must provide the jury with a vehicle to properly express its reasoned moral response to particular mitigation evidence presented by the defendant. *Penry*, 532 U.S. at 796-804. *Simmons* held that where the prosecution raises the issue of future dangerousness, and the defendant is ineligible for parole under state law, the defendant is entitled to an instruction specifically informing the jury of the ineligibility for parole. *Simmons*, 512 U.S. at 161-71. The holdings of *Penry* and *Simmons* involved specific rights granted to defendants in death penalty trials – the right to have the jury properly consider mitigating and aggravating evidence in fixing the punishment. The decisions do not compel the conclusion that instructions in a non-capital trial correctly setting forth state law violate due process.

Similarly, *Richardson v. Marsh* had nothing to do with the constitutional validity of instructions on accomplice liability under state law. *Richardson* involved whether the admission of a co-defendant's redacted sentence violated the Confrontation Clause. *Richardson*, 481 U.S. at 202. The portion of *Richardson* cited by Sarausad concerning a claim of prosecutor misconduct was merely a direction on remand for the Sixth Circuit to consider whether a prosecutor's comments "can serve as the basis for granting a writ of habeas corpus" in light of the defendant's failure to object. *Id.* at 211. The language was not a holding, and it did not clearly establish that an instruction, which is correct under state law, violates due process.

Sarausad argues that, even where the jury is correctly instructed in accordance with state law, “[f]ederal courts are free to consider whether a prosecutor’s argument may have confused the jury.” Br. Opp. at 14. While prosecutorial misconduct may violate due process, a claim of prosecutorial misconduct is distinct from the claim of instructional error granted by the Ninth Circuit in this case. Although the Ninth Circuit mentioned the prosecutor’s argument as one of four factors in determining whether the jury may have misapplied the instructions, the circuit court did not grant relief on a claim of prosecutorial misconduct. Instead, the court granted relief based upon a claim that the instructions violated due process. Pet. App. 53a-79a. Sarausad’s mischaracterization of the ruling does not alter the fact that the Ninth Circuit granted relief on instructional error when the instructions correctly set forth state law.

Furthermore, the assertion that the prosecutor’s argument caused the jury to misapply the instructions is flawed for two additional reasons. First, the state courts ruled the prosecutor did not misstate Washington law. Pet. App. 192a and 209a-15a. The ruling of state law is binding on the federal courts. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). Second, even if the prosecutor’s arguments were misleading, the “arguments of counsel generally carry less weight with a jury than do instructions from the court.” *Boyde v. California*, 494 U.S. 370 (1990). The state court reasonably found no due process violation because the jury was correctly instructed as to accomplice liability. This state court decision was not objectively unreasonable.

In addition to the inter-circuit conflict identified in Waddington's petition, the Ninth Circuit's failure to give proper deference to the state court adjudication of the claim of instructional error also conflicts with the Seventh Circuit's decision in *Garth v. Davis*, 470 F.3d 702 (7th Cir. 2007). In *Garth*, the Indiana court ruled the jury was erroneously instructed on accomplice liability because the jury was not informed that it must find Garth had intent to kill. *Id.* at 709 and 711. Garth argued the instruction violated due process because it allowed the jury to convict him of attempted murder without a finding of the requisite *mens rea*. *Id.* at 709. Despite the erroneous instruction, and despite concern about the effect the instructions may have had, the Seventh Circuit ruled the state court could reasonably conclude there was no due process violation because the instructions as a whole adequately instructed the jury. *Id.* at 712. Unlike the Ninth Circuit, the Seventh Circuit determined the state court decision, even if erroneous, was not objectively unreasonable.

Finally, Sarausad suggests review is not appropriate because the Ninth Circuit's decision has limited effect. By rejecting the Washington Supreme Court's determination that the pattern instruction correctly informed the jury of accomplice liability, the Ninth Circuit has issued an opinion in direct conflict with the decision of the Washington Supreme Court. By declaring that the instruction adopted by the Washington Supreme Court is ambiguous, the opinion necessarily invites challenges to convictions under Washington's accomplice liability statute. The Court should grant the petition.

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be reversed.

RESPECTFULLY SUBMITTED.

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