

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 15 2007

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

MALCOLM P. COLEMAN,	)	No. 05-17122
	)	
Petitioner-Appellant,	)	D.C. No. CV-03-05780-DLB
	)	
v.	)	<b>MEMORANDUM*</b>
	)	
DIANE BUTLER, Warden;	)	
ATTORNEY GENERAL FOR THE	)	
STATE OF CALIFORNIA,	)	
	)	
Respondents-Appellees.	)	
_____	)	

Appeal from the United States District Court  
for the Eastern District of California  
Dennis L. Beck, Magistrate Judge, Presiding

Argued and Submitted November 6, 2007  
San Francisco, California

Before: FERNANDEZ and McKEOWN, Circuit Judges, and TRAGER,  
District Judge.

Malcolm P. Coleman appeals the district court's denial of his petition for

---

\*This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

\*\*The Honorable David G. Trager, Senior United States District Judge for  
the Eastern District of New York, sitting by designation.

habeas corpus relief. See 28 U.S.C. § 2254. We affirm.

Coleman asserts that in instructing the jury, the state trial court erred. He, therefore, claims that he was denied due process of law because he might have been found guilty by a preponderance of the evidence rather than beyond a reasonable doubt. See Gibson v. Ortiz, 387 F.3d 812, 820 (9th Cir. 2004). We disagree.

The instructions may not have been perfect, but imperfect is not the equivalent of unconstitutional. We must, of course, consider the instructions as a whole<sup>1</sup> and determine whether the state court determination that there was no reasonable likelihood<sup>2</sup> that the jury's verdict was substantially and injuriously affected or influenced<sup>3</sup> by the imperfect instructions was objectively unreasonable.<sup>4</sup>

---

<sup>1</sup>Middleton v. McNeil, 541 U.S. 433, 437, 124 S. Ct. 1830, 1832, 158 L. Ed. 2d 701 (2004) (per curiam); see also United States v. Munoz, 233 F.3d 1117, 1130 (9th Cir. 2000).

<sup>2</sup>See Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198, 108 L. Ed. 2d 316 (1990); see also Lankford v. Arave, 468 F.3d 578, 585 (9th Cir. 2006), cert denied, \_\_\_ U.S. \_\_\_, \_\_\_ S. Ct. \_\_\_, \_\_\_ L. Ed. 2d \_\_\_ (Oct. 1, 2007); Allen v. Woodford, 395 F.3d 979, 996 (9th Cir. 2005).

<sup>3</sup>See Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722, 123 L. Ed. 2d 353 (1993); see also Calderon v. Coleman, 525 U.S. 141, 145-46, 119 S. Ct. 500, 502-03, 142 L. Ed. 2d 521 (1998) (per curiam).

<sup>4</sup>See Middleton, 541 U.S. at 436, 124 S. Ct. at 1832.

On this record, it was not.<sup>5</sup>

AFFIRMED.

---

<sup>5</sup>We note that this case is quite unlike Gibson, 387 F.3d at 822–24. Here the jury was never told (explicitly or otherwise) that it could find Coleman guilty on any standard less than beyond a reasonable doubt.