

In the
Supreme Court of the United States

JAKE PAUL HEINEY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On a Petition for Writ of Certiorari to the
Ohio Court of Appeals, Sixth Appellate District

PETITION FOR WRIT OF CERTIORARI

WILLIAM V. STEPHENSON

COUNSEL OF RECORD

MICHAEL H. STAHL

STAHL LAW FIRM

316 N. MICHIGAN ST., STE 600

TOLEDO, OH 43604

(567) 213-8196

BILLSTEPHENSONLAW@HOTMAIL.COM

QUESTIONS PRESENTED

This Court has held that Due Process in criminal cases requires that a State prove every element of an alleged crime beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 364 (1970). This Court has also held that a known improper jury instruction as to “reasonable doubt” automatically invalidates any conviction. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), because the jury must make the finding of guilt. *Id.* at 277.

1. Is a state court conviction valid if the jury was given a known improper instruction as to the definition of an element of the charged offense and the improper instruction permitted the Jury to find guilt without the State having proven the element beyond a reasonable doubt with its proper definition?
2. May “harmless error” analysis be applied where a jury instruction as to the definition of an element of the charged offense was found to be error and the error made it possible for the jury to find guilt without finding the element in question proven beyond a reasonable doubt?

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PETITION FOR WRIT OF CERTIORARI

Dr. Jake Heiney, currently in the custody of the Sheriff of Lucas County, Ohio, through counsel, respectfully petitions this court for a Writ of Certiorari to review the judgement of the Ohio Court of Appeals below.



OPINION BELOW

The Ohio Sixth District Court of Appeals issued its decision on August 24, 2018, reported as *State v. Heiney*, 117 N.E.3d 1034 (Ohio Ct. App. 2018). App.4a. Dr. Heiney raised eleven assignments of error on appeal, and the Court of Appeals opinion is approximately seventy pages long.

Relevant to this petition is Dr. Heiney's Eleventh Assignment of Error where he asserts that the trial court, over objection, improperly instructed the jury as to the definition of the "force" element of the felony charges against him, contrary to his rights under the U.S. Constitution. App.115a-116a The Court of Appeals addressed this assignment of error in eight paragraphs. App.56-60a. The Court determined that there was error, that the instruction was improper, but the error was harmless because, "it is unlikely that the jury relied upon the inapplicable sentence to find non-physical force, alone, supported the GSI convictions because the state correctly argued the presence of physical force." App.59a. Emphasis added.

Dr. Heiney timely sought review by the Ohio Supreme Court, asserting as a proposition of law that the state had moved the goalposts of a conviction with the erroneous jury instruction, which permitted the jury to find “force” without the state proving a use of “force,” as properly defined by the Ohio Supreme Court, beyond a reasonable doubt which violated his rights to be tried before an impartial jury, to have the state prove every element beyond a reasonable doubt, and to be accorded a fair trial in accordance with Due Process under the U.S. Constitution.

Dr. Heiney’s sentence had been stayed by the Court of Appeals pending its decision, and Dr. Heiney sought a similar stay from the Ohio Supreme Court on September 20, 2018. That motion was denied on November 7, 2018, with Chief Justice O’Conner and Justice Fischer dissenting. App.3a.



JURISDICTION

The Ohio Supreme Court decided to not accept jurisdiction on Dr. Heiney’s case on December 26, 2018, with Justices Fischer, and DeGenaro dissenting. App. 1a, 2a. Based upon the dissents, Dr. Heiney moved the Ohio Supreme Court to reconsider that decision on January 7, 2019. On March 6, 2019 the Ohio Supreme Court denied Dr. Heiney’s motion to reconsider, with Justice French dissenting. App.82a, 83a.

Dr. Heiney now makes a timely Petition for Certiorari and asserts jurisdiction under 28 U.S.C. § 1257.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. VI

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .

U.S. Const. amend. XIV

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Ohio Rev. Code § 2901.01

(A) As used in the Revised Code:

(1) “Force” means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

Ohio Rev. Code § 2907.05

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or

more other persons to have sexual contact when any of the following applies:

- (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.



STATEMENT OF THE CASE

This case, with its allegations of sexual misconduct, comes at a time when courts and prosecutors face intense pressure to bring charges, and to punish those who offend. This pressure heightens the temptation to extra-legislatively expand the scope of criminal statutes, to rationalize deprivations of rights and the sanctity of a fair trial in a criminal matter.

Dr. Heiney was an Orthopedic Surgeon with a busy practice in which he saw approximately one hundred patients a week, and the individual exams lasted, at most, fifteen or twenty minutes. All of the allegations occurred during regular business hours in a clinic where there were at least three members of Dr. Heiney's staff caring for patients in the same location, and numerous patients were waiting to be seen by Dr. Heiney.

The complaints against Dr. Heiney are based upon alleged inappropriate touching, and looking, during a medical exam, where neither of the women involved alleged any use of physical force, or that they were in fear, or under any kind of duress. App.5a-10a.

Dr. Heiney was charged with two counts of Gross Sexual Imposition, felonies under Ohio law, and one

count of Tampering with Records, a misdemeanor under Ohio law. Dr. Heiney denied, and continues to deny all of the charges, and was tried by Jury in the Lucas County Court of Common Pleas and convicted on all counts on February 29, 2016. App.77a.

Relevant to this Petition, the prosecution moved the trial court to issue jury instructions that permitted the jury to find the “force” element proven if it determined that “subtle or psychological force” was used, despite the statute requiring physical force. App.88a. As the trial court was briefed by the defense in opposition to the instruction, that instruction is only applicable in cases of sexual assault by parents upon minor children and was not applicable to the facts of this case based upon long-standing rulings by the Ohio Supreme Court. App.91-92a. The trial court held a hearing, and ruled on the record, without citing to a specific case, that the “psychological force” instruction was proper, and included it in the jury instructions. App.108a-109a. The Court of Appeals found this instruction to be in error, but found the error harmless. App.59a. Dr. Heiney contends that the instruction deprived him of his right to have a jury find him guilty beyond a reasonable doubt on all elements of the offense, and of his due process rights.



REASONS FOR GRANTING THE PETITION

I. THE PETITION SHOULD BE GRANTED BECAUSE WHILE STATE COURT'S PROPERLY INTERPRET STATE STATUTES, THEY MAY NOT CONSTITUTIONALLY PERMIT A CONVICTION TO STAND WHERE THE JURY IS NOT KNOWN TO HAVE FOUND GUILT

The rationale relied upon by the Court of Appeals in this case presents an unacceptable construction of the use of force as it applies to Gross Sexual Imposition between adults. As the Court of Appeals acknowledged, the standard of “subtle and psychological” is “neither physical force nor threat of physical force . . .” and is inappropriate in situations that are not analogous to a parent-child level of control. App.58a. Since the Court of Appeals found this instruction to be harmless error, two questions are raised.

An improper Jury Instruction which allows a Jury to find guilt beyond a reasonable doubt without finding all of the material elements beyond a reasonable doubt is a fundamental denial of the Defendant’s rights to a trial by jury under the United States Constitution. When an instruction presents an easier met definition of a fact that must be proven there is no alternative but reversal because the Court may not enter a directed verdict of guilty, and or the improper definition amounts to structural error.

A. The Right to a Trial by a Jury Requires Certainty That the Jury, Not the Court, Made the Finding of Guilt

As Justice Scalia discusses in *Sullivan*, the right to a trial before a jury “includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of ‘guilty.’” *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). “It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt.” *Id.* at 278. “[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.” *Id.* at 279. Yet this is exactly what the Court of Appeals has done in this case, by finding that it was “unlikely” that the jury “relied upon” the improper instruction. App.59a.

In *Sullivan*, the issue was an erroneous instruction as to the standard for reasonable doubt, but the same logic must apply to a situation where the jury makes its determination of guilt based upon an instructed definition of a fact that is both erroneous and more easily found. This would not apply to all definitions given in jury instructions, but it does apply where the instruction allows the jury to potentially convict without finding all of the elements of the crime beyond a reasonable doubt. The jury potentially found Dr. Heiney guilty of applying “psychological force” which is not the required “physical force.” The jury cannot be said with certainty to have reached a verdict

beyond a reasonable doubt, and so the conviction must be reversed. Because of inclusion, rather than the omission, of such a jury instruction, Dr. Heiney was denied his right to have the case tried by a Jury, separate and distinct from the violation of his due process rights. By clarifying *Sullivan* to include narrow situations such as this one specifically under the Sixth Amendment right to a jury trial, the Court would prevent similar errors in the future.

B. Harmless Error Analysis Does Not Apply in This Situation, Since the Error Is Structural

A harmless error analysis cannot be applied in this situation because “[t]he most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt—not that the jury’s actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough.” *Id.* at 280. (Emphasis added.)

In other words, the error constitutes a “structural error” under the due process clauses of the Fifth and Fourteenth Amendments such that the integrity of the trial itself is irredeemably compromised, and harmless error cannot apply.



CONCLUSION

For the foregoing reasons, Petitioner respectfully requests his petition be granted.

Respectfully submitted,

WILLIAM V. STEPHENSON
COUNSEL OF RECORD
MICHAEL H. STAHL
STAHL LAW FIRM
316 N. MICHIGAN ST., STE 600
TOLEDO, OH 43604
(567) 213-8196
BILLSTEPHENSONLAW@HOTMAIL.COM

COUNSEL FOR PETITIONER

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