NO: 19-7789

ORIGINAL

In the

Supreme Court of the United States

STEVEN KLEIN

Petitioner,

v.

CALIFORNIA, ET AL,

Respondent.

On Petition for Writ of Certiorari to the California Appeals Court

PETITION FOR A WRIT OF CERTIORARI

STEVEN KLEIN
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January 23, 2020

QUESTION PRESENTED

Whether the trial court erred by overruling Klein's objection to prosecution's misstated of the burden of proof during closing arguments when he instructed the jury **not** to determine whether the State had proven every fact, but instead, he charged the jury with considering all of the competing evidence together – in conglomeration – in deciding whether there was a reasonable doubt about Klein's guilt; does it not violate The Due Process Clause of the Fourteenth Amendment which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Cage v. Louisiana, 498 U.S. 39 (1990), citing In re Winship, 397 U.S. 358, 364.

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STATEMENT OF THE CASE

By Complaint filed December 23, 2015, appellant was charged with two felony counts of Vehicle Code section 23152, driving under the influence: Count 1: subdivision (a) of the above section by a person who is under the influence of any alcoholic beverage; and Count 2: subdivision (b) of the above section by a person who has 0.08 percent or more, by weight, of alcohol in his blood.

On May 3rd, 2016, the state of California brought Steven Klein to trial. Klein's trial commenced on March 2, 2016. (CT 161-163.) The jury found appellant guilty of Counts One and Two as charged.

CHALLENGED JURY INSTRUCTIONS

CALCRIM 224: PROVIDES:

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

THE JUDGE'S ORAL RECITATION PROVIDED:

"But before you can rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty of the crimes charged, you got to be convinced beyond a reasonable doubt that 'all of those facts' upon which the inference rests have likewise been proven beyond a reasonable doubt. Also, if you've got two reasonable interpretations of the evidence, one of which points to the defendant's innocence, another to his guilt, you got to accept the one that points to his innocence and reject the one that points to his guilt. If, on the other hand, you've got two interpretations of the evidence, one you think's reasonable and another is unreasonable, you always have to accept the reasonable interpretation." (3RT 265.)

CHALLENGED JURY INSTRUCTIONS
"You have to consider 'all of the evidence together,' and then consider whether 'all of that evidence together' points to a reasonable doubt, and if 'all of the evidence together' does not point to a reasonable doubt, and only points to guilt, then you must reject the ones –" (4RT 314.)

FOURTEENTH AMENDMENT DUE PROCESS CLAUSE
The Due Process Clause of the Fourteenth Amendment which "protects the accused against conviction except upon proof beyond a reasonable doubt of 'every fact' necessary to constitute the crime with which he is charged." **Cage v. Louisiana, 498 U.S. 39 (1990), citing In re Winship, 397 U.S. 358, 364.**

The Court instructs:

COURT "You must decide what the facts are in our case based solely upon the instructions and facts that we give you." **(RT 260:17).**

COURT: "You got to follow the law as I explain it to you even if you disagree with the law." **(RT 260:25).**

PROSECUTION: "I just want to go over a couple... instructions that you heard from the Court...'He told you you must follow the law as I explain it to you, even if you disagree with the law." **(RT 281:21).**

Prosecution during closing argument charged the jury with:

PROSECUTION: "And so he talks about all of these things one by one... and he tried to do that for each and every piece of evidence in this case... that's not how it works... you have to consider all of the evidence together, and consider whether all of that evidence together points to a reasonable doubt, and if all of the evidence together does not point to a reasonable doubt, and only points to guilt, then you must reject the ones." **(RT 313:25 thru RT 314:19).**

Prosecution in charging the jury with a Constitutionally deficient instruction during closing argument, nullified Klein's right to closing argument recognized in **Herring v. New York, 422 U.S. 853 (1975).**

In ***Sparf v. United States, 156 U. S. 51, 90***, and the other authorities , *e. g.*, ***Sullivan, supra, at 275***, all confirm that the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence. **United States v. Gaudin, 515 U.S. at 511-515. (1995).**

"We presume that the jury followed these instructions, see **Richardson v. Marsh, 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)** (noting the "almost invariable assumption of the law that jurors follow their instructions"), and proceeded on the basis of "considering all of the evidence together – " thus, in conglomeration – for which divested the jury of their constitutional duty of deciding for themselves whether the state had carried it's burden of proving "every fact beyond a reasonable doubt." **Winship**, Ibid.

The Ninth Circuit Court of Appeals held in **Doe v. Busby, 661 F.3d 1001 (9th Cir. 2011);** "Misstating the correct burden of proof is in the category of errors that cannot be balanced or offset by the consideration of competing evidence. Not only is the misstatement of the burden of proof not an evidentiary issue for the factfinder, the error occurs after the taking of evidence and necessarily impacts the whole of trial because the judge has allowed the properly received evidence to be filtered through what we called in **Gibson** "an unconstitutional lens." **387 F.3d at 824.**

As the Court recognized in **Herring v. New York, 422 U.S. 853 (1975)**, the primary purpose of a defendant's closing is to hold the State to its burden of proof. **See 422 U.S. at 862.** ("Closing argument is the last clear chance to persuade the trier of fact

that there may be reasonable doubt of the defendant's guilt."). By overruling Klein's objections to the use of the Constitutionally infirm instructions, the trial judge "lessened the State's burden" and "infringed upon Klein's due process rights." The "misdescription of the burden of proof" (**Sullivan, supra at p. 281, 113 S. Ct. 2078**) nullified defense counsel's closing argument," as Klein's closing argument consisted of challenging each and every piece of evidence; the challenged instruction was tantamount to a **mandatory presumption**, as it directed the jury to consider unproven evidence, that had never been so much as appraised – much less proven beyond a reasonable doubt.

The Supreme Court has instructed that preclusion of closing argument in a criminal defense trial is structural constitutional error. **Herring v. New York, 422 U.S. 853, 864–65 (1975)**.

Winship further teaches that a defendant cannot constitutionally be tried using a lesser burden of proof. **397 U.S. at 364–65**. Due process does not permit shifting the burden of proof to the defendant by the use of conclusive or burden-shifting presumptions. **Mullaney v. Wilbur, 421 U.S. 684, 703–04 (1975)**. The prosecutor's language greatly raised the defense task from merely raising a reasonable doubt about any essential aspect of the prosecution burden, to requiring the defense to a raise a reasonable doubt regarding "all of the evidence together." Klein's objection that this was a misstatement of the law was improperly overruled. (Ibid.).

REASONS FOR GRANTING THE WRIT

For the foregoing reasons, the Court should grant this petition for Certiorari to determine whether it violates the defendant's constitutional right to acquittal absent proof beyond a reasonable doubt of every fact necessary to constitute the crime charged, when the government charges the jury with considering "all of the evidence together;" hence, in conglomeration. Such tactic is akin to circumventing a Fish & Game "Catch and Release" law via weighing fish/game together; (e.g., weighing all Fish together in a bucket to avoid detection of Fish not meeting the minimum legal threshold.)

The Constitutionally Infirm, burden-shifting instruction runs directly contrary to Winships Maxim, for which deprived Klein of the following Constitutional Rights:

- **Fourteenth Amendment**; Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. **In re Winship, 397 U.S. 358, 364 .**
- **Sixth Amendment**; right to "participate fully and fairly in the adversary factfinding process," of which closing argument was thee last chance to persuade the trier of fact that there may be reasonable doubt of Klein's guilt." **Herring, See 422 U.S. at 862**
- **Sixth Amendment**; "the Constitution gives a criminal defendant the right to demand that a *jury* find him guilty of all the elements of the crime with which he is charged." **United States v. Gaudin, 515 U.S. 506, 511 (1995).**

Considering the context of the instructions as a whole and the trial record, the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. The instruction in directing the jury to consider to "consider all of the evidence together," relieved prosecution of it's Constitutional duty and burden of proving every fact of every element of the charged crime, thereby effectively taking that question away from the jury. **United States v. Gaudin, 515 U.S. 506, 511 (1995)**.

("If there is a 'reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard,' then the charge is constitutionally deficient." (quoting **Victor v. Nebraska, 511 U.S. 1, 6 (1994),** (citing, **Estelle v. McGuire, 502 U.S. 62, 72 & n. 4 (1991).**

In sum, there is no question that the trial court violated Klein's due process rights under a long line of clearly established Supreme Court precedent. **In re Winship, U.S. 358, 364 (1970). See Estelle v. Williams, 425 U.S. 501, 503 (1976); Henderson 397 v. Kibbe, 431 U.S. 145, 153 (1977); Ulster County Court v. Allen, 442 U.S. 140, 156 (1979); Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979). See also Sullivan v. Louisiana, 508 U.S. 275 (1993)** (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt of every fact necessary to constitute the crime charged).

I. The California Appeals Court's Decision Conflicts with California Supreme Court Precedent. In **People v. Nicolas, 214 Cal. Rptr. 3d 467, 481 (Cal. Ct. App.), review denied, (Cal. June 14, 2017)**, The Nicolas court cites the California Constitution, ultimately it applies "the rule announced by [the California] Supreme Court in **Aranda**, and appropriately applied by the [California] Court of Appeal in **Cruz**." **Nicolas, 214 Cal. Rptr. 3d at 481**. Those cases make clear that the rule announced in Aranda implements federal constitutional precedent. **People v. Aranda, 283 P.3d 632, 648 (Cal. 2012)** ("**An instruction that effectively lowers the prosecution's burden of proving guilt beyond a reasonable doubt is structural error because it 'vitiates all the jury's findings** . . . .'" (quoting **Sullivan v. Louisiana, 508 U.S. 275,281 (1993))**; **People v. Cruz, 206 Cal. Rptr. 3d 835, 841 (Cal. Ct. App. 2016)** (distinguishing between structural error that "has the effect of lowering the reasonable-doubt standard," and other error that is "subject to harmless error analysis under" **Chapman v. California, 386 U.S. 18 (1967)).**

II. Ninth Circuit Court of Appeal in denying Klein Certificate Of Appealability failed to recognize Ninth Circuit's very own precedent,[1] as well as United States Supreme Court Precedent,[2] ("A Sullivan error precludes harmless error review because no verdict within

1 **Doe v. Busby, 661 F.3d 1001 (9th Cir. 2011),** and **Gibson v. Ortiz, 387 F. 3d 812 (9th Circuit 2004).**

2 **Winship, 397 U.S. 358 (1970)**, and **SullivanvLouisiana, 508 U.S. 275(1993).**

the meaning of the Sixth Amendment has been rendered."); **Sullivan, 508 U.S. at 280** ("[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. In short, when a court's erroneous jury instruction impermissibly lowers the burden of proof, that error requires structural error review, not harmless error review. **Mendez v. Knowles, 556 F.3d at 768 (9th Cir. 2009).**

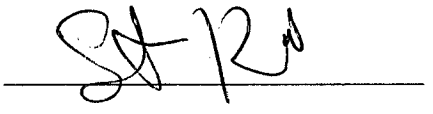
"But the essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty." **Rose v. Clark, 478 U. S. at 578. (1986).**

In the Supreme Court of the United States,

I, Steven Klein,, declare under penalty of perjury under the laws of the United States of America the forgoing facts are true to the best of my knowledge, via signature below.

Please construe Petitioners Petition liberally, as he pleads to the Court Pro Se.

RESPECTFULLY SUBMITTED.

Steven Klein 

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