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IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

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SUPREME COURT, U.S.

JAIME GONZALO CASTIBLANCO CABALCANTE

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

1. In Connecticut v. Johnson, 460 U.S. 73, 88 (1983)(plurality opinion), the court held that instructions "permitt[ing] the jury to convict [a defendant] without ever considering the evidence concerning an element of the crimes charged...deprive[the defendant] of constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." The question presented is: Did the Fifth Circuit Court of Appeals err in finding that Castiblanco failed to state a valid claim of the denial of a constitutional right and the District Court was correct in its ruling when it held that a "'no' response to the jury's question during deliberations reliev[ing] the jury from considering the knowledge element in counts one and two of the indictment" (Appendix 1 * 32) was an error of constitutional magnitude but (non-structural and harmless thus) insignificant as to grant habeas relief?
2. Under the rule announced in Sullivan v. Louisiana, 508 U.S. 275 (1993), a trial court's failure to correctly instruct the jury respecting the requirements articulated in In re Winship, 370 U.S. 358, 364 (1970), deprives the accused of his Fifth Amendment right to be found guilty "according to the procedure and standards appropriate for criminal trials in federal courts."¹ and the Sixth Amendment right to a jury trial and a fair trial. The question presented is: Should the rule of Sullivan apply to the instruction at issue? In other words, whether a supplemental instruction relieving the Government of the burden enunciated in Winship on the question of the defendant's state of

¹ Bollenbach v. United States, 326 U.S. 607, 614 (1946).

mind is a Cage error.² If such is the case, should this error operate to acquit Castiblanco of the two offenses charged in the indictment?

3. Did the Fifth Circuit Court of Appeals err in finding that Castiblanco failed to state a valid claim of the denial of a constitutional right and the District Court was correct in its ruling when it held that a legally incorrect answer to a jury's question during deliberations concerning the Government's burden to determine Castiblanco's guilt can be cured by a cursory direction to read again a portion of the written instructions previously given to the jury?

² See Cage v. Louisiana, 498 U.S. 39 (1990)(per curiam); and Victor v. Nebraska, 511 U.S. 1, 6 (1994). The question for the court in Cage was whether the instruction at issue complied with the requirements articulated in Winship.

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OPINION BELOW

On April 4th, 2022, Circuit Judge Leslie H. Southwick filed an unpublished opinion denying Castiblanco's application for a Certificate of Appealability, Circuit Judge Southwick determined that Castiblanco failed to state a claim of the denial of a constitutional right and that jurists of reason could not dispute that the District Court was correct in its ruling (Appendix 8).

JURISDICTION

This petition is timely filed under Supreme Court Rule 13, and this court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury... nor be deprived of life, liberty, or property without due process of law..."

The Sixth Amendment to the Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury..."

STATEMENT OF THE CASE

I. Introduction

Castiblanco's trial and resulting 30-year sentences were grossly unfair because the trial judge committed a grievous error in responding "no" to a jury's legal question during deliberations respecting the burden borne by the Government to prove knowledge, an essential element charged in counts One and

Two of the indictment. In his petition for habeas relief Castiblanco complains that the "no" response, inter alia, relieved the jury from considering knowledge, a statutory element of the two offenses charged in the indictment. The District Court does not contend that a "no" response relieving the jury from considering knowledge is an error of constitutional magnitude but it holds that such an error is non-structural and harmless, thus denying Castiblanco habeas relief. The last say, the Fifth Circuit Court of Appeals' decision, found no denial of a constitutional right in subtracting from a criminal trial an element of the offenses charged. For the court, for purposes of determining an accused's guilt, there is no meaningful difference in doing so.

The courts are wrong, instructions of this sort deprive a criminal defendant of basic constitutional rights and are contrary to the requirements articulated by the Supreme Court in In re Winship, 397 U.S. 358, 364 (1970).³

³ Cases in which courts have granted relief because it was found the challenged instructions somehow relieved the prosecution of proving every element of the crime: Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (rather than evaluating the evidence to determine if the state had overcome the presumption of innocence and proved beyond a reasonable doubt that the defendant had intended to kill, the jurors might have believed that upon finding certain preliminary facts "they were directed to find against defendant on the element of intent"); Mullaney v. Wilbur, 421 U.S. 684 (1975) (the state must prove all the elements of a criminal offense and could not constitutionally shift the burden of proving such elements to the defendant); Estelle v. McGuire, 502 U.S. 62, 76-77 (1991) (O'Connor J., dissenting) (warranting, contrary to the majority, habeas relief on the ground that the instruction relieved state of its burden of proving the petitioner committed the crime); Yates v. Evatt, 500 U.S. 391, 401-02 (1991) (granting relief based on instruction shifting burden of persuasion to the defendant); Rose v. Clark, 478 U.S. 570, 575 (1986) (similar to Yates, *supra*); Bennett v. Superintendent, 886 F.3d 268, 288 (3rd Cir. 2018) (failure to instruct the jury of intent-to-kill requirement "relieved the commonwealth of its burden of proving...specific intent...in violation of (petitioner's) right to due process"); Langford v. Warden, 665 Fed. Appx. 388, 389 (6th Cir. 2016), cert. denied, 137 S.Ct. 2187 (2017) (granting writ because "trial judge failed to instruct the jury on mens rea for complicity"); Elvik v. Baker, 660 Fed. Appx 538 (9th Cir. 2016) (trial court's failure to instruct the jury on the statutory "presumption that

The Bill of Rights provides certain constitutional protections when the government seeks that a person should pay irreparably for a crime. "[A] person accused of a crime...would be at severe disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty [of such a crime] and imprisoned for years [without being adjudged guilty of an essential fact constituting that crime]." Winship, 397 U.S. at 363 (alterations added).

II. The Error Forming the Basis for Habeas Relief that Renders the Assistance of Castiblanco's Trial and Appellate Counsel Ineffective.

The jury, during deliberations, sent a note asking to the District Court

children (between the ages of eight and fourteen years) lack the capacity to distinguish right from wrong" impermissibly "relieved the government of its burden of proving an element of the crime"); Chambers v. McDaniel, 549 F.3d 1191, 1193 (9th Cir. 2008) (the court granted the writ of habeas corpus because the "instructions...permitted the jury to convict (petitioner of first degree murder) without a finding of the essential element of deliberation"); Medley v. Runnels, 506 F.3d 857, 859 (9th Cir. 2007) (en banc), cert. denied, 552 U.S. 1316 (2008) ("state trial court violated...due process by instructing the jury that the flare gun is a firearm, thus taking from the jury the determination of an element of the offense"); United States v. Sheldon, 544 F.2d 213, 221 (5th Cir. 1976) ("By effectively eliminating from the jury's consideration of the (CI's) activities on the issue of inducement, the court gave a directed verdict which is, of course, legally impermissible"); Smith v. Horn, 120 F.3d 400, 410 (3rd Cir. 1997), cert. denied, 522 U.S. 1109 (1998) (granting habeas relief because the trial judge's erroneous instructions "operated to lift the burden of proof on an essential element of an offense as defined by state law" in violation of the Due Process Clause); Stark v. Hickman, 455 F.3d 1070, 1079 (9th Cir. 2006) ("trial court's instruction during the guilty phase of the trial that the jury was to conclusively presume petitioner was sane" unconstitutionally "shifted the burden of proof to the defendant"); Powell v. Galarza, 328 F.3d 558, 563 (9th Cir. 2002) (jury instruction "improperly removed the element of specific intent....the only contested issue-- from the jury's consideration and in effect commanded a direct verdict for the state"); United States v. Johnson, 718 F.2d 1317 (5th Cir. 1983) (en banc) (the trial court directed a verdict by instructing the jury that a particular document was a security, an essential element that ought to be determined by the jury); and Robertson v. Cain, 324 F.3d 297, 299 (5th Cir. 2003) ("jury instructions on law of principals...improperly relieved the prosecution of its burden of proving an essential element of the crime (namely the defendant specific intent to kill)").

a purely legal question: "[M]ust we believe that each defendant knew or intended importation to the U[nited] S[tates].]" (Emphasis supplied by the jury) (Appendix 1, page 36 (page ID #4424)). Being a legal question, a "yes" or "no" answer is apt to respond to the jury and unequivocally the correct response is "yes." Moreover, such a response would have resolved the whole problem.⁴ The trial judge responded "no."

Castiblanco's constitutional claims centered essentially on the correctness of the "no" response and the effect it had on his constitutional rights as a criminal defendant. One of them, Castiblanco argued, was the "no" negates a requirement articulated in Winship (proof of all the elements), depriving him of his right to have the jury make a factual determination, both formally and effectively, on knowledge, a statutory element of both counts of the indictment. Castiblanco was entitled to such a determination under the Constitution. See In re Winship, 397 U.S. at 364 ("the Due Process Clause protects an 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, 41 (1990)(per curiam) ("the instruction at issue was contrary to (a) requirement articulated in Winship") ("a reasonable juror could have interpreted the instructions to allow a finding of guilty based on a degree of proof below that required by the Due Process Clause"); Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993) ("the prosecution bears the burden of proving all elements of the offense charged,

4. The Fifth Circuit has held that "[a] question of law is by definition susceptible of only two answers: 'yes,' the requirements of legal principles are met or 'no,' they are not met." United States v. Hausmann, 711 F.2d 615, 618 (5th Cir. 1983) (per curiam) (emphasis supplied by the court) (quoting United States v. Watson, 623 F.2d 1198, 1201 (7th Cir. 1980) ("There is, in theory at least, no continuum of assurance and dubiosity as to the establishment of the proposition of law similar to the varying degrees of certainty and uncertainty which may be ascribed to propositions of fact.")).

and must persuade the factfinder...of the facts necessary to establish each of those elements"); and United States v. Gaudin, 515 U.S. 506, 511 (1995) ("The Constitution gives a criminal defendant the right to demand the jury to find him guilty of all the elements of the crime with which he is charged").

Normally, any federal court would ensure that trial errors of this sort that go to a bedrock principle in the criminal system of justice (in this case the procedure and standard by which criminal culpability is determined in criminal trials at federal courts) do not go unaddressed. Such is not the case here. The District Court, and ultimately the Fifth Circuit Court of Appeals, despite Castiblanco's inconsistency, have kept themselves in a denial mode to address and decide the more significant constitutional claims raised by Castiblanco.

III. First District Court's Holding (The Trial Court's Holding)

Castiblanco raised the "no" supplemental instruction issue for the first time more than nine years ago in a post-trial motion (Appendix 2). In the motion he complains the "no" is legally incorrect, in conflict with the instructions previously given to the jury. He argues "the correct response would be 'yes'" while "[t]he Court's ['no'] response to the jury's question misstates the law of conspiracy as set forth in the jury instruction as to the requirement that each individual defendant must have intent to import cocaine to the United States from abroad." (Appendix 2, page 34).

The District Court denied the motion without ever considering what the jury brought for clarification of the court and without conducting the only relevant inquiry, whether the "no" answer to the jury is a correct statement of the law.⁵ Such analysis was crucial for the Court's conclusion of law and

⁵ When a defendant, as Castiblanco in the present case, complains that the

antecedent to any other analysis or inquiry from the Court.

The Court determined "the Court's response was proper because it specifically directed the jury to the instructions concerning Count One of the indictment. In the instructions, the three elements of the offense were described with precise detail." (Appendix 3, page 35). That could have been a reasonable legal conclusion from the District Court had the jury not showed confusion on the standard for determining criminal culpability and had trial judge abstained from responding to the jury's question and solely given a cursory direction to the jury, as the trial judge did in Weeks v. Angelone, 528 U.S. 225 (2000). But such is not the case, the fact is the trial judge here responded "no" followed by a period⁶ and that "no" was not only palpably wrong and misleading, as the response that the trial judge gave to the jury in Bollenbach, 326 U.S. 607, but it finally was subtracted from the District Court's analysis, as if the "no" was never given to the jury.

In the present case, the legal debate and all the entire point of attending is a striking fact laid just before the District Court, the "no" given to the jury during deliberations, where the court has never said the "no" is a correct statement of the law, nor could it. Thus, if the "no" is legally incorrect, as Castiblanco sustains, the Court must explain why Castiblanco's argument fails, for the incorrectness of the "no," standing alone, is outcome determinative and warrants a different result in the case subjudice.

The District Court overlooked the warning made by the Supreme Court in

"no" response given to the jury is an incorrect statement of the applicable law, "the relevant inquiry [for the court] is whether [the 'no' response is] a correct statement of the law," United States v. Phea, 755 F.3d 255, 266 (5th Cir. 2014), not whether in the opinion of the court the response was adequate or proper.

6 The "no" and the following sentence are separated by a period, not by a comma. In its order the District Court erroneously transcribed the court's official transcripts altering the original note written by the Court. (Appendix 4, page 38 (page ID #4431)).

Bollenbach, concerning the delicacy of judicial communication with a deliberating jury. In that case, the Court held it is extremely important for supplemental instructions to be accurate and not misleading because jurors are particularly receptive to the guidance they receive at that time, when they are thinking about the specific issue and not overburdened with other issues or other instructions. Moreover, when the question from the jury, as in the present case, involves a constitutional requirement,⁷ it becomes a matter of due process of law, as guaranteed by the Fifth Amendment, to respond correctly to the jury. See Estelle, 502 U.S. at 70. In responding "no" to the jury's question the trial judge instructed the jury that it could afford the accused less due process than he is entitled to get under the Constitution. Guilty knowledge is a constitutional requirement to procure the conviction of each individual defendant charged in counts One and Two of the indictment.

The rule of law is that an incorrect response to a jury's legal question during deliberations constitutes an equivocal direction to the jury that is not cured by prior correct instructions given to the jury and invariable requires reversal. See Bollenbach, 326 U.S. at 612-13 (it is reversible error for the trial judge to give an answer to the jury that is misleading or legally incorrect)⁸; also see United States v. Stephens, 569 F.2d 1372, 1376 (5th Cir. 1978) ("Although the court further instructed the jury to consider the (original) charge, this cautionary statement (to read the original instructions again) did not balance the misleading instructions coming as it

⁷ In this case the jury sought clarification respecting what they needed to find concerning the knowledge element to procure the conviction of the defendants charged in Count One of the indictment. Must they determine guilty knowledge as to each individual defendant or can they procure the conviction of all defendants if only one or two had guilty knowledge?

⁸ "The Supreme Court has clearly stated [in Bollenbach, 326 U.S. at 612-13,] that, it is reversible error for a trial judge to give an answer to the jury's question that is misleading, unresponsive or legally incorrect." United States v. Frega, 179 F.3d 793, 810 (9th Cir. 1998).

did at a crucial time in the jury deliberations"); and United States v. Wisecarver, 598 F.3d 982, 989 (8th Cir. 2010) ("the fact that the district court initially properly instructed the jury is insufficient to cure the error, especially because the supplemental instructions was in response to a specific question posed by the jury").

However, if Bollenbach and Stephens had not existed, United States v. Panter, 688 F.2d 268, 270 (5th Cir. 1982), also controls. In Panter the Court determined that "[i]nstructions must be consistent and not misleading. '[A] correct instruction does not cure the error of giving another inconsistent one.'" (Emphasis added and citation omitted).

It follows that Castiblanco's counsel's failure --by means of a motion for reconsideration of a post-trial motion or raising the issue in direct appeal-- to pursue a reversible error renders his trial and appellate assistance constitutionally ineffective, therefore constituting a basis for habeas relief. Castiblanco's counsel's ignorance of the per-se nature of the Bollenbach, Stephens, and Panter rules cannot be what Strickland⁹ contemplates as "sound trial strategy," 466 U.S. at 689, rather it is the essence of counsel's incompetence to fail to understand the governing law necessary to formulate such strategy. Kimmelman v. Morrison, 477 U.S. 365, 386 (1986) (a purportedly strategic decision is not objectively reasonable when the attorney failed to investigate its options and make a reasonable decision between them); and Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) ("Nero's attorney clearly was not making a tactical decision since he was unaware that Nero was entitled to a mistrial").

⁹ Strickland v. Washington, 466 U.S. 668 (1984).

IV. Second District Court's Holding (The Habeas Court's Holding)

A. The Habeas Petition

Castiblanco filed a Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, pursuant to 28 U.S.C. §§ 2255(a) and (f)(1). Relevant to the instant petition, Castiblanco argued before the Habeas Court that:

1. Castiblanco was deprived of effective assistance of trial counsel when counsel failed to file a motion to, pursuant to Fed.R.Crim.P. 59(e), amend or alter the trial court's order entered on February 29, 2013 (Dkt. #978), denying Castiblanco's motion for a new trial. The motion for a new trial was based solely on a "no" erroneous response to a jury's legal question during deliberations that Castiblanco claimed misstated the applicable law (Dkt. #910 * 3).
2. Appellate counsel rendered ineffective assistance in screening out from the appeal brief the issue of the "no" response to the jury's legal question during deliberations.
3. The error forming the basis for habeas relief, that is, the "no" response to the jury's question during deliberations, is an extremely egregious error that grant habeas relief under many different grounds:
 - (A) An incorrect answer to a jury's legal question during deliberations is a reversible error in direct appeal and in a motion for a new trial thus rendering the assistance of counsel ineffective in trial and appeal stage.
 - (B) The "no" response does not comply with the requirements articulated in In re Winship, 397 U.S. 358 (1970), thus in violation of the rule drew by the Supreme Court in Cage v. Louisiana (Cage error violates the Due Process

Clause), and later altered and expanded in Sullivan v. Louisiana (Cage error violates the Due Process Clause and the Jury Clause).

- (C) The "no" response is structural error of the sort that always leads to fundamental unfairness. Weaver v. Massachusetts, 582 U.S. ___, 198 L. Ed. 2d 420, 432 (2017).
- (D) The "no" response relieved the jury from considering knowledge, a statutory element of both offenses charged in the indictment.
- (E) The "no" response is the functional equivalent to a direction of a verdict for the prosecution.
- (F) The "no" response violates the Due Process Clause of the Fifth Amendment and the Jury Clause and the right to a fair trial of the Sixth Amendment.

B. The Judgment (Dkt. #16)

The Habeas court entered a final appealable judgment on March 31st, 2020, denying Castiblanco relief on his petition for habeas relief. Since the Habeas Court did not deny Castiblanco's §2255 petition on procedural grounds, it must be assumed that the petition was denied on the merits of Castiblanco's claims. The problem is that the Habeas Court's holding respecting the harmlessness of the "no" answer given to the jury hardly could be considered a judgment on the merits when in its decision the Habeas Court failed to address and expressly decide on the most crucial claims for relief:

1. The correctness of the "no" given to the jury.
2. Whether the "no" response complied with the requirements articulated in In re Winship.
3. Whether the "no" response effectively relieved the jury from considering the knowledge element of both counts of the indictment.
4. Whether the "no" response is the functional equivalent of directing a

verdict for the prosecution.

5. Whether the "no" response is an error that always leads to a fundamental unfairness.

The District Court, the only body accountable for the error, has shown a persistent and extreme reluctance to expressly recognize the obvious, this is, that its response to the jury was legally incorrect and that it faulted to the age-old principle that a trial judge may not mislead the jury during deliberations by misstating the applicable law. In pursuing such a purpose the District Court kept away from considering what the jury brought for clarification before the court, abstained from conducting the relevant inquiries, ignored standards of review and flouts Supreme Court and Fifth Circuit Court of Appeals' binding precedents.

C. The Habeas Court's Erred in Its Holdings

a) The Habeas Court Erred In Holding That a Motion for Reconsideration was not Required (Appendix 1 * 31)

The Habeas Court concluded that trial counsel's assistance was constitutionally effective because a motion for reconsideration was not required. Those conclusions of law are incorrect.

This case presents the same legal question that the federal courts considered in Bollenbach and Stephens, whether a legally incorrect answer to a jury's question during deliberations can be cured by a cursory direction to read again a portion of the written jury instructions previously given to the jury. The District Court facing the same relevant facts --a legally incorrect "no" response accompanied with a cursory direction to read again Count One of the indictment-- answered the question in the positive while the Supreme Court

and the Fifth Circuit Court of Appeals in the above mentioned cases answered the question in the negative.

The Trial Court's failure to consider or to correctly apply Bollenbach and Stephens to the facts of the case brought a valid basis for Castiblanco's trial counsel to file a motion for reconsideration that should have certainly succeeded. The Habeas Court's legal conclusion that Castiblanco's trial counsel was constitutionally effective is incorrect, and its legal conclusion that a motion for reconsideration was not required is unreasonable.

b) The Habeas Court's Holding that the "'No' Response to the Jury's Question Reliev[ing] the Jury From Considering the Knowledge Element in Counts One and Two of the Indictment" (Appendix 1, Page 32), Was Harmless, Non-Structural Error and Therefore an Error that Does Not Grant Habeas Relief, Is Unreasonable

(i) Harmlessness

The questions of law respecting whether an instruction permitting the jury to convict a defendant without ever considering the evidence concerning an element of the crimes charged can ever be treated as harmless error, and whether jury instructions relieving the prosecution of its burden of proving every element of the crime must grant a petitioner habeas relief are not questions of first impression for a federal court. Nonetheless, the District Court from an indistinguishable set of facts --a "no" supplemental instruction relieving the jury from considering knowledge, a statutory element in both counts of the indictment-- answered the first question in the positive and the second in the negative. The Supreme Court did all the opposite, in Connecticut v. Johnson, 460 U.S. 73, 88 (1983) (plurality opinion), it answered the first

question in the negative and in Waddington v. Sarausad, 555 U.S. 179, 191 (2009), it answered the second question in the positive.

The judgment of the Habeas Court is, of course, so wrong and unreasonable that it cannot stand. A harmless error is one that could not have affected the jury's deliberations and it is readily apparent that a supplemental instruction relieving the jury from considering a material fact, mens rea, constituting the offenses charged in the indictment is an error that not only affects substantial rights of the defendant but "had an unfair prejudicial impact in the jury's deliberations." United States v. Young, 470 U.S. 1, 17 n. 14 (1985).

The Habeas Court in reaching its conclusions of law ignored binding Supreme Court precedents, Johnson and Sarausad, and one of the most elemental principles of due process, that goes to the heart of the adversarial process, "the necessity of informing the jury that, to convict, it must find each defendant guilty...of every element charged." United States v. Birbal, 62 F.3d 456, 462-63 (2nd Cir. 1995); see also Apprendi v. New Jersey, 530 U.S. 466, 470 (2000) ("(T)aken together, (the Due Process Clause and the right to a trial by jury,) indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged"); Gilmore v. Taylor, 508 U.S. 333, 350 (1993) (Justice O'Connor with whom Justice White joins, concurring in the judgement) ("Due process, of course, requires that the (prosecution) proves every element of a criminal offense"); McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986) ("The due process requires the prosecution to prove...all the elements included in the definition of the offense of which the defendant is charged" (emphasis supplied by the court)); Alleyne v. United States, 570 U.S. 99, 104 (2013) ("The Sixth Amendment provides that those 'accused' of a 'crime' have the

right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of the crime be proved to the jury... the substance and scope of this right depends on the proper designation of the facts that are elements of the crime"); United States v. Gaudin, 515 U.S. 506, 510 (1995) (the Fifth and Sixth Amendments "require() a criminal conviction to rest upon a jury determination that the defendant is guilty of every element of the crime of which he is charged"); Cabana v. Bullock, 474 U.S. 376, 384 (1986) ("A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence...and a jury's verdict cannot stand if the instructions provided to the jury do not require it to find each element of the crime under the proper standard of proof"); Christoffel v. United States, 338 U.S. 84, 89 (1949) ("all the elements... charged shall be proved"); Carella v. California, 491 U.S. 263, 265 (1989) (per curiam) ("The Due Process Clause of the Fourteenth Amendment denies states the power to deprive the accused of liberty unless the prosecution proves...every element of the charged offense... Jury instructions relieving states of this burden violates a defendant's due process rights... Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases"); Hester v. United States, ___ U.S. ___, 139 S. Ct. 509, 202 L. Ed. 2d 627 (2019) ("If you're charged with a crime, the Sixth Amendment guarantees you the right to a jury trial. From this, it follows that the prosecutor must prove to a jury all the facts legally necessary to support your term of incarceration") (Justice Gorsuch with whom Justice Sotomayor joins dissenting from the denial of certiorari); Middleton v. McNeil, 541 U.S. 433, 437 (2004) (per curiam) ("In a criminal trial the state must prove every element of the offense, and a jury instruction violates due process if it fails to give

effect to that requirement"); Simpson v. Wetzel, 485 F.Supp. 3d 545, U.S. Dist. LEXIS 16424 (E.D. of Penn., Sept. 8, 2020) ("It is a hallmark of the law of the land that criminal defendants may only be convicted of the offenses charged if the state can prove each element of the offense... To let a state conviction that falls short of this fundamental requirement stand would not only offend the court, but, of course, violates the United States Constitution and the individual's due process rights under the Fourteenth Amendment"); and United States v. Canales, 744 F.2d 413, 434 (5th Cir. 1984) ("(T)he trial court may under no circumstances withdraw any element of an offense from the jury's consideration in a criminal case" (emphasis supplied by the court)).

The rule of law, summing up the Supreme Court's holding in Johnson and Sarausad, is that a supplemental instruction¹⁰ that relieves the jury from considering an essential element of the offenses charged can never count as harmless error and when such an error occurs a petitioner seeking redress is entitled to the writ of habeas corpus. See Robertson, 324 F.3d at 299 (the court reversed the district court's decision denying habeas relief to the petitioner because the "jury instruction on law of principals...improperly reliev(ed) the prosecution of its burden of proving an essential element of the crime (namely the defendant specific intent to kill)"). In reaching its conclusion on harmlessness and in denying the writ to Castiblanco, the Habeas Court did not conduct the relevant inquires and overlooked Sarausad, Johnson, and Robertson.

These cases could hardly be more on point against the Habeas Court's judgment. Under the holding of Sarausad, the "no" given to Castiblanco's jury

¹⁰ "When a defendant objects to a jury note response [the Fifth Circuit Court] treat[s] the response as a jury instruction..." NewCSI, Inc. v. Staffing 360 Sols, Inc., 885 F.3d 251, 263 (5th Cir. 2017).

as the answer to its question, straightforward entitles him to the writ. Sarausad has to do with a prisoner seeking habeas relief from an instruction given to the jury. The Supreme Court determined that to meet the burden, the petitioner must show that "there is a reasonable likelihood that the jury applied the [challenged] instruction in a way that relieved the [prosecution] of its burden of proving every element of the crime..." 555 U.S. at 190-91 (quoting McNeil, 541 U.S. at 437; and Estelle, 502 U.S. at 72 (quoting Boyde v. California, 494 U.S. 370, 380 (1990))). Therefore, according to Sarausad, to grant or deny habeas relief to Castiblanco, respecting the challenged "no" instruction to the jury, the relevant question, which the Habeas Court did not entertain, is whether there is a reasonable likelihood that the jury applied the "no" in a way that relieved the government of its burden of proving every element in Count One and Count Two of the indictment.

In the present case, the Habeas Court ought to have issued the writ considering the court assumed the "'no' response to the jury's question during deliberations relieved the jury from considering the knowledge element in counts one and two of the indictment" (Appendix 1, page 32). In other words, the Habeas Court ought to have issued the writ considering the Court assumed the challenged "no" response had the effect of relieving the Government of the burden enunciated in Winship, on the critical question of the defendant's state of mind. Compare with Sandstrom, 442 U.S. at 412 (the question for the Supreme Court in Sandstrom was whether the instruction at issue relieved the state of the burden enunciated in Winship on the critical question of the defendant's state of mind). Obviously, the "no" answer relieving the jury from considering knowledge operated to lift the burden borne by the government to prove knowledge, an essential element of both offenses as defined by federal statutes and as charged in the indictment. If the jurors did not deliberate on

the issue of knowledge, the evidence respecting knowledge became irrelevant for their verdicts and there was then no burden for the government to prove knowledge to the jury. What the jury must consider and what the government must prove is one in the same, to hold otherwise is to render either the jury or the trial superfluous.¹¹ See, e.g., Cunningham v. California, 549 U.S. 270, 282 (2007) ("must be submitted to the jury and proved beyond a reasonable doubt"); and Alleyne, 570 U.S. at 104 (the Fifth and Sixth Amendments provide that as part of due process of law a person held to a criminal prosecution enjoys the right that "each element of the crime be proved to the jury").

However, in the present case, the jury's verdicts do not satisfy the Constitution's jury verdict as articulated in In re Winship, therefore, in violation of the Cage rule. Cage, 498 U.S. 39 (a jury instruction is unconstitutional if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the (requirements articulated in the) Winship standard" (see Victor v. Nebraska, 511 U.S. 1, 6 (1994))). A guilty verdict coming from instructions to the jury that negate the requirement of proof of a statutory element certainly does not meet the requirement articulated in Winship, 397 U.S. at 364, and operates to acquit the defendant of the charged offense.¹²

In Johnson, 460 U.S. at 83-84, the question for the court was whether a

¹¹ The facts the jury must determine to return a "guilty" verdict squarely corresponds with the facts that the government must prove to gain a conviction. If a single fact is missed, the criminal conduct charged in the indictment simply did not occur.

¹² If the instructions allow conviction based on proof insufficient to meet the Winship standard, the defendant must be acquitted. The Georgetown Law Journal, Thirty-Eighth Annual Review of Criminal Procedure, 2009, Proving Elements Beyond a Reasonable Doubt, Page 666 & n. 2032 (Appendix 5, page 41).

charge that might reasonably have been interpreted to require a conclusive presumption on the issue of intent may be considered harmless. The Court answered the question in the negative. It found that a conclusive presumption on the issue of intent was the functional equivalent to a directed verdict on the issue of intent, Id. at 84, and determined that instructions of this sort, "permitting the jury to convict [a defendant] without ever considering the evidence concerning an element of the crimes charged[,]...deprive[s] the defendant] of constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." 460 U.S. at 88 (emphasis and alterations added).

The supplemental instruction on knowledge at issue in the present case and the conclusive presumption on intent at issue in Johnson are indistinguishable. Both instructions permit the jury to convict the defendant without ever considering the evidence concerning an element of the crimes charged, deprive the defendant of the same constitutional rights, are the functional equivalent of a directed verdict on the element at issue, and have the same effect upon the jury. This is, the supplemental instruction given in the present case on the requisite findings concerning knowledge, as well as the conclusive presumption concerning intent given in Johnson, "eases the jury's task [and] there is no reason to believe that the jury would have deliberately undertaken the most difficult task of evaluating the evidence of [the element in question,]" 460 U.S. at 85 (internal quotation marks and citations omitted, alterations added), when the instructions unambiguously tell them they were not required to do so.¹³ Both instructions led the juries to ignore the evidence concerning the element at issue in procuring the conviction of the

13 "A jury is presumed to follow its instructions" and "to understand a judge's answer to its questions." Weeks, 528 U.S. at 234.

accused. See Johnson, 460 U.S. at 84. This is contrary to what the Constitution commands. "[A] defendant is 'indisputably entitle[d]' to 'a jury determination that [he] is guilty of every element of the crime with which he is charged[.]'" United States v. Standford, 823 F.3d 814, 834 (5th Cir. 2016) (citations omitted).

(ii) Structural Error

The question of law respecting whether instructions permitting the jury to convict a defendant without ever considering the evidence concerning an element of the crimes charged are structural error was answered in the positive by the Supreme Court in Johnson, 460 U.S. at 88. The Habeas Court answered the question in the negative.

The Habeas Court's holding of non-structural error is incorrect and contrary to well settled federal law. First, and most importantly, the Supreme Court in Johnson, 460 U.S. at 88, in unequivocal language determined that such an error is structural. The Court held that an instruction "permitting the jury to convict [a defendant] without ever considering the evidence concerning an element of the crimes charged...can never be treated as harmless error" (emphasis added). An error that never can be treated as harmless error is the quintessential example of structural error. Irrespective of what particular circumstances the case under scrutiny presents, the error always causes prejudice to the defendant.

The "no" in the present case relieved the jury from considering knowledge a statutory element of both offenses charged in the indictment and in doing so the jury was permitted to convict the defendant without ever considering evidence respecting the knowledge element of both counts of the indictment.

Second, the Habeas Court relied on Weaver, 582 U.S. ___, 198 L. Ed. 2d

420, to reach its conclusion of non-structural error but failed to conduct the relevant inquiry set forth in Weaver, "whether [a 'no' response to a jury's question during deliberations that relieved the jury from considering the knowledge element in both counts of the indictment] counts as structural error because it always leads to fundamental unfairness or for other reasons." 198 L. Ed. 2d at 432.

In other words, the threshold question is whether there may be circumstances under which the error identified by the court does not lead to fundamental unfairness. In the present case, the question must be answered in the negative:

- (1) Whenever a trial judge gives a supplemental instruction to the jury that relieves the jury from considering a statutory element of the offenses charged, such a constitutional violation renders the trial fundamentally unfair because, as Castiblanco explained in his original brief, such an "instructional error lessen[s] what the jury ought to find [to render every guilty verdict] in disadvantage of the defendant and in benefit of the prosecution" (Appendix 7, page 44). The purpose of doing away with the requirement of guilty [knowledge from the jury] is to ease the prosecution's path of conviction [in every count charged in the indictment]." Morissette v. United States, 342 U.S. 246, 263 (1952) (alterations added).
- (2) Whenever a trial judge gives an instruction relieving the jury from considering a material issue, as knowledge here, such an instruction is the functional equivalent of a directed verdict for the prosecution on that issue. See United States v. Sheldon, 544 F.2d 213, 221 (5th Cir. 1976); and Mims v. United States, 375 F.2d 135, 148 (5th Cir. 1967). A direction of a verdict for the prosecution renders a trial fundamentally

unfair in every case that such a direction is given, and,

(3) An instruction that relives the jury from considering a statutory element "is plainly inconsistent with the rooted presumption of innocence." Cool v. United States, 409 U.S. 100, 104 (1972) (per curiam). In a criminal trial a defendant is presumed innocent and that presumption extends to every element of the offense, see Sandstrom, 442 U.S. 510, thus, to divest a defendant of his presumption of innocence without consideration of the evidence against him, if it so exists, is a constitutional violation that renders the trial fundamentally unfair in every case that the presumption is defeated in that way.

Additionally, the error is structural for another reason, the error defies harmless error review. The error identified by the Habeas Court violates the rule drawn in Cage, 498 U.S. 39, and the Supreme Court determined in Sullivan that a Cage error¹⁴ is not amenable of harmless-error review. See 508 U.S. at 281 (harmless-error analysis does not apply to a Cage error). See also United States v. McGuire, 79 F.3d 1396, 1403 (5th Cir. 1996) ("(H)armless error (is) inapplicable when jury verdict (is) secured in violation of In re Winship, which requires proof for conviction of every essential element of the offense").

¹⁴ A Cage error in a criminal trial means a misrepresentation or misdescription by the trial judge in instructing the jury to perform its constitutional task whereby the trial judge is found to have lowered the burden borne by the prosecution to prove an offense, or the offenses charged in the indictment, and the effect is that otherwise valid and invariably valued guilty verdicts from the jury are rendered unenforceable for the convictions arise from a constitutionally-unqualified tribunal, a jury misunderstanding the federal standard (Winship) for determining the guilt or innocence of the accused. Therefore, there is no jury verdict within the meaning of the Fifth and Sixth Amendments to review for harmlessness.

V. The Fifth Circuit Court of Appeals' Holding

The Fifth Circuit Court of Appeals erred in finding that Castiblanco failed to state a valid claim of the denial of a constitutional right and the District Court was correct in its ruling when it held that a "'no' answer to the jury's question during deliberations relieve[ing] the jury from considering the knowledge element in counts one and two of the indictment" (Appendix 1, page 32) was an error of constitutional magnitude but non-structural and harmless thus insignificant as to grant habeas relief. Castiblanco was able to state a valid claim of a denial of constitutional rights protected under the Fifth and Sixth Amendments by demonstrating that the District Court's assessment of a constitutional claim was not only wrong but unreasonable because in reaching its conclusion of law the District Court not only flouted Supreme Court and Fifth Circuit Court of Appeals' binding precedents, it also nullified a constitutional doctrine drawn by this Court in Cage and Sullivan, a trial judge's misstatement of a requirement articulated in In re Winship, 370 U.S. at 364, does, by that fact alone, violate the Constitution.

However, "a substantial showing of a denial of a constitutional right" necessary to satisfy the requirements under 28 U.S.C. §2253(d)(2) can be made from the analysis, in and of itself, of the special nature of the supplemental instruction given to the jury in this case, this is, from the analysis of a supplemental instruction relieving the jury from considering the evidence concerning a statutory element of the offenses charged. The Fifth and Sixth Amendments provide that as part of due process of law a person held for a criminal prosecution enjoys the right that "each element of the crime be proved to the jury." Alleyne, 570 U.S. at 104. The fundamental right of a defendant to be presumed innocent is swept away precisely to the extent judges are permitted to relieve the jury from considering an element of the offenses

charged and each of the weapons given by the Bill of Rights to a criminal defendant to defend his innocence --the right to counsel the right to jury trial, the right to a fair trial, and the right adverted in Bollenbach, 326 U.S. at 614, to be found guilty "according to the procedure and standards appropriate for criminal trials in federal courts"-- is nullified to the extent the government to secure a conviction, as in the present case, does not have to introduce evidence to support essential allegations of the indictment it has brought. It would be a senseless and stupid thing for the Constitution to take all the precautions to protect the accused from abuses if the trial judge in the last breath of the trial enjoy the discretion to alter the core rules of the game, the requirements articulated in Winship, and remove from the jury's consideration all the traces respecting an essential component of the offenses charged.

Such result would completely frustrate the purpose of the Founders to establish a system of criminal justice in which the accused --even the poorest and more humble-- would be able to protect himself from wrongful charges by a big and powerful government. It is little less than fantastic to imagine that those who wrote our Constitution and the Bill of Rights intended to have a government that could create crimes of several separate and independent parts and then relieve the government of proving a portion of them. Turner v. United States, 396 U.S. 398, 430 (1970)(Black J., dissenting opinion). Of course, within certain broad limits it is not necessary for Congress to define crimes to include knowledge as one of its elements. But if it does, constitutional due process requires the government to prove knowledge before it can convict the accused of the crimes it deliberately and clearly defined.

"The Fifth Amendment's command that cases be tried according to due process includes the accused's right to have the jury find the facts of the case, including the crucial facts of guilt or innocence." Id. See, e.g. United States ex rel Toth v. Quarles, 350 U.S. 11, 15 (1955).

In sum, trial and appellate counsel's failure to seek redress to his client from a supplemental instruction that had the effect of relieving the Government of the burden enunciated in Winship on the critical question of the defendant's state of mind, of course, renders his assistance constitutionally ineffective. Instructions of this sort "require reversal because they cause fundamental unfairness, either to the defendant in the specific case or by pervasive undermining of the systemic requirements of a fair...judicial process." Weaver, 198 L. Ed. 2d at 435.

REASONS FOR ALLOWING THE WRIT

1. This case calls for the application of the Cage-Sullivan doctrine in a context other than a misdescription of the concept of "reasonable doubt." Although the Supreme Court has addressed the Cage-Sullivan doctrine in Neder v. United States, 527 U.S. 1 (1999)¹⁵ and Tyler v. Cain, 533 U.S. 656 (2001),

¹⁵ This case is distinguishable from Neder. In Neder the government was not relieved of its burden of proving materiality with regard the tax and bank fraud charges. It had to prove materiality to the trial judge and all of the remaining elements of the tax and bank fraud offenses to the jury.

For purposes of rendering a verdict the jury in Neder never was instructed to consider materiality. In the present case, the jury was first instructed to consider knowledge, but the ultimate instruction given by the trial judge relieved the jury from considering knowledge. Castiblanco was denied a trial on the knowledge element. Neither the jury was instructed to deliberate on knowledge, nor the government was held to its burden of proving knowledge.

still it is not completely clear what Cage and Sullivan actually establish. Did Cage and Sullivan apply, as in the present case, to instructions to the jury that lower the burden borne by the prosecution to prove the offenses charged in the indictment by means of negating the requirement of proof of knowledge, an essential element charged in both counts of the indictment? Or, did Cage and Sullivan apply solely to instructions that vitiate all the jury's findings, that is, instructions that convey the concept of "reasonable doubt" to the jury in a manner that raises the degree of doubt required for acquittal?

Of course, instructions to the jury that vitiate all the jury's findings are Cage error. But that was not the question in Cage. The question in Cage was whether the instruction at issue complies with the requirements articulated in In re Winship. See Cage, 498 U.S. at 40. If the same question is formulated in the case subjudice, the answer should be answered, as well as in Cage, in the negative. Obviously, an instruction negating the requirement of proof of guilty knowledge to convict a defendant runs contrary to a requirement articulated in Winship (proof of all elements of the offense).

Cage, Sullivan and the present case involve instructions to the jury lowering the prosecution's burden of proof as explained in In re Winship. In Cage and Sullivan the error in the instruction had the effect of allowing the conviction upon a greater failure of proof as to every fact that ought to be proved by the prosecution. In the present case, the error allowed the conviction without ever considering on an essential element constituting both offenses charged. The last word needs to be said. The Supreme Court has not yet stated that an instruction that does not vitiate all the jury's findings can violate the rule of Cage. Neither has the Court ever explicitly said that a Cage error must operate to acquit a defendant.

2. This case also calls for an exercise of this Court's supervisory power under Supreme Court Rule 10(a) to avoid a miscarriage of justice. This Court should take action on this case because it is readily apparent that the instant convictions are a complete nullity.

If the jury did not deliberate on the issue of knowledge then the guilty verdict it returned does not satisfy the Constitution's requirement of guilty of every element with which the accused was charged. Castiblanco was therefore afforded less due process than he is entitled to get under the Constitution and deprived of the Sixth Amendment's guarantee to a jury trial on the issue of knowledge. "A finding that the defendant possessed the requisite [guilty state of mind that the statute's language and purpose require] is essential for preserving individual liberty." Lorenzo v. SEC, 872 F.3d 578, 598 (D.C. Cir. 2017) (Circuit Court Judge Kavanaugh, dissenting opinion) (citation omitted, alterations added).

Moreover, if Castiblanco was not determined guilty on an essential fact constituting each of the offenses with which he was charged, he stands convicted of "an act that the law does not make criminal." Bousley v. United States, 523 U.S. 614, 620 (1998) (citation omitted); see also United states v. Williams, 836 F.3d 1, 13 (D.C. Cir. 2016) ("If an element of the crime is missing the charged culpable conduct has not occurred"). By extension, where the convictions and sentences are not authorized by substantive law, then the finality interests are at their weakest. As Justice Harlan wrote, "[t]here is little societal interest in permitting the criminal process to rest at a point where ought properly never to repose." Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan J., separate opinion).

The District Court's failure to consider what the jury brought for clarification, to conduct relevant inquiries and to follow standards of

review; its disregard of Supreme Court and Fifth Circuit Court of Appeals' binding precedents; its reluctance to be fair, to get it right and to do justice addressing and resolving the more critical claims for relief that would have revealed the real significance and scope of the error at issue and should have led the District Court to the opposite holding; and, its misunderstanding of a bedrock procedural element essential for the fairness of any criminal prosecution ("the necessity of informing the jury that, to convict, it must find each defendant guilty...of every element charged" (Birbal, 62 F.3d at 462-63)), form the basis for this Court to take action in this case.

Contrary to what the Fifth Circuit Court of Appeals held, the error complained of, obviously, affected substantial rights of Castiblanco, "had an unfair prejudicial effect in the jury's deliberations," Young, 470 U.S. at 17 n. 14, and also operates to acquit Castiblanco.

3. This is an extraordinary case where the Supreme Court is apt to decide wisely on the issues presented without need, at all, to see on the record of the trial. For the Court to determine whether the "no" is a correct statement of the law and whether the supplemental instruction at issue in the present case complies with the requirements articulated in Winship, the Court only needs to focus on what the instant foreman wrote to the court in his note and what the jurors were told by the trial court in its response to their note (this is, what the trial judge ultimately instructed the jury to do to determine the accused's guilt). To do so, where the issues are purely legal questions subject to plenary review by the Court, the Court does not need to go beyond the four corners of the two brief notes that the jury and the trial court exchanged during deliberations.

CONCLUSION

Because the error raised in this Petition relates to an important issue with impact on every single criminal prosecution in this country, and because it would be a manifest injustice to deny reparation for the injury suffered by the accused for the trial court's action, the Petitioner respectfully requests the Court to grant him the writ of certiorari.

Respectfully Submitted,

Date: April 19/22

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