

IN THE SUPREME COURT  
OF THE UNITED STATES

ROBERT WILLIAM WAZNEY, Petitioner,

v.

State of South Carolina, Respondent.

PETITION FOR REHEARING

\*\*\*

QUESTION PRESENTED

WHETHER APPLYING NEW LAW DECLARING JURY CHARGE UNCONSTITUTIONAL VIOLATES THE  
RIGHT TO TRIAL BY JURY

\*\*\*

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

This case involves in addition to the authorities already cited in the petition for certiorari, the following provisions of the United States Constitution:

Sixth Amendment which says:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...

\*\*\*

COMES NOW, Robert Wazney, Petitioner, pro se, who after being duly sworn deposes and states:

This question presents a substantial ground for relief and was not previously presented.

PETITION FOR REHEARING

Petitioner Robert Wazney respectfully moves this Court for an order vacating the dismissal of his petition for a writ of certiorari entered on May 30, 2023, and granting the petition. This motion is made upon the grounds that the Court's decision in Sullivan v. Louisiana, 508 US 275 113 S.Ct. 2078, 124 L Ed 2d 182, and Montgomery v. Louisiana, 577 US 190, 136 S Ct. 718, 193 L Ed 2d 599, clearly establishes that the courts erred in holding (a) to dismiss pursuant Anders v. California, and (b) to refuse to give retroactive effect to rule held unconstitutional during petitioner's direct review of criminal conviction, by barring habeas corpus,

I. STATE HIGH COURT HOLDING IN STUKES ANNOUNCING RULE UNCONSTITUTIONAL IS MANIFESTLY UNTENABLE UNDER SULLIVAN v LOUISIANA AND MONTGOMERY v LOUISIANA

The primary issue in this proceeding is whether State v. Stukes, 416 SC 493, 787 SE2d 480 (2016) announcing rule of criminal procedure unconstitutional when it applied State v. Leonard, 292 SC 133, 137, 355 SE2d 270 273 (1987) and S.C. Const. art. V § 21, to condemn jury instructions that misdefined the concept of reasonable doubt, the state court had allowed the jury to find Petitioner guilty by a standard of proof that failed to meet the requirements of the Due Process Clause, State v. Wazney 2017 WL 4817153, made judgment of conviction void for want of jurisdiction requiring automatic reversal.

The record shows that the instructions--being more repugnant to the Constitution than those in Cage v. Louisiana, 498 US 39--that guided the jury at Petitioner's trial were identical to those later held unconstitutional in Stukes (Petition Appx. C, p 245, lines 1-3), that the rule was enacted while Petitioner's case was under direct review, and that it is retroactive in Petitioner's case. However, the court held that habeas relief was nevertheless barred by state laws, refusing to give unconstitutional rule retroactive effect (Petition Appx. Z).

This conclusion has now implicitly undermined this Court's decision in Montgomery v. Louisiana, *supra*.

C 7

Sullivan v. Louisiana weighs against the court of appeals' conclusion to dismiss as meritless. In discussing the nature of the right protected by Cage, the Sullivan Court cited Patterson v. New York, 432 US 197 (1997), Leland v. Oregon, 343 US 790 (1952), In re Winship, 347 US 358 (1970), and Cool v. United States, 409 US 100 (1972)(per curiam)--all cases decided well before the South Carolina Court of Appeals rejected petitioner's denial of confrontation, denial of compulsory process, et al. claims on direct appeal, (see 'pro-se brief of appellant').

The Court's observation that the interrelationship between the reasonable doubt standard and the Sixth Amendment right to trial by jury is "self-evident," Sullivan, *supra*, at 2, also shows that Cage did nothing new when it reaffirmed the necessity of jury instructions that farily convey, rather than dilute, the concept of proof beyond a reasonable doubt.

## II. WHEN STUKES ANNOUNCED RULE IS UNCONSTITUTIONAL, SULLIVAN SHOWS THAT IT VIOLATES "FUNDAMENTAL FAIRNESS" AND MONTGOMERY SHOWS STATE HIGH-COURT HAS DUTY TO PROVIDE RELIEF

The high-Court rejected petitioner's alternative jurisdiction argument where Court instructed jury and convicted petitioner under unconstitutional statute. (Petition Appx. X). Sullivan and Montgomery show that the high-court greatly underestimated it's significance. Sullivan makes clear that when a jury convicts a criminal defendant after hearing the sort of instruction on reasonable doubt given in Cage (and in this case), "there has been no jury verdict within the meaning of the Sixth Amendment," because the verdict cannot reflect the sort of jury finding which is implicit in the Sixth Amendment guarantee. Sullivan also squarely held that a Cage error in the definition of reasonable doubt is a "structural defect[] in the constitution of the trial mechanism" because the jury guarantee that it violates is a "'basic protectio[n]' whose precise effects are immeasurable, but without which a criminal trial cannot reliably serve its function." Sullivan, at 3, quoting Arizona v. Fulinante, 111 S.Ct. 1246, 1265 (1991). The Sullivan Court concluded

The right to jury trial reflects, as we have said, "a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 US [145], 155. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error".

Id. Cage error "will always invalidate the conviction", Sullivan, *supra*. Montgomery makes clear that a conviction under an unconstitutional law "is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in \*731\* the sense that there may be no means of reversing it. But ... if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." Ex parte Siebold, 100 US 371, 376-377. If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires." Yates v. Aiken, 484 US 211, 218. Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge.

The fundamental nature of the right safeguarded by Cage was violated, Sullivan leaves no room for doubt as to the full significance of the constitutional violation that occurred in Cage, and in this case. The state high-Court made a new law and explicitly stated that the law applies retroactively to petitioner's case pending on direct review. The process to correct court error was summarily rejected by high-Court, this Court should now correct the errors, because federal habeas courts are to review state-court decisions against the law and factual record that existed at the time the decisions were made. Greene v. Fisher, 132 S.Ct. 38 (2011), "Section 2254(d)(1) [of the federal habeas statute] refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made." Cullen v. Pinholster, 563 US 170, (2011).

59

III. TO PERMIT THE STATE OF SOUTH CAROLINA TO CONTINUE PETITIONER'S IMPRISONMENT WOULD BE FUNDAMENTALLY UNFAIR

Frasier v. South Carolina, 430 F.3d 696, held that when a state court decision is inconsistent with clearly established Supreme Court precedent, it is entitled to § 2254(d)(1) deference, (quoting Williams v. Taylor, 529 US 362, 412). If this petition for rehearing is denied, and barring some extraordinary development, South Carolina will continue to avoid petitioner's claims to sustain his incarceration. Sullivan establishes that if South Carolina is permitted such imprisonment, it will have done so without first having obtained the jury verdict of guilty beyond a reasonable doubt which both the Due process Clause and the Sixth Amendment guarantee. The Court should not allow that to happen.

For reasons that Sullivan has made so dramatically clear, it is most unlikely that this Court will ultimately resolve the question against those Louisiana and South Carolina state prisoners whose convictions were obtained in violation of the Cage principle. Because of the importance of this issue, it will not be the last. But the question will never be presented any more clearly than in this case, and petitioner submits that it would be a terrible miscarriage of justice for the Court to allow his imprisonment in violation of Cage by denying this petition, only to address the issue he raises in some future case.

IV. THE WRIT SHOULD BE GRANTED TO CONSIDER THE EFFECT, IF ANY, OF BOYDE AND OR VICTOR UPON CAGE

Victor v. Nebraska, 511 US 1, holding instructions, taken as a whole, should correctly convey the concept of reasonable doubt to the jury, concluded that

C-1

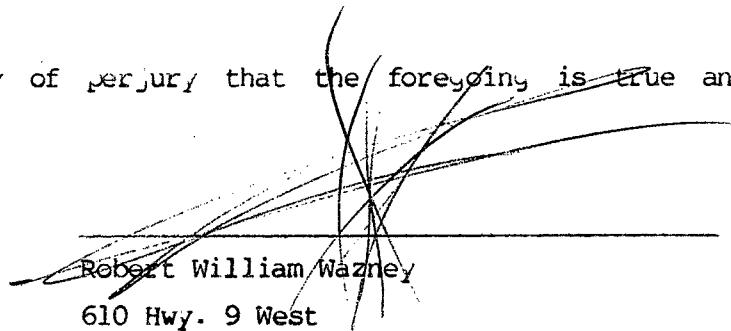
the important question is whether there is a "reasonable likelihood" that the jury was misled or confused by the instruction, and therefore applied it in a way that violated the Constitution. Boyd v. California, 494 US 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990). Any jury instruction defining "reasonable doubt" that suggests an improperly high degree of doubt for acquittal or an improperly low degree of certainty for conviction offends due process. Either misstatement of the reasonable-doubt standard is prejudicial to the defendant, as it "vitiates all the jury's findings," see Sullivan, at 281, (emphasis deleted), and removes the only constitutionally appropriate predicate for the jury's verdict.

See, also, Estelle v. McGuire, 502 US. 62, 72 (1991) "[W]e inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution" (quoting Boyd v. California, 494 US 370, 380 (1990)).

#### CONCLUSION

For the foregoing reasons, the order denying the petition for writ of certiorari should be vacated, and the writ granted. In the alternative, the Court should summarily vacate the judgement of the court of appeals and remand this case for reconsideration in light of Sullivan v. Louisiana and Montgomery v. Louisiana.

I declare under penalty of perjury that the foregoing is true and correct.

  
Robert William Wazney  
610 Hwy. 9 West  
Bennettsville, SC 29512  
Petitioner, pro se

Marlboro County, USA

June 17, 2023

No. 22-7215

IN THE SUPREME COURT  
OF THE UNITED STATES

ROBERT WILLIAM WAZNEY, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF GOOD FAITH

Pursuant Rule 44.2, I hereby certify that the foregoing Petition for Rehearing in this case 22-7215 is presented in good faith and not for delay, and is limited to the grounds specified in rule 44.2.

Robert William Wazney  
Petitioner, pro se

Marlboro County, USA

June 19, 2023