No. 23-_____

In The

Supreme Court of the United States

MATTHEW HAYKO,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Indiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

At trial, Mr. Hayko proposed to call three witnesses to testify as to their opinions of his accuser's untruthfulness under Indiana Evidence Rule 608(a). On appeal, the Court of Appeals reversed and ordered a new trial, finding that the trial court applied the wrong foundational requirements to his witnesses. On the State's *Petition to Transfer*, the Supreme Court of Indiana agreed but found the error harmless. In a trial that came down entirely to the credibility of the accuser, the Court found that the jury would not have afforded the testimony of Mr. Hayko's witnesses much weight.

The harmless error doctrine was articulated by this Court in *Kotteakos v. United States*, 328 U.S. 750 (1946). The intent of the doctrine was to end the practice of reversing convictions on the basis of technical errors that likely had no effect on the outcome of the trial. Since this Court's decision in *Kotteakos*, the harmless error doctrine has been expanded by appellate courts nationwide. The opinion by the Supreme Court of Indiana in this case demonstrates how the doctrine has now been expanded to allow appellate courts to take on roles traditionally reserved for juries. Indeed, the Court below is now using the harmless error doctrine to find facts, weigh evidence, and hypothesize on a jury's likely verdict absent the trial court's error, presenting the following question:

Whether an appellate court can violate a defendant's right to trial by jury under the Sixth Amendment by weighing evidence and judging the credibility of witnesses to decide the defendant's guilt in the absence of a trial court's error?

PARTIES TO THE PROCEEDING

Petitioner Matthew Hayko was the defendant in the trial court proceedings and appellant in the Court of Appeals of Indiana and Supreme Court of Indiana proceedings. Respondent State of Indiana was the plaintiff in the trial court proceedings and appellee in the Court of Appeals of Indiana and Supreme Court of Indiana proceedings.

RELATED CASES

- *State of Indiana v. Matthew Hayko*, No. 74C01-1902-F3-000058, Spencer County Circuit Court. Judgment entered October 5, 2021.
- *Matthew Hayko v. State of Indiana*, No. 21A-CR-2407, Court of Appeals of Indiana. Judgment entered September 28, 2022.
- *Matthew Hayko v. State of Indiana*, No. 23S-CR-13, Supreme Court of Indiana. Judgment entered June 22, 2023.

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Petitioner Matthew Hayko respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Indiana.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana's opinion is reported at 211 N.E.2d 483. (Pet. App. 1). The order of the Supreme Court of Indiana denying rehearing is unreported but is reproduced in the appendix. (*Id.* at 54).

JURISDICTION

The Supreme Court of Indiana denied rehearing on August 18, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides: "In 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Indiana Evidence Rule 608(a) allows a party to introduce two types of evidence regarding a witness's credibility: (1) evidence regarding the witness's reputation for having a character of truthfulness or untruthfulness; and/or (2) evidence in the form of an opinion on the witness's character for truthfulness or untruthfulness. The foundational requirements for opinion evidence and reputation evidence under Evidence Rule 608(a) are different. A foundation for reputation evidence requires evidence of "a general reputation, held by an identifiable group of people who have an adequate basis upon which to form an opinion" and evidence that "the witness testifying to reputation . . . [had] sufficient contact with that community or society to qualify as knowledgeable of the general reputation of the person whose character is attacked or supported." *Dynes v. Dynes*, 637 N.E.2d 1321, 1323 (Ind. Ct. App. 1994); *Bowles v. State*, 737 N.E.2d 1150, 1153 (Ind. 2000). By contrast, a foundation for opinion evidence requires only that an opinion witness testify from personal knowledge.

Mr. Hayko was charged with several counts of molesting his daughter which included a count that is the highest-level felony under Indiana law. Mr. Hayko's

accuser testified sufficiently to support each allegation of the charging information; yet, the jury did not credit her testimony with much credibility as it acquitted him of all charges but the lowest level offense in the information.

At trial, Mr. Hayko proposed to call three witnesses to testify as to their opinion about his accuser's untruthfulness. The trial court excluded Mr. Hayko's witnesses on the grounds that he did not meet the foundational requirements for reputation evidence.

On appeal, Mr. Hayko raised several issues challenging his conviction, including that the trial court misapplied Evidence Rule 608(a) when it excluded his three witnesses. As well, he argued that the exclusion of these witnesses violated his right to present a defense. The Court of Appeals reversed on the basis of the trial court's misapplication of Evidence Rule 608(a). (Pet. App. 23, 40). On the State's *Petition to Transfer*, the Supreme Court of Indiana reversed. The Court agreed that by applying the foundation requirements for reputation witnesses to opinion witnesses, the trial court violated Indiana Evidence Rule 608(a). However, in a case that came down entirely to the accuser's credibility, the Court found that the exclusion of these witnesses – who each would have testified that the accuser was not truthful – was harmless. The Court so found because it determined that the jury would not likely have afforded much weight or credibility to these witnesses. (Pet. App. 19-20).

Mr. Hayko filed a *Petition for Rehearing* in which he argued, in part, that the Indiana Supreme Court's application of the harmless error test violated his right to trial by jury under the Sixth Amendment.

The Court denied the *Petition for Rehearing*, (Pet. App. 54), and this petition followed.

REASONS FOR GRANTING THE PETITION

The evidence against Mr. Hayko was entirely based upon the testimony of his accuser; accordingly, Mr. Hayko's entire defense was to demonstrate that his accuser was lying. There were no eyewitnesses, and there was no forensic evidence; indeed, the accuser did not disclose her accusations for approximately one year. Thus, the credibility of Mr. Hayko's accuser was the central issue at trial. In an effort to further his defense, Mr. Hayko proposed calling three family members to testify that the accuser, his daughter, was not truthful. Both the Court of Appeals of Indiana and the Supreme Court of Indiana determined that the trial court abused its discretion in excluding the evidence. The Court of Appeals found that this evidence affected the outcome of the proceedings. Indeed, the Court determined that the evidence "affected the essential fairness of the trial[,]" noting that the entire trial turned on the accuser's credibility and that the erroneously excluded evidence went directly to this issue. (Pet. App. 40). The Supreme Court of Indiana dismissed these concerns, concluding that "it is not readily apparent a

reasonable, average jury would have weighed the witnesses' opinions of [the accuser's] character for untruthfulness in a manner favorable to [Mr.] Hayko." (Pet. App. 19). The Court was also comforted by the fact that the accuser's credibility had been challenged otherwise during trial. *Id.*

This application of the harmless error doctrine is wildly at odds with the original intent of that doctrine and constitutes a usurpation of the role of the jury in violation of the Sixth Amendment.

A. The Move of Appellate Courts to a Guilt-Based Harmless Error Doctrine Has Created a Slippery Slope Toward Usurping Juries

The harmless error doctrine was first formulated in the Judicial Code in 1919 and subsequently clarified by this Court in *Kotteakos v. United States*, 328 U.S. 750 (1946). As Justice Rutledge explained in *Kotteakos*, the harmless error doctrine grew out of concern that "courts of review, 'tower above the trials of criminal cases as impregnable citadels of technicality[,]'" and that "[s]o great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained." 328 U.S. at 759.

Indeed, prior to the harmless error doctrine, many hard-won convictions had been reversed because of minor errors. This Court in *Kotteakos* noted one infamous example of this phenomenon: *State v. Campbell*,

109 S.W. 706 (Mo. 1908). In *Campbell*, an appeal from a conviction for rape, the Missouri Supreme Court "reversed a conviction for rape on the ground that the indictment described the charged offense as 'against the peace and dignity of state,' rather than 'against the peace and dignity of *the* state,' as the Missouri Constitution required." Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167 (1995) (*emphasis in original*). The harmless error doctrine was adopted in response to such absurd outcomes and designed to "inject reasoned judgment back into the process of appellate review." *Id.*

The harmless error doctrine originally addressed technical errors. Indeed, in *Kotteakos*, this Court addressed a variance in the proof adduced at trial – a variance that almost certainly had no impact on the proceedings. Since *Kotteakos*, however, the harmless error doctrine has expanded substantially. In *Chapman v. California*, 386 U.S. 18 (1967), this Court expanded the doctrine from technical errors to violations of a defendant's constitutional rights so long as the violation was "unimportant and insignificant." 386 U.S. at 22. Even in so deciding, this Court was careful to note that "we must recognize that harmless error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one." *Id.* In a subsequent opinion, this Court readdressed this focus on technical,

insignificant errors, commenting that "[t]he harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Despite these express limitations on the doctrine, both this Court and other state and federal courts have examined the likelihood of conviction rather than the effect of the error on the proceedings. For example, in *Harrington v. California*, 395 U.S. 250 (1969), this Court declined to reverse a defendant's conviction where the trial court erroneously permitted the introduction of two confessions of non-testifying codefendants. This Court upheld the conviction on the basis that the evidence against the defendant was "overwhelming." *Harrington*, 395 U.S. at 254. There are no shortage of cases following this focus on inevitable conviction.

However, this Court has since moved away from this approach; indeed, it has openly rejected it. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court addressed the trial court's error in submitting an unconstitutional reasonable doubt instruction to the jury. Writing for this Court, Justice Scalia rejected this guilt-based approach to ascertaining harmless error, holding that: "[t]he inquiry, in other words, is not whether, in a trial that occurred without the error, a

guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." 508 U.S. at 279. Justice Scalia also turned his concern toward the Sixth Amendment: "That . . . to 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.* This conservative approach is not the one taken by countless other lower courts, including the Supreme Court of Indiana in this and other cases. Rather, that Court and others have expanded the harmless error doctrine in a manner that directly conflicts with the concern of Justice Scalia in *Sullivan* over the sanctity of the Sixth Amendment.

B. Lower Courts, Including the Indiana Supreme Court in This Case, Are Employing the Harmless Error Doctrine in a Manner That Violates Defendants' Right to Trial By Jury

The Indiana Supreme Court's finding of harmless error in this case flatly contradicts *Sullivan*. In order to find the error in this case harmless, the Supreme Court of Indiana clearly engaged in its own fact-finding. It made two findings: (1) that the jury would not likely have credited Mr. Hayko's witnesses with much credibility due to bias; and (2) that these witnesses would not have had much impact because the accuser's credibility was otherwise challenged at trial. (Pet. App. 19-20). Both of these findings required the Supreme Court of Indiana to divine facts about the

credibility of both the accuser and Mr. Hayko's witnesses – an assessment made from a cold, print record. This contemplation about how the jury would have received Mr. Hayko's evidence and how it likely judged his accuser goes well beyond Justice Scalia's concerns in *Sullivan*. Indeed, the Supreme Court of Indiana not only hypothesized about the verdict absent the error – it first determined how the jury would have characterized the evidence before doing so. As remarkable as this employment of the harmless error doctrine may seem, it is not unusual. The pendulum has now swung so far and so wide, that courts have moved from reversing convictions based upon technical errors to affirming convictions by usurping a jury's role to imagine a guilty verdict.

The Supreme Court of Indiana is not alone. In *Richardson v. State*, 189 N.E.3d 629 (Ind. Ct. App. 2022), the Court of Appeals of Indiana found the erroneous admission of vouching testimony harmless in a child molesting case. In so holding, the Court noted that the uncorroborated testimony of a child molesting victim is sufficient to sustain a conviction and found it significant that the victim's testimony was considerably detailed – an implicit finding that the jury would have found the victim credible even if her credibility had not been bolstered with improper vouching evidence. 189 N.E.3d at 636-37.

Similarly, in *Hassine v. Zimmerman*, 160 F.3d 941 (3d Cir. 1998), the Third Circuit upheld a defendant's conviction for murder and related offenses even in light of the trial court's improper use of the defendant's

post-arrest, post-*Miranda* silence. 160 F.3d at 955-58. The Court determined that the evidence against the defendant was overwhelming and, like the Supreme Court of Indiana in this case, made a key factual finding to justify a verdict which may have been influenced by an error: that the defendant's testimony in front of the jury was not credible. *Id.* at 958.

The appellate courts in these cases did what Justice Scalia held the Sixth Amendment prohibits: it hypothesizes and then implements a guilty verdict that was, in fact, never found by a jury.

C. This Case Presents a Good Opportunity to Address Justice Scalia's Concerns Expressed in *Sullivan* Over the Harmless Error Doctrine and the Sixth Amendment

This Court has held that the Sixth Amendment is based upon the principle that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors. . . ." *United States v. Gaudin*, 515 U.S. 506, 510 (1995), *quoting* 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769). Moreover, this Court has held that "this right was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" *Id.* This Court has guarded this principle faithfully, requiring, for example, that any aggravating

circumstance that increases the penalty for a crime beyond the statutory maximum must be found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

If it is improper for a trial court to make factual findings related to a defendant's sentence, it is hard to imagine how it is permissible under the Sixth Amendment for an appellate court to make factual findings about a defendant's conviction. Indeed, for an appellate court to hypothesize about what a jury's verdict *would have been* absent an error is no different than that appellate court rendering the verdict itself; for, at the end of the proceedings, the reviewing court, like the reviewing court in this case, is upholding a verdict based upon critical facts never considered by a jury.

There has been resistance to this movement in other courts with an acknowledgement that it may violate the Sixth Amendment. In *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999), the defendant was charged with murder. *Barker*, 199 F.3d at 870. The defendant asserted that she killed the defendant in self-defense; however, the trial court refused her an instruction that she was entitled to use deadly force to resist imminent rape. *Id.* The Supreme Court of Michigan found that the trial court abused its discretion when it refused the instruction but found the error harmless because it concluded that no reasonable juror would have believed her claim of self-defense. *Id.*

On her habeas corpus petition, the Sixth Circuit reversed. The Court held that "the state trial court's

error in failing to specifically instruct the jury that [the defendant] would have been justified in using deadly force to stop an imminent rape had a substantial and injurious influence effect in determining the jury's verdict and resulted in actual prejudice to [the defendant]." *Id.* at 873. In so holding, the Sixth Circuit reasserted the harmless error doctrine thusly: "[only if a] court can say with certainty that a trial error had little to no impact on the judgment, should the judgment stand." *Id.* at 874. Finally, the Court flatly rejected the Michigan Supreme Court's attempt to weigh the evidence for the jury when implementing the harmless error doctrine:

> We further believe that the Michigan Supreme Court improperly invaded the province of the jury in determining that, although the general self defense instruction was erroneous in [the defendant's] case, the error was harmless because no reasonable juror could have believed that the force used by [the defendant] was necessary to prevent rape by an 81-year old "enfeebled" man.

Id. at 874. It is worth noting that the Sixth Circuit could easily have determined that no reasonable juror would have believed it necessary to use deadly force to fight off an 81-year-old man. However, instead, the Court concluded that the Michigan Supreme Court's decision to weigh the evidence in this manner – no matter how reasonable its interpretation of the evidence – violated a core principle of the Sixth Amendment which "prohibit[s] judges from weighing evidence

and making credibility determinations, leaving these functions for the jury." *Id.* The Sixth Circuit determined that the Supreme Court of Michigan violated this principle by choosing an interpretation of the evidence when the record contained support for a contrary position. *Id.*

The Sixth Circuit is not alone with its concern about the harmless error doctrine and the Sixth Amendment. Indeed, in *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207 (D.C. Cir. 1997), Justice Edwards commented that "[a]s I understand the 'harmless error' doctrine, it is not within the province of an appellate judge to usurp the role of a jury by speculating on what a jury might have done in the absence of significant error." *Burkhart*, 112 F.3d at 1218, Edward, J., *concurring*. Similarly, in a law review article cited by Justice Edwards, it is stated that:

> The appellate judge cannot watch the demeanor of witnesses, listen to the intonations of their voices, or engage in any of the countless other observations that inhere in an assessment of credibility. And, most importantly, an appellate panel cannot possibly know what a jury might have done if the case had been tried without error. Therefore, if there is any serious doubt on this score, the case ought to be returned to the jury.

Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1193-94 (1995).

Thus, there is growing concern both in this Court and lower courts that an appellate court's use of the harmless error doctrine may violate a defendant's right to a jury trial. As the question involves nothing short of the right to a jury trial under the Sixth Amendment, it is an important one. This Court should step in to stop appellate courts from acting as a second jury to impose a verdict that was never issued.

Mr. Hayko's case is an excellent vehicle for addressing this improper and unconstitutional expansion of the harmless error doctrine for three reasons. First, the Supreme Court of Indiana found an error harmless on a central question, indeed, on the only material question before the jury – the accuser's credibility. (Pet. App. 19-20). Second, it did so by making its own factual findings never presented to the jury; namely, it determined how a jury would have viewed the credibility of both Mr. Hayko's witnesses and the accuser if Mr. Hayko's witnesses had been permitted to testify. This neatly presents this Court with the inevitable consequences of a harmless error doctrine removed from its moorings and the concerns of Justice Scalia in *Sullivan*: an appellate court usurping the role of the jury by hypothesizing verdicts never issued.

Third, a favorable ruling on the merits would assuredly result in meaningful relief for Mr. Hayko. Both the Court of Appeals of Indiana and the Supreme Court of Indiana have determined that the trial court improperly excluded three critical witnesses in his defense. Mr. Hayko's conviction now rests entirely upon an appellate court's fact-finding through an

unconstitutional application of the harmless error doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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