

No. _____

In The
Supreme Court of the United States

SAMIR ALLEN FARHOUMAND,
Petitioner,

v.

HAROLD CLARKE,
Director, Virginia Dep't of Corr.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Following a bench trial, Petitioner Samir Farhoumand was convicted under a Virginia statute that prohibits an adult from knowingly and with lascivious intent exposing his or her genitalia to a person under the age of 15. The trial judge found that “touching” met the definition of exposure, regardless of whether the genitalia was exposed to view. The Virginia Supreme Court found that the trial judge had erred, and that exposure required that the genitalia be exposed to view. *Farhoumand v. Commonwealth*, 764 S.E.2d 95, 100 (Va. 2014). Despite this finding, the Court did not vacate the conviction, but evaluated the evidence for sufficiency, and affirmed. The question presented is: Can it reasonably be said that the trial judge may have convicted Farhoumand for conduct that was not covered by the charging statute? If so, then Farhoumand’s convictions must be vacated.

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THE OPINIONS BELOW

On February 7, 2017, the district court denied Farhoumand's habeas petition with an Order and Memorandum Opinion, Reprinted at Appendix B & C. The Fourth Circuit decision sought to be reviewed, *Farhoumand v. Commonwealth*, 764 S.E.2d 95 (Va. 2014), is reprinted at Appendix A.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit Court exercised jurisdiction over petitioner's appeal under 28 U.S.C. §§ 1291 & 2254. The Fourth Circuit denied relief on September 13, 2017.

This Court has jurisdiction under United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and United States Supreme Court Rule 10, petitioner having asserted below and asserting herein deprivation of rights guaranteed by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The question presented implicates the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE FACTS AND OF THE CASE

The allegations arose during the 2012 holiday season, when “S.F.,” a minor, told family members that his cousin Farhoumand had fondled him during the previous year when they had shared a bed. State App. 75, 82–83.¹ Farhoumand was a student living in California during much of that time. S.F. alleged that the touching had occurred in his bedroom at night during Farhoumand’s winter, spring, and summer breaks. State App. 71, 145–48. From the beginning, S.F. alleged that the acts complained of consisted virtually solely of fondling. State App. 56, 65–73, 129, 148–49. Regarding

¹ “State App.” refers to the appendix filed with the state habeas petition and that is in the record.

exposure, S.F. testified at trial that he saw Farhoumand's penis once, State App. 73, but admitted on cross-examination that he told the investigating detective contrary information, that "one time I kind of looked you know, but I didn't see anything." State App. 135.

Despite these facts, Farhoumand was arrested on March 27, 2012, on four warrants alleging that he *exposed* himself to his cousin during overnight stays at his cousin's home. The charge of exposure was a felony, whereas indecent touching charges were misdemeanors.

On May 21, 2012, the grand jury returned four indictments, each for a violation of Virginia Code § 18.2-370(A)(1). The indictments covered four consecutive time periods, with a single act of exposure — not indecent touching — charged in each period. The counts were as follows:

- a) FE-2012-704: Exposure of genitalia to S.F., a child thirteen years of age, between September 3, 2009 and December 31, 2009;
- b) FE-2012-705: Exposure of genitalia to S.F., a child thirteen² years of age, between January 1, 2010, and September 3, 2010;
- c) FE-2012-706: Exposure of genitalia to S.F., a child fourteen years of age, between September 4, 2010, and December 31, 2010; and
- d) FE-2012-707: Exposure of genitalia to S.F., a child fourteen years of age, between January 1, 2011, and September 3, 2011.

² Each of these indictments was later amended to allege exposure to Farhoumand when he was "under fifteen (15) years of age." State App. 5–8; 23.

A bench trial commenced on August 27, 2012, before the circuit court. State App. 27. During opening statements, it was clear the prosecution was pursuing the improper theory of “tactile exposure.” The prosecution argued that “there were other times when [Farhoumand] would pull his own pants down and take S.F.’s hand, and have S.F. rub his own penis . . . those are going to be the time periods where there is the exposure under the statute.” State App. 40. The prosecution also opined, “*if we get through a motion to strike*, at the end of the trial, I would suggest there was [sic] going to be a few issues in this case. One, when exactly did this touching, this exposure occur, and . . . does this fit the code section?” State App. 42 (emphasis added). The prosecution even admitted that Farhoumand was being tried for “exposure *that’s not necessarily contemplated by the code section . . .*” State App. 42 (emphasis added).

In opening, the defense noted the same two crucial issues in the case: (1) “what happened, and when?” and (2) whether that conduct was “an offense against 18.2-370?” State App. 43. Agreeing that this would indeed be at issue in a motion to strike, the defense argued that the alleged conduct was not exposure under the statute. State App. 43.

At the close of the prosecution’s evidence, the defense moved to strike all four indictments. State App. 171–80. The trial court dismissed the first indictment solely because S.F.’s testimony was insufficient to prove that *anything* had occurred within the time-period covered by that indictment. State App. 191. The trial court noted similar problems with S.F.’s testimony concerning the last alleged act of abuse but denied the motion to strike

the fourth indictment because it covered a nine-month period from January 1, 2011, to September 3, 2011, *and because the court credited S.F.'s testimony that fondling occurred during every single school break.* State App. 180, 182. Most important, the trial court adopted the prosecution's theory of exposure, ruling that mere touch of an otherwise unseen penis was sufficient to prove exposure, and *on that basis* denied the motion to strike the three remaining indictments. State App. 187–92.

Farhoumand testified in his own defense and admitted touching S.F.'s penis over his clothing — conduct not covered by the exposure statute — while he thought S.F. was asleep. Farhoumand further admitted that he had done this as many as eight times between March and August 2010, a period covered by the second indictment, and that he had no other sexual contact with S.F. State App. 164–65, 168–69, 223–26, 233–35, 258–59, 275–76, 283. At the close of the evidence, the trial court denied, without explanation, Farhoumand's renewed motion to strike and found him guilty on the three remaining counts. State App. 339.

On November 15, 2012, Farhoumand argued motions to set aside the verdict because the trial court had applied an incorrect definition of the term “expose,” and because the evidence failed to establish with requisite specificity whether any particular act of exposure occurred within the time frames of the individual indictments. State App. 576–621. The court denied both motions. State App. 695.

Farhoumand's sentencing guidelines for these offenses provided a range of three to six months in jail. 11/15/12 Sentencing Tr. at 62–63. Nevertheless, the trial court sentenced Farhoumand to concurrent

terms of ten years imprisonment with six years suspended on each of the three counts — an active prison sentence of eight times the high end of the recommended sentencing guidelines — with active probation for ten years from the date of Farhoumand's release from prison.

On December 3, 2013, the Virginia Court of Appeals denied Farhoumand's appeal. *Farhoumand v. Commonwealth*, No. 2087-12-4, 2013 Va. State App. Lexis 353, at *7 (Dec. 3, 2013) (memorandum op.). State App. 716-26.

On May 29, 2014, the Supreme Court of Virginia awarded Farhoumand an appeal on two assignments of error namely, that the Court of Appeals erred by: 1) holding that the exposure requirement is met where genitalia is felt but not seen, and (2) determining that the evidence was sufficient to sustain Farhoumand's convictions. In asking for relief, appellate counsel requested that Farhoumand's convictions be vacated and the indictments dismissed, but appellate counsel did not ask for the alternative relief that the case be remanded to the trial court for a determination of whether Farhoumand's conduct met the elements of the statute beyond a reasonable doubt.

On October 31, 2014, the Supreme Court of Virginia reversed the Court of Appeals. *Farhoumand v. Commonwealth*, 764 S.E.2d 95 (Va. 2014). The Court held that "the word 'expose,' as it is used in Code § 18.2-370, requires a visual display where the genitalia are seen, or where there is a possibility that they could be seen. Accordingly, exposure does not include situations where the genitalia are felt but are otherwise covered or obscured from view." *Id.* at 100.

The Supreme Court of Virginia did not, however, reverse and remand, even though the trier of fact had applied the wrong law to the facts. Thus, Farhoumand had been tried and convicted for conduct that is not actually punishable under the code section with which he was charged. Instead, the appellate court, seemingly conflating the two assignments of error, simply moved on to consider the *sufficiency* of the evidence under the visual exposure theory. *See id.*

In considering sufficiency, of course, the appellate court noted that it “review[s] the sufficiency of the evidence in the light most favorable to the Commonwealth, and only reverses the judgment of the circuit court when its decision is plainly wrong or without evidence to support it.” *Id.* at 102 (citing *Maldonado-Mejia v. Commonwealth*, 752 S.E.2d 833, 835 (Va. 2014)). Applying this highly deferential standard, the court then considered whether there was sufficient evidence of *visual exposure* for each of the indictments. *Id.* at 103–04. The court “reverse[d] and vacate[d] Farhoumand’s conviction under Indictment No. 4 (FE-2012-70) because the evidence was insufficient to prove that a distinguishable act of visual exposure occurred during the time-period stated in the indictment.” *Id.* at 104. As for the second and third indictments, the court held that the trial court erred in applying “a tactile definition of exposure” to convict Farhoumand. *Id.* “Nevertheless,” the court concluded, “after reviewing the evidence, we will affirm Farhoumand’s convictions . . . because there was sufficient evidence to prove that the defendant visually ‘expose[d]’ his penis to S.F., a minor child, in

violation of Code § 18.2-370(A)(1), during the time frames alleged.” *Id.* (alteration in original).

On November 21, 2014, Farhoumand petitioned for a rehearing, arguing that the case should have been remanded to the trial court for a sufficiency review. On January 15, 2015, the court denied the petition for rehearing.

On January 13, 2016, Farhoumand filed a state habeas petition directly with the Supreme Court of Virginia, claiming, among other things that the Court had violated his due process, notice, and fair trial rights by failing to vacate and remand, either for a new trial or for a determination based on a proper instruction.

On July 5, 2016, after a motion to dismiss by the Director, the state court dismissed Farhoumand’s petition without a hearing. The court found that the above claim was barred. Order, at 2.

On October 5, 2016, Farhoumand filed a § 2254 petition in the district court. The Director filed a motion to dismiss, and Farhoumand responded. On February 7, 2017, the district court granted the Director’s motion to dismiss and explicitly declined to issue a certificate of appealability. Fundamentally, the court reached the wrong conclusion by incorrectly finding that the trial court found Farhoumand guilty under both a tactile and visual exposure theory. This was plainly wrong, as the trial court record did not support such a finding and the Virginia Court of Appeals and Supreme Court of Virginia plainly did not so find.

On February 22, 2017, Farhoumand filed a notice of appeal. On September 13, 2017, the Fourth Circuit Court of Appeals denied a certificate of

appealability. *Farhoumand v. Clarke*, 697 Fed.Appx. 200 (4th Cir. 2017).

SUMMARY OF ARGUMENT

When a defendant is convicted under an overbroad jury instruction, and the evidence shows that the defendant committed acts covered by the “excess” — by the overbreadth, rather than by the charging statute as properly construed —there is a risk that he may have been convicted for conduct not prohibited by the charging statute. When this occurs, due process requires that the conviction be vacated and the case remanded for new trial or, in the case of a bench trial, a determination of guilt or innocence under a correct instruction and *beyond a reasonable doubt*. See *McDonnell v. United States*, ___ U.S. ___, 136 S. Ct. 2355, 2375 (2016). To do otherwise is to deprive the defendant of his right to trial by a properly instructed fact-finder, a clear deprivation of due process.

Here, the Virginia Supreme Court found that the trial judge erroneously instructed himself³ by employing an overbroad construction of the Virginia indecent exposure statute. By failing to vacate Farhoumand's conviction and remand, and by instead reviewing the case for sufficiency of the evidence, the Virginia Supreme Court: 1) usurped the fact-finding function of the trial court; 2)

³ See e.g., *Franca v. Rubin*, 168 N.E. 99, 100 (Mass. 1929) (“The judge by granting request 4 instructed himself that . . .”); *Henderson Lighting & Power Co v. Md. Cas. Co*, 69 S.E. 234, 237 (N.C. 1910) (“Upon the facts found by him, the learned judge, ‘sitting as a jury,’ should have instructed himself differently as to the law.”).

affirmed a conviction that may have been based on conduct not covered by the charging statute; and thus, 3) deprived Farhoumand of due process because he was never found guilty of a crime beyond a reasonable doubt.

REASONS FOR GRANTING THE PETITION

Farhoumand was convicted, following a bench trial, of violating Virginia Code § 18.2-370(A)(1), which makes it a felony for any adult to knowingly and with lascivious intent expose his genitalia to any person under 15. During the trial, the prosecution repeatedly pressed a legal theory of “tactile exposure,” meaning that a defendant can be convicted under the Virginia “exposure” statute for having another person touch his genitalia, as opposed to the defendant actually exposing himself. The prosecutor indeed succeeded in having the trial court accept the false premise that § 18.2-370(A)(1) allows conviction for “tactile exposure.” The Supreme Court of Virginia rejected this “tactile exposure” theory in *Farhoumand v. Commonwealth*, 764 S.E.2d 95, 99 (Va. 2014). The court held that the theory of “tactile exposure,” *on which it found the trial judge to have partially relied*, was incorrect, and that to be convicted under the Virginia statute, it was necessary that there be “a visual display where the genitalia are seen, or where there is a possibility that they could be seen.” *Id.* at 99.

The trial judge clearly accepted the prosecutor’s incorrect construction of the statute. In fact, the Virginia Supreme Court acknowledged this when it said:

The trial court relied, in part, upon the unpublished decision of the Court of Appeals of Virginia in *Mason v. Commonwealth*, Record No. 0309–97–2, 1998 WL 778114, slip op. at 4 (November 10, 1998) (en banc), which held: “[e]xposure means not only to ‘lay open to view’ but also to ‘lay open to feel or to touch.’”

Id. at 97. And later, in Farhoumand’s federal habeas, the district court accepted it as given that the trial judge employed the “theory of ‘tactile exposure.’” Memorandum Opinion, at 1. The Virginia Supreme Court did not vacate Farhoumand’s conviction, however, but instead reviewed the case for sufficiency of the evidence under the Commonwealth’s version of *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). This was Constitutional error.

When a *jury* convicts a defendant after receiving an erroneously overbroad instruction on the meaning of the charging statute, *and* the evidence shows that the defendant committed acts covered by the “excess” of the instruction (i.e., its overbreadth), there is a substantial risk that the defendant may have been convicted for conduct that is not forbidden by the statute. When this occurs, a reviewing court cannot say that the erroneous jury instruction was “harmless beyond a reasonable doubt.” *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016), citing *Neder v. United States*, 527 U.S. 1, 16 (1999).

It is critical that in *McDonnell*, the bare fact of the erroneous, overbroad instruction was enough to cause sufficient doubt about the validity of the guilty

verdict. The Court did not require preponderant evidence that the verdict had been tainted; it was enough that it “may have” been. Said the Court:

Because the jury was not correctly instructed on the meaning of "official act," it *may have* convicted Governor McDonnell for conduct that is not unlawful. For that reason, we cannot conclude that the errors in the jury instructions were "harmless beyond a reasonable doubt." *Neder v. United States*, 527 U.S. 1, 16, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (internal quotation marks omitted). We accordingly vacate Governor McDonnell's convictions.

McDonnell, 136 S. Ct. at 2375 (emphasis added).

McDonnell was followed in *United States v. Jefferson*, 2017 WL 4423258, *11 (E.D. Va. 2017), where the court — again faced with an overbroad jury instruction on the meaning of the charging statute — quoted the above “may have” language in *McDonnell* and vacated the conviction. Note that although both *McDonnell* and *Jefferson* involved alleged violations of the federal bribery statute, that fact did not influence the necessity of vacating; *McDonnell*, indeed, looked to *Neder*, a tax case, to support its view that because of the incorrect instruction, “we cannot conclude that the errors in the jury instructions were ‘harmless beyond a reasonable doubt.’” *McDonnell*, 136 S. Ct. at 2375.

McDonnell and *Jefferson* are certainly not alone in vacating a conviction when it “may have” been

caused by a faulty instruction. Similar to *McDonnell* and *Jefferson* is *United States v. Silver*, 834 F.3d 102, 119 (2d Cir. 2017), which also vacated a conviction because it may have been produced by an overbroad jury instruction.

That Farhoumand was tried by a judge, whereas McDonnell, Jefferson, and Silver by juries is a distinction without a difference. Ordinarily, the Commonwealth could argue the presumption that the trial judge knew and applied the correct law. But the Commonwealth cannot make that argument here, because the trial judge clearly accepted the incorrect “tactile exposure” theory advanced by the prosecution. Indeed, the Virginia Supreme Court and the district court (on review of Farhoumand’s habeas petition) so found. Memorandum Opinion, at 1.

This leaves Farhoumand with a stronger case for relief than the defendants in *McDonnell*, *Jefferson*, and *Silver*; there, the improper instruction “may have” caused the jury to convict improperly. But there is no “may have” here; Virginia’s highest court has determined that the trial judge *did* “rely,” in part, on a false construction of the “exposure” statute. Thus, it would be highly anomalous to deny Farhoumand’s petition for certiorari after having vacated the conviction in *McDonnell* on a far lesser showing.

In sum, Farhoumand has been convicted because of the trial judge’s failure to properly “instruct himself” on the meaning of the exposure statute. He has been imprisoned without being convicted beyond a reasonable doubt of any crime. The Court recently recognized in *McDonnell v. United States*, 136 S. Ct. 2355 (2016) that an erroneous jury instruction raises

the inference that the jury may have convicted the defendant for conduct that was not unlawful. Where this occurs — where the plain language of the instruction captured either lawful conduct or conduct not covered by the charging statute — the conviction obviously must be vacated. Again, the Court finds an erroneous jury instruction harmless "only if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Neder*, 527 U.S. at 18.

The Virginia Supreme Court's failure to vacate Farhoumand's conviction was contrary to, and involved an unreasonable application of, clearly established Federal law. 28 U.S.C. § 2254(d). A state court decision is "contrary to" clearly established federal law if it applies a rule that contradicts Supreme Court case law or if it reaches a conclusion different from the Supreme Court's decision in a case involving materially indistinguishable facts. *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003).

Here, the Virginia Supreme Court's failure to vacate the conviction was contrary to the clearly established federal law expressed in *McDonnell* and numerous previous cases. This is elemental due process.

The Virginia Supreme Court's decision also reached a conclusion different from the Supreme Court's decision in *McDonnell*, a case involving materially indistinguishable facts. If this case had been tried to a jury, an appellate court applying *McDonnell* would have remanded. The result cannot be different simply because the trier of fact was a judge.

Further, the Virginia Supreme Court’s legal error in reviewing the case for sufficiency of the evidence is patent. Once it is established that the fact-finder was given an impermissibly overbroad instruction, and that the defendant committed acts covered by the instruction’s “excess,” it is virtually impossible to know — absent written factual findings — whether the guilty verdict was based on conduct covered by the “excess” or was based on conduct within the statute as properly construed. In such as case, it is incorrect to ask whether the evidence was sufficient to convict. A review for sufficiency is appropriate when the fact find is *properly* instructed and has found the elements of the crime beyond a reasonable doubt.

Finally, because this case was similar to a jury trial in that the trial judge did not issue oral or written findings of fact, the Virginia Supreme Court could not have known what facts the trial judge regarded as operative. The Virginia Court thus tolerated risks that are impermissible under the Constitution. In *Fiore v. White*, 531 U.S. 225, 229 (2001), this Court held it unconstitutional to affirm a conviction secured under an incorrect interpretation of a statute that, correctly applied, excluded the conduct for which the defendant was convicted. Similarly, in *Cole v. Arkansas*, 333 U.S. 196, 200-02 (1948), the Court held it unconstitutional to affirm a conviction under a section of the statute different from the one under which the defendant was tried and convicted.

Thus, the question in an overbroad jury instruction case is not whether, viewing the evidence in the light most favorable to the prosecution, a rational jury *could have* rendered a guilty verdict.

Rather, as *McDonnell* held, the question is whether the improperly instructed fact-finder “may have convicted [the defendant] for conduct that is not unlawful,” *McDonnell*, 136 S.Ct. 2375 — or, what is the same, for conduct not covered by the charging statute.

CONCLUSION

The Court cannot conclude here, anymore than it could in *McDonnell*, that the trial judge’s overbroad self-instruction was “harmless beyond a reasonable doubt,” *Neder, supra*. Accordingly, the court should vacate Farhoumand’s conviction and remand for further proceedings.

Respectfully submitted,

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