ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOHN SULLIVAN, Petitioner v. LOUISIANA

CASE NO: 92-5129

PLACE: Washington, D.C.

DATE: Monday, March 29, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN SULLIVAN, :

Petitioner :

v. : No. 92-5129

LOUISIANA :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, March 29, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

JOHN WILSON REED, ESQ., New Orleans, Louisiana; on behalf of the Petitioner.

JACK PEEBLES, ESQ., Assistant District Attorney, Orleans Parish, New Orleans, Louisiana; on behalf of the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 92-5129, John Sullivan v. Louisiana.

Mr. Reed.

ORAL ARGUMENT OF JOHN WILSON REED

ON BEHALF OF THE PETITIONER

MR. REED: Mr. Chief Justice and may it please the Court:

When the State of Louisiana undertook to charge and accuse John Sullivan with murder, John Sullivan had the right to have the truth of that accusation determined by a jury and to have the truth of that accusation determined by a jury beyond a reasonable doubt.

When the State of Louisiana at trial undertook to prove that accusation by reliance on a professed accomplice, possibly beaten by the police at the time of his arrest in return for his original statement, held in jail for 2 years until the day of trial, and promised his freedom, his immunity, and his release upon his giving testimony in this case, John Sullivan had the right to have the credibility of that witness, in light of the other evidence of the case, tested and determined by a jury, and tested and determined by a jury by the standard of proof beyond a reasonable doubt.

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John Sullivan did not receive that right. 3 years ago, this Court held in Cage v. Louisiana that John Sullivan had not received that right. The Louisiana supreme court below held that John Sullivan had not received that right, and below the State conceded that John Sullivan had not received the right to a jury's determination by the standard of proof beyond a reasonable doubt because the jury instruction provided that a jury could convict not only on a standard of proof lower than that required by due process but by a standard -- on a standard of jury certainty below that required by due process.

So John Sullivan comes before this Court on direct appeal, on a conviction of murder, still subject in further proceedings, to the possibility of a sentence of death, without what this Court has called in Herrera a judgment of legal guilt.

QUESTION: Mr. Reed, what was the disposition made by the supreme court of Louisiana of the sentence imposed on Sullivan?

MR. REED: The Louisiana supreme court, Your Honor, vacated the sentence of death on the grounds that Mr. Sullivan's attorney had been ineffective in his representation during the penalty phase and leaves to further proceedings the possibility of reimposing that.

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Presumably there will be a new sentencing proceeding, and would be in the absence of action by this Court.

The jury in this case was not asked the right question. The question to be asked of a jury in a criminal trial is whether the defendant is guilty beyond a reasonable doubt and whether the jurors possess that subjective certainty beyond a reasonable doubt, and the jury not having been asked the right question, necessarily the jury by its verdict cannot be said to have answered that question.

The jury did not answer that question, and so the case went before the Louisiana supreme court, where the Louisiana supreme court, acknowledging the error, answered the question itself, and that is what the Sixth Amendment prohibits courts from doing by an application of an ordinary kind of harmless error test, which I would suggest was not applied in any way that could be considered correct in this case in any event.

The Louisiana supreme court made its own findings of credibility on a cold record, disregarded the testimony the bartender eyewitness Lowrey, and instead rested its -- its conclusion on the testimony of the accomplice, Hillhouse, finding that the testimony of that accomplice was unrefuted.

QUESTION: Well, Mr. Reed, if there were a case

in which the evidence were just crystal clear -- there's a confession by the defendant, there are five eyewitnesses who testified, there are finger print evidence and so forth, no one could disagree that the evidence is overwhelming -- is it possible in such a case that an appellate court could review it and conclude that no reasonable juror would have been able to do anything but find guilt beyond a reasonable doubt?

MR. REED: Your Honor asks, of course, the hardest question, and I think the principal answer to that question, in light of the Sixth Amendment, has to be no, so long as the defendant was in fact relying on the jury's finding of facts beyond a reasonable doubt.

QUESTION: Do you rely on the right of the jury to nullify any verdicts --

MR. REED: No, Your Honor, I do not.

QUESTION: Any juror could --

MR. REED: No.

QUESTION: For any reason --

MR. REED: No, I do not rely on jury nullification. I think that that lurks in the background here, but that is not an express part of our argument at all.

In a case such as the one Your Honor suggested, if there were defenses that were raised by a defendant

perhaps of self-defense, perhaps of justification, perhaps the Patterson v. New York kind of defense, the defense of insanity, the defendant not only confesses but gets on the witness stand and admits the elements of the offense, then I would suggest you could apply a harmless error analysis because in those cases the reasonable doubt fact-finding process might not be relied upon by the defendant.

He might be relying on some affirmative defense determined by a different standard, but I think principle requires that in Your Honor's case that the Sixth Amendment prohibit a finding of harmless error if the defendant is indeed submitting questions of fact to the jury by the standard of proof beyond a reasonable doubt.

It may be that there are such obvious cases. They will be very few, I would think, and even when you see cases where things are on videotape, nevertheless people and juries and lawyers advocating cases to juries --

QUESTION: But Mr. Reed, in most States -- I don't know if it's true in Louisiana or not -- the defendant simply enters a plea of not guilty.

You don't deny the allegations, as I understand it, in the indictment, and so the situation which you advert to in answer to Justice O'Connor's question where the defendant relies only on affirmative defense would be

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a purely fictional one.

I mean, a defendant can always say he's just putting the Government to its proof, can't he?

MR. REED: If the defendant is, indeed, Your Honor, putting the Government to its proof on the elements of the offense and requiring it to prove them beyond a reasonable doubt, then we would suggest that you cannot apply harmless error in the ordinary way, but must instead look to see whether he was relying on it and if he was then it cannot be harmless.

QUESTION: Look to see if he was relying on what?

MR. REED: On the -- on the obligation of the State or the Government to prove beyond a -- if he made in opening statements for Your Honor, the defendant comes before you, admits he killed so-and-so, admits he intentionally killed so-and-so, but tells you that he was insane at the time, then I think a court could conclude that that defendant was not relying on facts found beyond a reasonable doubt if the insanity defense was placed -- the burden was placed --

QUESTION: Wouldn't a not-guilty plea ordinarily be conclusive for the defendant?

MR. REED: Well, initially a not-guilty plea would certainly be the first step, and if that's all there

were before you, you might reach that conclusion, but when you review it there is much more before you than just a not-guilty plea.

There's the opening statements, there's the evidence, there's the closing arguments, and you can determine whether this is a case in which a defendant indeed was putting the Government to its test to persuade a jury fact-finder --

QUESTION: But in your view, then, a defendant would have to show something more than just a not-guilty plea.

MR. REED: No, Your Honor. I would be obliged to say that if a defendant pled not guilty and required the Government to go through its proof and you could not ascertain from opening statements or closing arguments that there was reliance -- that there was not reliance on the rule requiring proof beyond a reasonable doubt, that in that rare circumstance, if you didn't find counsel ineffective or lots of other problems along the way, in that rare circumstance you would have to find harmless error.

QUESTION: Mr. Reed, what is the difference between other kinds of errors in the jury instruction and this one? Suppose a jury instruction is inadequate because it incorrectly defines one of the elements of the

offense? Would that always be a basis for automatically setting it aside?

MR. REED: Absolutely not, Your Honor. I think --

QUESTION: Why?

MR. REED: As I would see it, only this, and the reason why is because in every other circumstance that I can contemplate, if there is an instruction on reasonable doubt there will be before a reviewing court some findings of the jury beyond a reasonable doubt.

Assume three elements, a misinstruction that fails on one, a guilty verdict -- there are findings beyond a reasonable doubt as to two elements. You may logically, you may not, but you can apply it analytically, say that having proved A beyond a reasonable doubt, there may be such an necessary inexorable connection between A and B that we can say as a matter of law that it was harmless error, that there was a failure of instruction on B. That is somewhat what was done in Pope, it's somewhat what has been done in the presumption cases.

Here, instead of having A proved beyond a reasonable doubt, what can we say about B or C, you have nothing that a jury has said to have been proved beyond a reasonable doubt. You have no anchor against which to conduct harmless error analysis, and that is the

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distinction between this and all other instructions.

They might come out differently in the analysis, but you can subject them to the analysis. Here you cannot.

I would, if you will, go back to the language of the harmless error rule, something that you can say beyond a reasonable doubt did not contribute to the verdict, something that you can say beyond a reasonable doubt that's Chapman, or beyond a reasonable doubt did not affect the fact-finding process, that's Van Arsdale.

How can something not contribute to the verdict when it defines the verdict, it defines the question the jury was asked and the answer that it gave, it -- in terms of -- it affects the fact-finding process, it defines the process they went through and, therefore, how can you say beyond a reasonable doubt that it was harmless when it defines it?

So in a sense you can --

QUESTION: Well, why wouldn't it be harmful only if the -- if there was a reasonable likelihood that the jury convicted on less than a reasonable doubt?

MR. REED: Well, because, Your Honor --

QUESTION: That's what you -- you really -- this instruction I think you claim left the jury -- at least it's likely that they convicted on less than a reasonable

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doubt, that the instruction permitted them to do that.

MR. REED: That's correct, Your Honor, and this Court so found, and the question --

QUESTION: In Cage.

MR. REED: In Cage, Your Honor, yes, and this is a virtually identical instruction, so this Court has held that that's what this instruction does.

QUESTION: Well, what if -- if you make an -- in Estelle -- you know Estelle v. McGuire.

MR. REED: Yes, sir.

QUESTION: It says in these kinds of cases you inquire whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.

MR. REED: Yes, Your Honor.

QUESTION: And it sounds to me like we were saying that if there was a reasonable likelihood, that's the end of the case. There's no separate harmless error analysis involved.

MR. REED: I think it's a matter of semantics, Your Honor. I could say there is no harmless error analysis, period, because there's a reasonable likelihood it affected because reasonable doubt was in Pope --

QUESTION: Yes.

MR. REED: Or you could say it the other way. I

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think the result is the same either way.

QUESTION: But what if you conclude that there wasn't any reasonable likelihood that the jury convicted on less than reasonable doubt?

MR. REED: Well, I think --

QUESTION: There's no -- then there isn't any error, I guess.

MR. REED: But I think Cage --

QUESTION: Harmless or otherwise.

MR. REED: Cage defines that there is such error. There is the dispute about the language, but the Cage instruction is not an ambiguous instruction, Your Honor, and the terms "could," "would," and "reasonable likelihood" are terms of art used by this Court when its interpreting an ambiguous instruction like Francis v. Franklin, Boyde, McGuire --

QUESTION: Oh, I would think you would argue that if Cage holds that, which it probably did, that there is a reasonable likelihood that the jury convicted beyond a reasonable doubt. That -- I would think you would argue that forecloses any further harmless error analysis, and I guess you do, don't you?

MR. REED: I certainly do, Your Honor. I only mean to consider some remote possibilities where it might not apply, or not so remote, but as long as the ordinary

criminal case like John Sullivan, relying on the State's requirement to prove the elements against him, defending on the basis principally of identity, that that is the seminal -- the key thing that a jury decides, and given that instruction, there's a reasonable likelihood they could, they would, they did.

It was a clear instruction before them that said they only had to convict when they were convinced to a grave uncertainty, not when they were convinced beyond a reasonable doubt.

QUESTION: Of course, the State suggests that this wasn't an ambiguous instruction at all, and it wasn't an erroneous one, don't they?

MR. REED: I think, Your Honor, Cage settles that question. That is, what --

QUESTION: I know they do, but -- I know you think so, but the State doesn't.

MR. REED: Well, they take -- they do take dispute --

QUESTION: Isn't that right, they assert that?

MR. REED: They do, and I think the answer to that -- I think the strength and the clarity of the Cage opinion is in its unanimity, in the language of the opinion in which the Court says it is plain to us that the words mean something less than reasonable doubt, all nine

members of this Court, and it is clear to us that a jury could.

I don't think there's any question that this Court's interpretation in Cage is that this is not an ambiguous instruction, it's a completely misleading one that dilutes the standard of proof beyond a reasonable doubt.

I would note that the words are identical. There's some dispute about grave doubt, grave uncertainty. In fact, the words "grave uncertainty" are used in both instructions. The courts of the country for the last 3 years have been following Cage and take it to mean what it says.

What the Louisiana supreme court did could not be defended under any basis of reasonable doubt analysis, because it is their own fact-finding, and I would suggest if you ever try a mode of approach to apply a factual harmless error analysis, a whole record approach, you would conclude that you became jurors yourselves arguing about it, because if you had to approach it in any kind of a way, you would have to consider whether it was beyond a reasonable doubt that no rational juror could have held a reasonable doubt.

And once you start considering those possibilities, I think I could convince a majority of this

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Court that a rational juror could have a rational -- a reasonable doubt, not only on the cold record but looking at the way Mr. Hillhouse scowled, or did he scowl, or did he sneer, or did he look down, or how did he look when he said the things he said and when he came back on rebuttal to add more things and more elements to the State's proof?

So when you try to start getting into that process, even in Justice O'Connor's extreme case, you start -- lawyers have defenses, clients have defenses, you can argue about them, you can consider what the possibilities are as they testify and as they present themselves, and the Constitution refers, defers, and reserves the decision of the credibility of those witnesses to a jury.

QUESTION: But of course, that kind of argument was made against a whole notion of harmless error when it was first introduced, but courts can't second-guess juries. We never know what a jury would have done had this evidence been brought before it, even though rational people would have said it didn't make much difference, but that line of argument was rejected for the great majority of harmless error applications saying that the principle of harmless error was applicable.

MR. REED: And in every case, Your Honor, it was rejected, and in every case harmless error analysis was

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conducted in light of and because there was before the court a jury finding of something beyond a reasonable doubt to that jury's certainty, and while I don't dispute that there may be some subjectivity that might go into the harmless error process of adding and subtracting to that, there is the integrity of a jury finding beyond a reasonable doubt.

QUESTION: Well, suppose that we flesh out a little bit Justice O'Connor's hypothesis and say that there were four eyewitnesses, each to a murder with which the defendant is charged. Each of them is grilled extensively by defense counsel, and it only firms up the witness' account -- those things do happen, as you know.

MR. REED: Yes.

QUESTION: And the defense -- defendant does not take the stand. Defendant puts on a couple of alibi witnesses who are simply made mincemeat of by the prosecution, and -- but there is this kind of flaw in the reasonable doubt instruction.

Your argument is that even in that extreme a case there's no possibility for harmless error.

MR. REED: No possibility that the court in that extreme a case could direct a verdict, Your Honor, no possibility in that extreme a case that the court could set aside a jury's verdict of acquittal, and no

possibility, therefore, in terms of the Sixth Amendment applying harmless error in that kind of a case.

If the principle allows this Court to declare the man guilty because the witnesses are that powerful against him that we can so declare it even though a jury has never found it, then that is saying that we do not need the jury in the first place, and it means that the reasonable doubt decision is reserved to --

QUESTION: What you must do, and you're certainly making arguments to that effect -- perhaps you've succeeded -- is to show why this reasonable doubt instruction is so much different from the other kinds of instructions that we do allow harmless error review, such as a Sandstrom error.

MR. REED: Well, I think the -- with the -- again, with the reasonable doubt instruction you have the jury finding. Without it, you do not. With it, you have deference to the jury. Without it, you have no deference to the jury, and that, I think is the distinction between the two, and the jury must be allowed to make those decisions, no matter how extreme the case. No, I'm not relying on --

QUESTION: You're saying, given one jury finding you can say well, it's inevitable that a jury that found this would find the other, but in this case you have no

jury finding --

MR. REED: Correct.

QUESTION: And therefore you're --

MR. REED: You're at sea. You're lost.

QUESTION: You have no fulcrum for the lever, right?

MR. REED: Nothing to hold on to, nothing to hang your hat on. You're just -- I mean, if I'm certain of A, you can say logically that I declare myself to be certain of A, B must follow.

I mean, if you ask me right now whether I'm certain I turned the stove off this morning, I'll say yes, I'm sure, but you don't know how sure I am, and if you're going to say, well, Mr. Reed was sure beyond a reasonable doubt, that's because you will be making that decision and you will be assessing those facts, and you will be making those determinations, and that's what the Sixth Amendment says that courts cannot do, and it says that courts cannot do for reasons that are among the most fundamental.

I mean, cross-examination is a nice right for a defendant, self-incrimination is a nice right, subpoenaing witnesses is a nice right, but the right to jury trial has something to do with apportionment of decision-making power, the structure --

QUESTION: Was that the basis of the Winship

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opinion and the successors to it, the Sixth Amendment right to jury trial, do you think?

MR. REED: No, Your Honor. The Winship opinion is based on the Fourteenth Amendment right to due process and right to that measure of certainty.

QUESTION: But you're basing your argument on the Sixth Amendment right to jury trial.

MR. REED: I think the Sixth Amendment right to jury trial forecloses the application of harmless error analysis in any customary form where a defendant is relying on the reasonable doubt instruction, but I would like to say that there is more to the argument than just the right to trial by jury, and that is that under the Fourteenth Amendment, somebody is -- a defendant is entitled not to be convicted except upon proof beyond a reasonable doubt to the satisfaction of the fact-finder.

That's part of the Winship formulation. It is the subjective degree of certainty of the fact-finder. The opinions are the intensity of belief of the fact-finder.

Reasonable doubt is not just a measuring yardstick of the quantum of evidence. As it was emphasized in Jackson v. Virginia in both the majority opinion and in the dissent, reasonable doubt is about the certainty of the fact-finder.

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As a matter of due process, I have the right to the certainty of the fact-finder. As a matter of Sixth Amendment -- of the Sixth Amendment, I have the right for that fact-finder to be a jury and none other.

If you go back to Duncan, Duncan speaks of the right of a defendant to the jury's verdict. The verdict is what a defendant has a right to. The verdict by definition is speaking the truth, the telling of the truth, the truth of the accusation.

Truth is determined by the standard of reasonable doubt, and what you're entitled to from the jury is the jury's determination of truth by that standard -- the truth of the application -- and that is the structural, the fundamental, structural role of a jury.

And in a case like this it is more telling than ever, because you have a witness essentially created by the Government, clothed with various immunities by the Government, and it should be the citizenry who will determine whether that is a witness who should be believed and not judges, who do not bring quite the same approach to those kind of fact-finding decisions and, whether they do or not, are not constitutionally permitted to make those kind of fact-finding conclusions on a cold record or, really, otherwise when a defendant asserts his right

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to trial by jury.

You know, there's been the evolution of the presumption cases and the Pope case and the discussion of how you can perform harmless error analysis with instructional errors, but I think if you look at Connecticut v. Johnson and Rose v. Clark, and Justice Powell's opinions in those two cases and their evolution through Carella and through Yates v. Evatt, the thread that holds that all together and is always paid respect to is reasonable doubt, a jury finding something beyond a reasonable doubt.

Everybody in Connecticut v. Johnson and Rose v. Clark agreed that the reasonable doubt was the touchstone to any performing of a harmless error analysis.

So I would, Your Honors, reserve the balance of my time for rebuttal, saying again that you cannot review the facts to find whether this error is harmless. John Sullivan is entitled to a jury's determination whether he's guilty beyond a reasonable doubt.

QUESTION: Cage didn't deal with harmless error.

MR. REED: Cage does not deal with harmless error, no, Your Honor.

QUESTION: And it didn't say that harmless error was out of the question.

MR. REED: No, it did not, Your Honor.

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QUESTION: Then it seems to me that a later case, Estelle, indicates that if you don't think that an error in an instruction contributed -- had a reasonable likelihood of contributing to the verdict --

MR. REED: As I read --

QUESTION: That's the end of it.

MR. REED: As I read Estelle, it's whether there's a reasonable likelihood that the jury has applied, and you -- there is a --

QUESTION: Yes, but what if there's a reasonable likelihood because of the state of the evidence that the jury did not apply the instruction in an unconstitutional manner?

MR. REED: You can only assume that the jury applies the instructions as the words -- as the words are meant. The words may have a clear meaning, this Court held in Cage, and I suggest they do. Having been asked that question, the jury can't have answered any other.

You might wonder how they could have applied it, or whether they in fact had a greater certainty. Indeed, they may have. I do not know. The Court does not know. They were not asked, and they did not tell us.

QUESTION: But I assume that in Cage, from reading the per curiam, that there must have been room in the evidence to have assumed that the jury could have

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applied the instruction in an unconstitutional manner and convicted on less than reasonable doubt.

MR. REED: They can at any time, Your Honor, but the facts in Cage were where two witnesses -- where two witnesses testified that the defendant went up to a body as it was lying on the ground and fired bullets into the back of the head at point-blank range, and there was no question of identity, so I don't think -- I think the Court was looking at the language and at the principle, and the harmless error principle requires that we cannot apply that kind of analysis.

Thank you.

QUESTION: Thank you, Mr. Reed.

Mr. Peebles, we'll hear from you.

ORAL ARGUMENT OF JACK PEEBLES

ON BEHALF OF THE RESPONDENT

MR. PEEBLES: Mr. Chief Justice, and may it please the Court:

The State of Louisiana has no quarrel with the defendant's right to a trial by jury, or with his right to have that jury determine his guilt or innocence, or with his right to have that jury determine his guilt or innocence by a criterion of beyond a reasonable doubt.

The essence of the difference between the State and the defense in this case is over the nature of the

errors that were committed by the trial judge in giving his jury charge.

I assure you that the State does not concede that John Sullivan was convicted by a standard of proof of less than beyond a reasonable doubt. Indeed, our argument to you today is that a careful reading of that jury charge indicates that he was not convicted by a jury charge --

QUESTION: Or was not permitted by the instruction to convict on any less than a reasonable doubt -- beyond a reasonable doubt.

MR. PEEBLES: Yes.

QUESTION: Well, aren't we bound to assume there was Cage error? Aren't you telling us that we don't assume there was Cage error?

MR. PEEBLES: You are not bound, Your Honor, because of Estelle v. McGuire.

In 1990, in Teague v. Louisiana, this Court considered a jury charge similar to the one we have today, and in Cage this Court held that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

But it's important to note that in Cage the Court said that in construing the instruction, we consider how reasonable jurors could have understood the charge as

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a whole. You used the language, how they could have understood it, and you said that because there was a possibility that they could have understood the language in the jury charge to reduce the burden of proof standard below that allowed by the Due Process Clause, you held that Mr. Cage was entitled to a new trial.

Now, later, in Estelle v. McGuire, you specifically explicitly disapproved the standard used in Cage. You explicitly said, in Estelle v. McGuire, we now disapprove the standard of review language in Cage and Yates and reaffirm the standard set out in Boyde.

QUESTION: Mr. Peebles, I apologize, but I would like to interrupt you.

I pulled out the petition for cert in this case, and the question presented in the petition for cert is this: Is a reasonable doubt instruction which is constitutionally deficient under Cage v. Louisiana subject to harmless error analysis?

That's the only question we took, and you are in effect recasting the question for us.

MR. PEEBLES: Well, I'm recasting the -- if that's the way the petitioner posed the question, but --

QUESTION: That's it.

MR. PEEBLES: We are suggesting to the Court that the review of the Louisiana supreme court's decision

on harmless error is appropriately before this Court and should be considered in light of the Estelle v. McGuire criteria.

QUESTION: But if we stick to the question we took, your argument is beside the point.

MR. PEEBLES: Well, that's correct, Your Honor, if the Court limits it that way.

QUESTION: Excuse me --

MR. PEEBLES: However, in rendering the -- granting the certiorari, you did not say, we are limiting the question in any particular manner.

QUESTION: Did you -- in the brief in opposition did you state that the question was inappropriate?

MR. PEEBLES: No, Your Honor --

QUESTION: Well, I think that's the --

MR. PEEBLES: We did not. We do think it's an appropriate question for this Court. However, it's not relevant for this particular case because, as I said, in the later case of Estelle v. McGuire, you changed the criterion by which such jury charges --

QUESTION: Excuse me, but you did not tell us this in your brief in opposition.

MR. PEEBLES: We did not, Your Honor.

QUESTION: All right.

QUESTION: Usually our rule is, Mr. Peebles,

that if things like this are not brought up in the brief in opposition to certiorari, we grant the case expecting to decide the question that's presented by the petition, and you've a right under the rules to argue an alternate ground for affirmance, or something like that, but we expect to address the question that's presented in the petition.

MR. PEEBLES: I appreciate that, your Honor.

The reason we are addressing it in this manner is that we are -- the petitioner here is seeking review of the finding of harmless error by the Louisiana supreme court. The actual analysis of that error we did not figure was limited to that which was submitted by the petitioner in his brief. That's the reason we were proceeding as we are here today.

QUESTION: Well, I don't mean in any way to suggest that other arguments are foreclosed to you, but one argument you can expect the Court to consider I think, because of the way the question presented is phrased, is, is harmless error analysis applicable to an instruction that violates the rule of Cage?

MR. PEEBLES: Yes, Your Honor, if you choose, that's of course your prerogative, but you have changed the rule in Cage. You have changed the criterion by which ambiguous jury charges are considered, so that the State

respectfully submits that that would be a moot point at this point.

The question now is whether the jury charge that was given in --

QUESTION: Well, really, you could just argue that Estelle answers the question of whether or not --

MR. PEEBLES: That's what we are suggesting to the Court.

QUESTION: Whether or not a Cage error is subject to something like harmless error analysis.

MR. PEEBLES: Yes, Your Honor, we are suggesting --

QUESTION: So you say, here's a Cage error, and you go about it by inquiring whether or not there's a reasonable likelihood that it -- that the jury applied -- convicted on a wrong standard.

MR. PEEBLES: Yes, Your Honor, that's what we're suggesting to the Court, that in this case a review of the charge shows that the jury did not convict on the wrong standard.

QUESTION: Well, I know, but you don't need to say that this is a -- it wasn't -- you don't need to say that this was not a -- that this instruction was not error under Cage. All you have to do is say well, if there was an error under Cage, it was harmless, and it's subject to

harmless error because Estelle says it is.

MR. PEEBLES: Your Honor, if there was error under Cage, and if you do not -- if you hold that the error was as stated in Cage and do not apply Estelle v. McGuire's criterion, then I think that this would not be an error which would be subject to the harmless error rule, because in Cage, the Court decided that the posture of the case was such that the defendant was denied a fundamental right.

QUESTION: Mr. Peebles, I may not be following the argument here, I must confess. I -- in your defense, you did in your brief in opposition call our attention to Estelle v. McGuire and the fact that it in effect changed the standard to some extent.

MR. PEEBLES: Yes, Your Honor, I did.

QUESTION: You did call that to our attention, but if the instruction uses grave uncertainty in a way that is a lesser standard of proof than proof beyond a reasonable doubt, if one reads it that way, then does it not necessarily follow under the language in Estelle that there's a reasonable likelihood that the jury applied the challenge instruction literally and therefore in a way that violates the Constitution?

MR. PEEBLES: Yes, Your Honor, it does, and we -- I would agree with that.

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QUESTION: And therefore that there's no room for harmless error, once you find that --

MR. PEEBLES: If -- once you conclude that the jury charge did reduce the level of the burden of proof instruction to that below that which is allowed by the Due Process Clause, then we submit that you cannot subject such an error to the harmless error rule --

QUESTION: That's the end of the ball game.

MR. PEEBLES: That would be the end of the ball game, yes.

QUESTION: Mr. Peebles, I don't think you're performing the responsibility you ought to perform before the Court. When we grant certiorari on a particular question, we expect it to be argued adversarially.

MR. PEEBLES: Well --

QUESTION: We don't decide cases on concessions by the -- of the principal point presented by the petition for certiorari.

MR. PEEBLES: Your Honor, as I understand, the issue before the Court is whether the harmless -- whether the error committed by the trial judge is harmless, or can be harmless, and we're prepared to argue that question. We do not want to argue something that we feel is not correct under law.

QUESTION: Well, Mr. Peebles, did the State

concede before the Louisiana supreme court that the jury instruction on reasonable doubt was erroneous?

MR. PEEBLES: Yes. Portions of the instruction were incorrect.

QUESTION: Yes. I thought that had been the concession below --

MR. PEEBLES: Yes, Your Honor.

QUESTION: And that we would just take it on the same concession here. It was error. Now, what can be done about it?

MR. PEEBLES: Well, it was error in that it misdescribed to an extent what reasonable doubt is. We submit, however, that the nature of that error is such that it does not reduce the burden of proof level unconstitutionally. It simply enters a degree of vagueness or confusion into the jury charge.

QUESTION: Well, it's not error, then, you're saying.

MR. PEEBLES: Yes.

QUESTION: But --

MR. PEEBLES: We're saying that under the criterion of Estelle v. McGuire, it is not error.

QUESTION: But the question presented, and I'm sure you know it as well as I do, is whether a constitutionally deficient reasonable doubt instruction

can be found harmless error.

Now, I think you have to accept by hypothesis that this particular instruction was constitutionally deficient, or you've at least got to argue before us whether or not it was -- can be found to be harmless error, and we expect you to argue the other side of that case.

MR. PEEBLES: Well, Your Honor, the other side of that argument would be that in this particular case the entire record before the Court was complete. No evidence was omitted, no issues were omitted, this Court can analyze the issues and the evidence, and make a determination as to whether there was overwhelming evidence of guilt in this case.

QUESTION: But in effect that's an argument that there was a sufficiency of evidence to find beyond a reasonable doubt. It is not an argument, as I understand it, that the jury did find beyond a reasonable doubt.

MR. PEEBLES: Well, we know that the jury did find that he was guilty beyond a reasonable doubt. The question is whether the jury --

QUESTION: Well, it did not find --

MR. PEEBLES: Had before it the proper criteria.

QUESTION: Excuse me. It did not find it beyond a reasonable doubt in accordance with an instruction

correctly describing the reasonable doubt standard.

MR. PEEBLES: That's correct, Your Honor, and that, again, brings us back to the issue as to whether or not that instruction correctly told the jury what it must find in order to evaluate the evidence.

QUESTION: Mr. Peebles, what if no instruction had been given at all on burden of proof in a criminal case, just no instruction? Now, could that be harmless?

MR. PEEBLES: No, Your Honor --

QUESTION: No.

MR. PEEBLES: It could not have been. I'm sure under Jackson v. Virginia the Court has said as much, and in fact, if the jury --

QUESTION: Well then, how would you have a different result if the instruction that is given is erroneous and doesn't present the right standard?

MR. PEEBLES: If the instruction is erroneous but nonetheless does not reduce the burden of proof beyond a reason -- to that which is not permitted by the due process clause, then the mistake would be harmless. That's essentially what we're arguing in this case, Your Honor, that those words about -- which have been criticized do not cause the charge to become unconstitutional.

QUESTION: Well, that takes you back to your

same argument that there's just no constitutional violation --

MR. PEEBLES: That's correct.

QUESTION: By virtue of the instruction.

MR. PEEBLES: That's correct, Your Honor, it does.

If the Court has any further questions, I'll be glad to answer them.

QUESTION: Thank you, Mr. Peebles.

MR. PEEBLES: Thank you.

QUESTION: Mr. Reed, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JOHN WILSON REED

ON BEHALF OF THE PETITIONER

MR. REED: Your Honors, there was one way to apply the Cage instruction. It was to permit a conviction on less than reasonable doubt.

There is necessarily a reasonable likelihood that it was applied in that way. As necessarily, therefore, they were asked the wrong question and answer and, necessarily, we can't apply harmless error, because we would thereby be substituting our judgment for theirs, which was not given and was not properly asked.

Unless there are further questions, Your Honor, I would submit the case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Reed. The case is submitted.

MR. REED: Thank you.

(Whereupon, at 1:41 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)