No. ____

IN THE

Supreme Court of the United States

GLENN BENNETT, JR.,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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NOVEMBER 13, 2018

QUESTIONS PRESENTED

This petition presents the questions of whether reasonable jurists can debate the following issues:

1. Whether the erroneous jury instruction given in Mr. Bennett's case, which negated his only defense, relieved the State of the burden of proving all elements of the charged offense, and directed the jury to find Mr. Bennett guilty, was an unconstitutional denial of his constitutional right to due process under the Fifth, Sixth, and Fourteenth Amendments.

2. Whether Mr. Bennett's defense counsel's failure to object to the erroneous instruction was an unconstitutional denial of Mr. Bennett's Sixth Amendment right to the effective assistance of counsel.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Glenn Bennett, Jr. respectfully petitions for a writ of certiorari to review the Eleventh Circuit's judgment.

OPINIONS BELOW

The Eleventh Circuit's denial of Mr. Bennett's application for a Certificate of Appealability (COA) in Appeal No. 18-11898 is provided in Appendix A.

JURISDICTION

The United States District Court for the Middle District of Florida had jurisdiction over Mr. Bennett's 28 U.S.C. § 2254 motion. The district court denied that motion and application for COA on April 4, 2018. Mr. Bennett filed a notice of appeal and application for a COA in the Eleventh Circuit, which was denied on August 13, 2018. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional provision:

U.S. Const., Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service

> in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amendment VI

> 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

Mr. Bennett moved to vacate his conviction and sentence under 28 U.S.C. § 2254, arguing the jury, at his Florida state trial for armed robbery with a deadly weapon, had been erroneously instructed on the voluntary intoxication defense. The trial judge erred in giving the jury instruction on voluntary intoxication. The instruction, as given, negated the actual defense and instead required the jury to find Mr. Bennett guilty – instead of not guilty – if they jury found evidence that Mr. Bennett was so intoxicated from the voluntary use of drugs as to be incapable of forming the intent to deprive the victims of their property.

Mr. Bennett's trial counsel failed to object to the erroneous instruction, and Mr. Bennett was found guilty and sentenced to life imprisonment.

1. Trial

On May 11 and 12, 2000, Mr. Bennett was tried before a jury on the charge that on November 18, 1999, at approximately 3:30 a.m., he robbed a Waffle House restaurant in Jacksonville, Florida, and that in doing so he was armed with a deadly weapon, to wit, a knife. *See* Transcript of Trial, Doc 20-2 - Pg 150, 161-162.[1] His only defense at trial was that he was so intoxicated from the ingestion of prescription painkillers, Valium, and beer, that he was unable to form the specific intent to deprive the victims of their property, an essential element of the charged offense. *See* Doc 20-6 – Pgs 55-58; 20-2 - Pgs 35-38; *Bell v. State*, 394 So. 2d 979, 980 (Fla. 1981) ("We hold that specific intent is still a requisite element of the crime of robbery").

The trial court agreed with Mr. Bennett that he was entitled to have the jury instructed on his voluntary intoxication defense. Doc 20-3 - Pg 85. It intended to give the standard Florida jury instruction on

[1] The trial transcript is Exhibit D of the state's appendix, found at Doc 20-2 - Pgs 142-303, and at Doc 20-3 - Pgs 1-170.

voluntary intoxication. *See id.* at 85-88; *see also* Standard Jury Instructions in Criminal Cases § 3.6(d), 508 So. 2d 1221(Fla. 1987). Instead, in its final charge to the jury, the court instructed it as follows:

> Now, a defense asserted in this case is the defense of voluntary intoxication by the use of drugs.
>
> Now, the use of drugs to the extent that it merely arouses passions, diminishes perceptions, releases inhibitions or clouds reason and judgment does not excuse the commission of a criminal act.
>
> However, where a certain mental state is an essential element of the crime, and a person was so intoxicated that he was incapable of forming that mental state, then the mental state would not exist and, therefore, the crime could not be committed.
>
> Now, I advise you that the intent to temporarily or permanently deprive either Edith Gruhn and/or Greg Anderson of the money or other property is an essential element of the crime of robbery, and I advise you that the intent to temporarily or permanently deprive Waffle House of the money or other property is an essential element of the crime of theft. Therefore, if you find from the evidence that the defendant was so intoxicated from the voluntary use of drugs as to be incapable of forming the intent to temporarily

> or permanently deprive Edith Gruhn and/or Greg Anderson and Waffle House of the money or other property, or if you have a reasonable doubt about it, *then you should find the defendant guilty.*

Doc 20-3 - Pgs 148-49 (emphasis added).

Counsel for Mr. Bennett did not object to the omission of the word "not" from before the word "guilty" in the instruction. Doc 20-3 - Pg 149, 157. A printed copy of correct instructions was not provided to the jury to take back to the jury room. *Id*. at 158; *see also* State's Response to Defendant's Motion for Postconviction Relief, Doc 20-5 - Pg 162 ("[A] written set of instructions was not given to the jury in the case at bar").[2]

The jury found Mr. Bennett guilty of armed robbery with a dangerous weapon. Doc 20-3- Pg 162. He was later sentenced to life imprisonment as a Prison Releasee Re-Offender in accordance with the provisions of Fla. Stat. § 775.082(8). Doc 20-1 - Pgs 88-89.

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[2] Not until 2007 were trial courts in Florida required to provide copies of the written jury instructions to jurors for their use during deliberations. *In re Amendments to The Florida Rules of Civil Procedure, The Florida Rules of Criminal Procedure, The Standard Jury Instructions in Civil Cases, and The Standard Jury Instructions in Criminal Cases--Implementation of Jury Innovations Committee Recommendations*, 967 So.2d 178, 180 (Fla. 2007). Before that, the decision whether to provide the jury with written instructions was a matter of the court's discretion. *In re Florida Rules of Criminal Procedure-Rule 3.400*, 657 So.2d 1134, 1135 (Fla. 1995).

2. Direct Appeal

Mr. Bennett's direct appeal was affirmed per curiam by the Florida First District Court of Appeal on May 21, 2001. Doc 20-4 - Pg 45. His petition for discretionary review was denied by the Florida Supreme Court on April 22, 2002. Doc 20-4 - Pg 59.

3. Post-Conviction Proceedings

On December 11, 2002, Mr. Bennett filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Doc 20-4 - Pg 66. In his motion he raised five grounds for relief, only two of which are relevant here, as they are identical to the two grounds raised in the petition for writ of habeas corpus before the Eleventh Circuit Court. Those grounds were: (1) that "defendant was denied his right to a fair trial by impartial jury in violation of the Sixth and Fourteenth Amendments when trial judge gave an inaccurate and misleading jury instruction which had the effect of negating defendant's only defense;" and (2) "defendant was denied his rights to a fair trial by impartial jury and the effective assistance of counsel in violation of the sixth and fourteenth amendments by counsel's failure to object and/or request a

curative instruction when trial judge improperly instructed the jury to find the defendant guilty of armed robbery." Doc 20-4 - Pgs 70, 73.

4. Trial Court's Denial of Mr. Bennett's 3.850 motion

The state court denied Mr. Bennett's 3.850 motion without an evidentiary hearing. Doc 20-6 - Pg 29. Although it found that the trial court committed error in instructing the jury on Mr. Bennett's voluntary intoxication defense, it held that the error did not rise to the level of "fundamental error," which under Florida law means that the error did not "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Id*. at 32. This was so, the court stated, "because the voluntary intoxication jury instruction was correctly stated and sufficiently explained through defense counsel's opening statement, through defense counsel and the State's closing arguments, and through the mental state jury instruction." *Id*. at 34. By "mental state jury instruction," the court meant that portion of the instruction which stated that "where a certain mental state is an essential element of the crime, and a person was so intoxicated that he was incapable of forming

that mental state, then the mental state would not exist and, therefore, the crime could not be committed." Doc 20-6 - Pg 34.

As to ground two, the court held that "defense counsel's failure to object to the misstatement or request a curative instruction was error." *Id*. at 35. The court went on to find, however, that for the same reasons discussed in denying ground one, "chiefly that defense counsel and the State explained the voluntary intoxication defense thoroughly throughout the trial and stated the jury instructions correctly during closing arguments . . . there [wa]s no reasonable probability that the outcome of the proceeding would have been different absent counsel's failure to object to the misstatement or request a curative instruction." *Id* at 36.

5. Florida Appellate Court Ruling

Mr. Bennett appealed the denial of his 3.850 motion to the Florida First District Court of Appeal. Doc 20-6 - Pg 116. The court affirmed per curiam without opinion on December 22, 2011. *Id*. at 126.

6. Federal District Court: The Petition, Response, and Supplemental Brief

On April 17, 2012, Mr. Bennett submitted for mailing a Petition under 28 U.S.C. § 2254 by a Person in Custody Pursuant to a State

Court Judgment. Doc 1 - Pg 10. The state filed its answer, Doc 19, and on September 9, 2015, the district court, stating that it found the issues raised were "substantial enough to warrant appointing counsel for Petitioner," appointed the office of the undersigned to represent Mr. Bennett, and ordered it to submit a supplemental brief on Petitioner's behalf. Doc 25 - Pg 1.

In the supplemental brief, Mr. Bennett argued two grounds; Grounds One and Two of Mr. Bennett's federal petition were identical to the Grounds One and Two raised in his state post-conviction motion. *Compare* Doc 20-4 - Pgs 70, 73 with Doc 1 -Pgs 7, 8.[3]

The first ground raised was that by giving the erroneous jury instruction, the trial court had relieved the state of its burden to prove all elements of the offense beyond a reasonable doubt and completely

[3] Mr. Bennett argued below and asserts here that the procedural posture of these constitutional claims was uncomplicated, because in its answer to the petition, the state raised no defenses of timeliness, procedural default, or failure to exhaust. *See generally* Doc 19. Although in its answer it includes boilerplate language to the effect that it "asserts all available procedural bars," *id*. at 1, 6, it pointed the district court to none. Given that the time for raising them would have been in its answer, the state forfeited any defenses to Mr. Bennett's grounds for relief, even assuming any existed. *See* Rule 5(b) of the Rules Governing Section 2254 Cases for the United States District Courts ("[The answer] must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations").

negated Mr. Bennett's only defense, which was prejudicial to Mr. Bennett. Doc 27 – Pgs 7-23. Mr. Bennett argued that the state court's denial of the 3.850 motion was not entitled to any deference and should be reviewed de novo,[4] because in denying the 3.850 motion, the state court applied the wrong standard. *Id*. The state court had found the instruction to be an error, but found it did not constitute fundamental error under Florida law based on the context of the trial, specifically citing the other times throughout the trial where the voluntary intoxication defense had been properly stated. Doc 27 – Pgs 9-11. Mr. Bennett argued that by reaching its decision in this manner, the state court had applied the "reasonable likelihood" standard as set forth in *Boyde v. California*, 494 U.S. 370, at 380 (1990), which, Mr. Bennett

[4] Mr. Bennett acknowledged that, ordinarily, the state court's denial of a 3.850 motion would be entitled to deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (April 24, 1996). Doc 27 – Pgs 9-10. Mr. Bennett argued, however, that the state court's adjudication of his claims was based both on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding and was contrary to, and involved an unreasonable application of, clearly established Federal law; therefore Mr. Bennett's constitutional claims should be reviewed de novo.

asserts, is only appropriate for *ambiguous* jury instructions and not for *erroneous* jury instructions, such as the one in this case. *Id.* – Pgs 9-12.

Mr. Bennett went on to argue that even assuming that the *Boyde* "reasonable likelihood" test applied to the instruction given, the state court's holding that it was not likely that the erroneous instruction misled the jury was based on an objectively unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Id.* – Pgs 12-19. Mr. Bennett pointed out that his only defense at trial was voluntary intoxication and that his defense had conceded every element save intent, thus the voluntary intoxication instruction was the most important instruction that was given to the jury. *Id.* – Pg 13. The first time the jury heard an instruction on the defense from the court was shortly before the jury retired to deliberate and immediately before an instruction to the jury that it must follow the law as set out in the instructions it had been given by the court, and that if it failed to follow the law, its verdict would be a miscarriage of justice. *Id.* – Pgs 13, 16, *citing* Doc 20-3 - Pg 1.

Mr. Bennett also pointed out the state court had not cited the repeated occasions that the trial court directed the jury to take

instructions only from the judge and not from counsel. *Id* - Pg 12. Thus, Mr. Bennett argued, by failing to acknowledge these facts, the state court's denial of Mr. Bennett's claims was also contrary to, and involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. *Id*; 28 U.S.C. § 2254(d)(1). It is more than well-settled that "[a] jury is presumed to follow its instructions." *Weeks v. Angelone,* 528 U.S. 225, 234 (2000); *see also Francis v. Fran*klin, 471 U.S. 307, 324 n. 9, (1985) ("Absent such extraordinary situations, however, we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions."). *Id*. – Pg 14.

Mr. Bennett acknowledged that in *Middleton* this Court held that nothing in *Boyde* precludes a state court from assuming that counsel's arguments clarified an ambiguous jury charge. *Middleton v. McNeil*, 541 U.S. 433, 437-38 (2004). But, Mr. Bennett argued that *Middleton* was inapplicable as the instruction at issue here was not ambiguous, but rather directed the jury to find Mr. Bennett guilty. *Id*. – Pgs 17-19.

Mr. Bennett concluded by arguing that under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), the error was not harmless

because the state court had found that there was substantial evidence of Mr. Bennett's intoxication, thus there is grave doubt regarding whether the verdict would have been different had the jury been properly instructed on the defense of voluntary intoxication. Doc. 27 – Pgs 19-23.

As to the second ground, Mr. Bennett argued that he was deprived of his right to effective assistance of counsel under the Sixth Amendment when his trial counsel failed to object to the erroneous jury instruction, and there would have been a reasonable probability of a different result absent that error. *Id* – Pgs 23-25. In denying the 3.850, the state court found the failure to object was error, but that the error was not prejudicial as the defense had been explained by counsel throughout the trial. *Id – Pg* 24. Mr. Bennett argued, especially in light of the substantial evidence of his intoxication, that this finding was based on an unreasonable determination of the facts in the state court proceeding, and was contrary to and involved an unreasonable application of clearly-established federal law. *Id*.

7. Federal District Court: The Order to Reply

After reviewing Mr. Bennett's supplemental brief, the district court ordered the Respondent to file a supplemental response to address the following questions:

> a. Was the jury instruction at issue here "ambiguous," such that the Court should apply the "reasonable likelihood" test described in *Boyde v. California*, 494 U.S. 370, 380 (1990), before finding that the instruction was constitutionally erroneous? Or was the instruction "erroneous," such that the Court should proceed to apply the harmless-error test from *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)? *See also Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998) (explaining the difference between the *Boyde* test and the *Brecht* test).
>
> b. In specifically determining whether a jury instruction is "ambiguous" or "erroneous," does the Court look at that instruction in isolation, or in the context of the surrounding instructions? In other words, can an instruction which is, standing by itself, plainly incorrect nevertheless be made "ambiguous" by surrounding instructions that conflict with the incorrect instruction?
>
> c. If the jury instruction did amount to constitutional error, has Petitioner shown that the instruction had "a substantial and injurious effect or influence in determining the jury's verdict[?]" *See Brecht*, 507 U.S. at 623.

Doc 28 – Pgs 1-2.

7. Federal District Court: Order Denying the Petition

On April 4, 2018, the district court denied relief on both grounds raised in Mr. Bennett's petition. Doc 35. As to the first ground, the district court found that the trial court had erred when it "misspoke" and instructed the jury to find Mr. Bennett guilty, instead of not guilty, if it found that he was so intoxicated that he was incapable of forming the intent to commit robbery. *Id* – 9. However, the district court further found that, considering the entire trial record, the trial judge's misstatement did not result in a violation of due process. *Id*. – Pgs 9-10. The district court ruled that the state court's denial of the 3.850 motion was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *Id*- Pgs 10-11.

The district court stated that the issue of whether the instruction was ambiguous or erroneous was irrelevant. *Id* – Pgs 11-15. Since the state court found that the instruction was constitutionally erroneous,

the district court deferred to the state court's finding and then applied the *Brecht* harmless error test. *Id*. The district court ruled that any error was harmless, stating:

> As the post-conviction court also noted, the extensive discussion about the voluntary intoxication defense coming from both attorneys and the judge indicates that a single misstatement—although said at an inopportune time just prior to deliberations—did not unduly prejudice the jury. Petitioner and Respondent both recognize that the entire case hinged on the voluntary intoxication defense. *See* Doc. 27 at 8 ("[voluntary intoxication] was the lone element of the offense at issue in his trial, as defense counsel conceded that Mr. Bennett was the person who entered the Waffle House in question armed with a knife and who left with several hundred dollars"); Doc. 33 at 8–9 ("The whole case boiled down to whether the jury would excuse his behavior because he was too intoxicated"). This Court finds it improbable that the jury—led by the judge and both attorneys to fixate on the voluntary intoxication defense throughout the entire trial—were led astray upon hearing the isolated erroneous instruction which was not repeated. Indeed, the Supreme Court stated that jurors synthesize all they have seen, with a "commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Boyde*, 494 U.S. at 381–82.

> In view of the entire record, the jury surely did not retire to deliberate with the impression that if they found voluntary intoxication, they should nevertheless find the defendant guilty. Thus, the trial judge's single error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. Accordingly, Petitioner is not entitled to relief on Ground One.

Doc 35 – Pgs 19-20.

As to Ground Two, the district court found that the state post-conviction court's decision finding deficient performance but not ineffective assistance of counsel was correct. *Id* – Pgs 21-23.

The district court denied Mr. Bennett a certificate of appealability. *Id*. – Pg 24.

On June 5, 2018, Mr. Bennett filed an application for certificate of appealability in the Eleventh Circuit Court of Appeals. Mr. Bennett requested that the Eleventh Circuit issue a COA on the issue of whether the erroneous jury instruction given in Mr. Bennett's case, which negated his only defense, relieved the State of the burden of proving all elements of the charged offense, and directed the jury to find Mr. Bennett guilty, was an unconstitutional denial of his constitutional right to due process under the Fifth, Sixth, and Fourteenth

Amendments. Additionally, Mr. Bennett requested a COA on the issue of whether his defense counsel's failure to object to the erroneous instruction was an unconstitutional denial of Mr. Bennett's Sixth Amendment right to the effective assistance of counsel. On August 13, 2018, the Eleventh Circuit denied the motion. Appendix A. The Eleventh Circuit held that Mr. Bennett had failed to make a substantial showing of the denial of a constitutional right, citing to 28 U.S.C. § 2253(c)(2). Appendix A.

REASONS FOR GRANTING THE PETITION

Eighteen years ago, Mr. Bennett was charged in State of Florida with armed robbery with a deadly weapon. At his jury trial, Mr. Bennett admitted that the government had proved every element except one – specific intent. Mr. Bennett argued that at the time of his offense he was too intoxicated to be able to form the specific intent to deprive the victims of their property, an essential element of the charged offense. This was his sole defense at trial. The trial court agreed that Mr. Bennett was entitled to a jury instruction on voluntary intoxication, but in giving the instruction in its final charge to the jury, the court made a critical error. It erroneously stated that if the jury found from the evidence that Mr.

Bennett was so intoxicated from the voluntary use of drugs as to be incapable of forming the intent to deprive the victims of their property, it should find him guilty – instead of not guilty. Essentially, the jury was directed to find Mr. Bennett guilty, if he did not prove his defense, and guilty, if he did prove his defense. And his trial counsel did not object to the instruction. While the trial judge's error may not have been intentional, the result was a mandate to the jurors to find Mr. Bennett guilty, which they did. He was sentenced to life imprisonment without ever having the chance to have a jury decide whether he has proved his defense.

Mr. Bennett later filed a Petition under 28 U.S.C. § 2254 arguing that he had been deprived Due Process and Effective Assistance of Counsel based upon the erroneous instruction. The district court found that the trial judge had misspoke, but found that it did not amount to a violation of Due Process. Mr. Bennett applied for a COA from the Eleventh Circuit, but, in a three sentence order, it said he had failed to make a substantial showing of the denial of a constitutional right and denied the COA.

Mr. Bennett submits that the Eleventh Circuit erred in not finding the issues raised by Mr. Bennett constitute a substantial showing of the denial of a constitutional right and are reasonably debatable among jurists. The Eleventh Circuit's failure to recognize that the erroneous jury instruction deprived Mr. Bennett of his constitutional rights merits this Court's exercise of its supervisory power to correct this oversight.

This Court has clarified that a COA "does not require a showing that the appeal will succeed." *Welch v. United States*, 136 S. Ct. 1257, 1263–64 (2016) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)). An applicant need only show that the issues raised are debatable among jurists. *Id.* Indeed, this Court has recently confirmed that a prisoner's failure "to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017). Thus, a claim can be "debatable" even if "every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Cockrell*, 537 U.S. at 337.

Mr. Bennett asserts here, as he asserted in the Eleventh Circuit, that he has made a substantial showing of the denial of his constitutional

rights. Thus, the Eleventh Circuit erred in denying him a COA, and he respectfully requests that this Court grant this petition for certiorari.

MR. BENNETT MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT BECAUSE HIS JURY WAS GIVEN AN ERRONEOUS INSTRUCTION THAT NEGATED HIS DEFENSE AND RELIEVED THE STATE OF THE BURDEN TO PROVE ALL ELEMENTS OF THE CHARGED OFFENSE.

I. Mr. Bennett was denied his constitutional right to due process.

In a criminal trial, the state must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. *See Sandstrom v. Montana*, 442 U.S. 510, 520-521 (1979). While not every deficiency in a jury instruction rises to the level of a due process violation. The question is "'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Boyde v. California*, 494 U.S. 370, 378 (1990) (quoting *Cupp*, 414 U.S. at 146-147, 94 S.Ct. 396). If the charge as a whole is ambiguous, the question is whether there is a "'reasonable likelihood that the jury has applied the challenged

instruction in a way' that violates the Constitution." *Estelle*, 502 U.S. at 72, 112 S.Ct. 475 (quoting *Boyde*, 494 U.S. at 380, 110 S.Ct. 1190).

Here, there can be little doubt that the erroneous jury instruction given at Mr. Bennett's trial "so infected the entire trial that the resulting conviction violates due process." *Id*. An essential element of Mr. Bennett's offense of conviction – armed robbery – was the specific intent to deprive the victims of their property. *Bell*, 394 So. 2d at 980. Indeed, it was the lone element of the offense at issue in his trial, as defense counsel conceded that Mr. Bennett was the person who entered the Waffle House in question armed with a knife and who left with several hundred dollars from the restaurant's cash register. Doc 20-2 - Pg 178. Defense counsel also told the jury that intent was the only question the defense was controverting, and introduced evidence solely on that point. Doc 20-3 - Pg 129. Finally, the trial court found that Mr. Bennett was entitled to an instruction on voluntary intoxication.

The instruction actually given, however, informed the jury that if it found from the evidence that the defendant was so intoxicated from the voluntary use of drugs as to be incapable of forming the intent to deprive the victims of money or other property – *or even if it had a*

reasonable doubt about it – it should find Mr. Bennett guilty. Doc 20-3 - Pg 149. In other words, the erroneous instruction directed the jury to return a verdict of guilty even if it found that Mr. Bennett was incapable of forming the intent to commit the crime, an essential element of the charged offense. It thus violated the Due Process Clause of the Fourteenth Amendment, which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

The erroneous instruction also prevented the jury from considering Mr. Bennett's voluntary intoxication defense, thereby depriving him of his Fifth Amendment due process right to a fair trial and Sixth Amendment right to present a defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'")).

II. The erroneous jury instruction, when viewed in context of the entire trial, deprived Mr. Bennett of his right to due process.

In denying Mr. Bennett's petition, the district court found that the

instruction was given in error, but also found that, given the context of the entire trial, the jury would not have "been led astray upon hearing the isolated erroneous instruction." Doc 35 – Pg 19. The district court cited to the state post-conviction court's order which based its ruling on the fact that the voluntary intoxication defense had been correctly explained in defense counsel's and the government's closing arguments. *Id* – Pg 5. The district court reasoned that, given the fact that the entire trial hinged on the voluntary intoxication defense, the jury would not be misled by a misstatement of law. *Id*. at 19.

The district court's application of the harmless error test was wrong. The *Brecht* test asks "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 673 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In applying that standard it should be axiomatic that the less important the erroneous jury instruction, the less likely that any error would be harmful — the more important the instruction, the greater the possibility of harm. Thus an error in the jury instruction on the sole issue before the jury carries a great potential of being a harmful error.

But the district court inverted this scenario. Instead of

considering whether the error in an important instruction could have influenced the jury's verdict, the district court concluded that the jury instruction was on a topic of such *great importance* that it could not possibly have influenced the jury. In other words, the district court posited that the jury must have disregarded the jury instruction and relied on the arguments of counsel, because it would have recognized that the issue was of such great importance. The district court's interpretation of the harmless error test places defendants in a Catch-22 situation. If the jury instruction is on an unimportant matter, then an error will most likely be found to be harmless. If the jury instruction is on an important matter, then the jury will be presumed to have recognized the error and ignored the flawed instructions, so therefore it is also harmless.

The district court's position is contrary to well-settled case law that "[a] jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *see also Francis v. Franklin*, 471 U.S. 307, 324 n. 9 (1985) ("Absent such extraordinary situations, however, we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.")

Furthermore, while counsel's arguments can clarify an ambiguous jury charge, here, unlike in *Middleton*, the instruction at issue was not ambiguous, but rather it negated the sole defense and directed the jury to find the defendant guilty if they doubted Mr. Bennett's defense. There was only one contested issue before these jurors. This is not the case of a somewhat confusing instruction that can be understood in light of surrounding circumstances of a trial, this instruction clearly and unambiguously directed the jurors to return a verdict of guilty.

In denying the application for a COA, the Eleventh Circuit did not address the district court's analysis of the jury instruction.

III. Reasonable jurists can debate whether the jury instruction was subject to harmless error analysis.

The issue of whether or not an erroneous jury instruction such as this one deprives a defendant of his constitutional right to due process and merits relief is debatable among jurists. Some, like the district court, would argue that the jury instruction is subject to harmless error review. Others, would argue that such an error is a structural error not subject to harmless error analysis as it "vitiates all the jury's findings," and produces "consequences that are necessarily unquantifiable and indeterminate," *Sullivan v. Louisiana,* 508 U.S. 275, 281- 282 (1993).

In *Sullivan*, the trial court gave the jury a defective "reasonable doubt" instruction in violation of the defendant's Fifth and Sixth Amendment rights to have the charged offense proved beyond a reasonable doubt. *See Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam). The *Sullivan* Court explained some constitutional errors may be harmless error, while others cannot never be subject to harmless error analysis. *Sullivan*, 498 at 278-80. Specifically, the *Sullivan* Court held that errors that result in verdicts that may not have been found beyond a reasonable doubt cannot be reviewed for harmless error, stating:

> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. *See Chapman, supra*, 386 U.S., at 24, 87 S.Ct., at 828 (analyzing effect of error on "verdict obtained"). Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." *Yates v. Evatt*, 500 U.S. 391, 404, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The 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. That must be so, because 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. *See Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986); *id*., at 593, 106 S.Ct., at 3114 (BLACKMUN, J., dissenting); *Pope v. Illinois*, 481 U.S. 497, 509–510, 107 S.Ct. 1918, 1926, 95 L.Ed.2d 439 (1987) (STEVENS, J., dissenting).

Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. **There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless**. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. *See Yates*, supra, 500 U.S., at 413–414, 111 S.Ct., at 1898 (SCALIA, J., concurring in part and concurring in judgment). **The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty**. *See Bollenbach v. United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946).

Sullivan, 508 U.S. at 279–80. (emphasis added).

Here, the jurors were instructed to return a verdict of guilt without having to find that the government had proven his guilt beyond a reasonable doubt. The erroneous jury instruction stated:

> … if you find from the evidence that the defendant was so intoxicated from the voluntary use of drugs as to be incapable of forming the intent to temporarily or permanently deprive Edith Gruhn and/or Greg Anderson and Waffle House of the money or other property, or if you have a reasonable doubt about it, then you should find the defendant guilty.

(Exhibit "D", page 311.) This erroneous instruction not only directs the jury to find Mr. Bennett guilty if he was too intoxicated to form the requisite intent, it also directs a verdict of guilty if the jurors had reasonable doubt as to the defense. Since the jury was not required to find that Mr. Bennett had the requisite specific intent beyond reasonable doubt in order to find him guilty, the jury *never* returned a verdict of guilty beyond a reasonable doubt. Therefore, under *Sullivan*, some jurists would find it debatable whether there is anything to subject to harmless error review.

In denying the application for the COA, the Eleventh Circuit did not address the *Sullivan* case that was argued in the application.

MR. BENNETT HAS MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT BECAUSE HIS DEFENSE COUNSEL FAILED TO OBJECT TO AN ERRONEOUS JURY INSTRUCTION THAT NEGATED HIS DEFENSE AND RELIEVED THE STATE OF THE BURDEN TO PROVE ALL ELEMENTS OF THE CHARGED OFFENSE.

Mr. Bennett argues that he was denied his constitutional right to due process because his trial counsel performed deficiently in failing to object to the error in the most important instruction given by the court to the jury, an error that deprived Mr. Bennett of his sole defense, and there would have been a reasonable probability of a different outcome but for counsel's ineffectiveness.

The state court that denied Mr. Bennett's 3.850 motion found that "defense counsel's failure to object to the misstatement or request a curative instruction was error." Doc 20-6 - Pg 7. But the state court found that there was no prejudice because "defense counsel and the State explained the voluntary intoxication defense thoroughly throughout the trial and stated the jury instructions correctly during closing arguments," therefore Mr. Bennett had not been prejudiced by counsel's error. *Id*. at 8.

The district court deferred to the state court, and the Eleventh Circuit did not address the matter specifically in denying the application

for the COA.

But as Mr. Bennett has argued above, the jury instruction was far from harmless. It relieved the government of its burden to prove every element, negated the sole defense at trial, and directed a verdict of guilty. The failing to object to an error in so crucial an instruction can never be considered to be not prejudicial.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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