NO. _____

IN THE
UNITED STATES SUPREME COURT

DAVID TACHAY HEARD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Questions Presented

1. Should federal district courts be required to give a cautionary jury instruction, upon a defendant's request, to guide the jury's evaluation of eyewitness identification testimony when identification is an issue in the case?

2. Should appellate review of a decision on a suppression motion be confined to the evidence that was in the record when the trial court decided the motion?

3. When an indictment fails to allege that a defendant charged with being a felon in possession of a firearm knew of his status as a felon, does a district court commit plain error by failing to instruct the jury that the government must prove the defendant's knowledge that he was a felon when he possessed the firearm?

List of Parties

All parties appear in the caption of the case on the cover page.

Related Cases

None.

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Petition for Writ of Certiorari

The Petitioner, David Tachay Heard, respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit.

Opinion Below

The opinion below (Pet. App. A) is published at 951 F.3d 920 (8th Cir. 2020). The appellate court's order denying rehearing (Pet. App. B) is unpublished.

Jurisdictional Statement

The Eighth Circuit entered judgment on March 3, 2020, and denied rehearing on April 21, 2020. This Petition for Writ of Certiorari is timely filed within 150 days of the filing of the Order denying the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, 5th Amendment

United States Constitution, 6th Amendment

18 U.S.C. Section 922(g)(1): It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to...possess in or affecting commerce, any firearm or ammunition.

Statement of the Case

Petitioner, David Tachay Heard ("Heard"), seeks review of a decision of the Court of Appeals for the Eighth Circuit that affirmed his conviction of four federal crimes.

Heard, who is African-American, was involved in a car accident on July 30, 2017. Justin Summers, who is white, was a passenger in a car that drove past Heard's damaged car as it was parked on the side of the road. Summers called 911 at 7:16 p.m. to report the accident. Summers also reported that he saw a black man in dark clothes and a white hat throw a gun into a ditch.

Officer Burke arrived at the accident scene about 45 minutes after Summers made his call. Burke and other officers searched the ditch. About an hour after Summers called 911, the officers found a package of marijuana. About twelve minutes after they made that discovery, they found a handgun. The officers arrested Heard and placed him in the back of a squad car.

An officer called Summers and asked him to return to the scene. Summers drove himself to the scene, arriving at 8:49 p.m. Summers parked behind Officer Burke's squad car. Summers remained in his car

as Officer Burke spoke to him. Officer Burke told Summers that they had a suspect in custody and wanted to see if Summers could identify him as the person who threw something into the woods. Summers remained in his car as Officer Burke shined a spotlight on the side of the squad car in which Heard was detained. Heard was then made to exit the squad car with the spotlight shining on him. Heard's hands were handcuffed behind his back and another officer was holding his arm. Officer Burke asked Summers if Heard was the man he saw. From a distance of 20 to 25 feet, Summers identified Heard, although he noted that the man he saw was wearing a white hat. Heard was hatless.

A superseding indictment charged Heard with four crimes: possessing a firearm after being convicted of a felony, 18 U.S.C. § 922(g); possessing marijuana with intent to distribute, 21 U.S.C. § 841(a); possessing a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c)(1)(A), with an enhancement for having a prior conviction for the same offense, *id.* § 924(c)(1)(C)(i); and possessing a stolen firearm, 18 U.S.C. § 922(j).

Heard moved to suppress the evidence that derived from an impermissibly suggestive identification procedure in violation of his

right to due process. The court held a suppression hearing at which the evidence described above was developed. Summers did not testify at the hearing. In a Report and Recommendation, the presiding Magistrate Judge recommended that the motion be denied. After Heard objected to the Report and Recommendation, the District Court entered an order denying the motion.

The charges were tried to a jury. At trial, Summers testified that when he first saw Heard, he paid close attention because his car was severely damaged, he could see Heard's face clearly and in good light, and that Heard gave him a "threatening look" and made it clear he didn't want Summers there.

Heard requested that the jury be given a cautionary instruction regarding the evaluation of eyewitness identification testimony. *See* Eighth Circuit Model Jury Instructions 4.08 (2017). Prior to hearing much of the trial testimony, including any testimony of defense case, the trial court denied that request. Nor did the trial court instruct the jury that it could not find Heard guilty of being a felon in possession of a firearm unless it found that Heard knew of his status as a convicted felon.

The jury found Heard guilty on all counts. The court imposed a concurrent sentences of 97 months on Counts 1, 2, and 4 and a consecutive sentence of 300 months on count 3. Judgment was entered on November 7, 2018.

Heard appealed the judgment of conviction. Among other issues, his appeal challenged the district court's denial of his request for an eyewitness identification jury instruction and the denial of his suppression motion. The court of appeals concluded that the cautionary instruction was unnecessary because other evidence in the record, including the discovery of the gun and marijuana in a ditch, corroborated the identification. The court of appeals also concluded that the showup was not unnecessarily suggestive and, even if it was, the identification was reliable. Although Heard argued that the appellate court could not rely on trial evidence that was not before the court when the order denying his suppression motion was entered, the court of appeals impliedly rejected that argument and relied on Summers' trial testimony as proof that his identification was reliable.

While the appeal was pending, the Supreme Court decided *Rehaif v. United States*, 139 S.Ct. 2191 (2020). Heard contended on appeal

that, by virtue of the *Rehaif* decision, he was entitled to a new trial because the jury was not instructed that his knowledge of his prior felony conviction was an element of the offense. The court of appeals rejected that argument in a footnote, holding that no showing of plain error had been made because Heard admitted his knowledge of the felony conviction at trial. *United States v. Heard*, 951 F.3d 920, 929 n.2 (8th Cir. 2020).

Heard moved the court of appeals for rehearing en banc. The court entered an order denying that motion on April 21, 2020. (Pet. App. B.)

Reasons for Granting the Petition

The United States Court of Appeals for the Eighth Circuit has entered a decision in conflict with the decisions of other United States courts of appeals. See, Supreme Court Rule 10(a).

I. To Create a Uniform Federal Standard for District Courts When Deciding Whether to Give a Cautionary Instruction to Guide a Jury's Evaluation of Eyewitness Identification Testimony (Particularly in Cross-Racial Identifications).

The Supreme Court has endorsed the use of "jury instructions on . . . the fallibility of eyewitness identification." *Perry v. New Hampshire*, 565 U.S. 228, 233 (2012). The Court noted that "many federal and state

courts have adopted" such instructions. *Id.* The Court also called attention to its approval of such instructions in other cases. *Id.* However, the circumstances under which federal law mandates such an instruction was not an issue in *Perry*.

Notwithstanding the recognition in *Perry* that eyewitness identification instructions are an essential safeguard against wrongful convictions, lower court decisions that consider the necessity of eyewitness identification instructions are in conflict. *Compare United States v. Anderson*, 739 F.2d 1254, 1258 (7th Cir. 1984) ("[i]n cases where witness identification is an issue, the trial judge must, at the defendant's request, instruct the jury about eyewitness identification testimony") with *United States v. Castillo*, 189 F. App'x 648, 649 (9th Cir. 2006) (reaffirming that an eyewitness identification instruction "is unavailable in this jurisdiction").

The court below relied on still another standard when it held that no instruction was required because the prosecution's case did not rest solely on a questionable identification. *Heard*, 951 F.3d at 926. Various other standards, discussed below, contribute to a lack of uniformity regarding the most important safeguard against wrongful convictions

that defendants may have in prosecutions that rely on an eyewitness identification. The Supreme Court should grant review to clarify the standard that federal trial judges should follow when deciding whether to caution juries about the circumstances — well known to social scientists but not to the general public — that may undermine the reliability of an eyewitness identification.

When "more might be done to advance the reliability of our criminal justice system," a high court should exercise its supervisory authority to protect the innocent. *State v. Romero*, 191 N.J. 59, 74, 922 A.2d 693, 702 (2007). Minimizing wrongful convictions is consistent with the fundamental constitutional value that the innocent should never be punished.[1] The question is how the Supreme Court, in its administration of the federal criminal justice system, can help juries avoid convicting innocent defendants who have been misidentified by

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[1] Constitutional values that protect the innocent from wrongful convictions are either "explicitly enshrined in constitutional text or have been found implicit in the guarantees of due process," including the presumption of innocence, the requirement of proof beyond a reasonable doubt, the entitlement to a unanimous jury, and the prohibition against the appeal of an acquittal. Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 Harv. L. Rev. 1065, 1068 (2015).

eyewitnesses. Granting review will give the Court the opportunity to answer that vital question.

A. Scholarly Research Confirms the Unreliability of Eyewitness Identifications.

The Supreme Court has long recognized that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). A recognition based on judicial experience has more recently been reinforced by science. "There is now a robust body of scientific research and evidence that highlights the unique perils of eyewitness identification testimony as 'one of the greatest causes of erroneous convictions'." *United States v. Valencia-Cortez*, 769 F. App'x 419, 422 (9th Cir.), *cert. denied*, 140 S. Ct. 578 (2019) (quoting *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 313 (3d Cir. 2016) (McKee, C.J., concurring)).

In recent decades, "there have been over 2000 scientific investigations on the reliability of eyewitness identification." Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J.L. & Psychiatry 265, 265 (2004). With "impressive" consistency, those studies

have demonstrated the "pitfalls of eyewitness identification." *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985) (citing *People v. McDonald*, 690 P.2d 709, 718 (Cal. 1984)). A comprehensive literature review by the National Research Council explains that several factors affect the reliability of an eyewitness identification, including whether the witness and the suspect are of different races, the length of time the witness observes the suspect, the amount of time that passes before the witness makes an identification, and stress or anxiety the witness experienced when the observation was made. Nat'l Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 94-99 (2014).

Cross-racial identifications, in particular, are notoriously unreliable. *See United States v. Stevens*, 935 F.2d 1380, 1392 (3d Cir. 1991) ("Scholarly literature attacking the trustworthiness of cross-racial identification is now legion."); June E. Chance & Alvin G. Goldstein, *The Other-Race Effect and Eyewitness Identification*, *in* Psychological Issues in Eyewitness Identification 153, 154 (Siegfried Ludwig Sporer et al., eds. 1996) ("Greater probability of misidentification when

witnesses and defendants belong to different groups is both all too common and an exceedingly grave problem in today's society.")

Whether the witness has a particular reason to pay attention while observing the suspect is another critical factor. Amy-May Leach et al., *Lineups and Eyewitness Identification*, 5 Ann. Rev. L. Soc. Sci. 157, 161 (2009). Environmental factors, including lighting and the distance between the witness and the suspect, also affect the accuracy of identifications. Thomas J. Nyman, *A Stab in the Dark: The Distance Threshold of Target Identification in Low Light*, 6 Cogent Psychology (June 16, 2019), https://www.tandfonline.com/doi/pdf/10.1080/23311908.2019.1632047.

In addition, the nature of the identification procedure affects the reliability of an identification. Showups are "inherently suggestive." Leach et al., *supra*, at 161. Since the police are showing the witness only a single suspect, the witness does not choose among possible suspects. *Id.* Showups are suggestive precisely because "they suggest to the witness which person to choose." Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30*

Years Later, 33 Law & Hum. Behav. 1, 7 (2009). Presenting a single suspect for identification encourages identification of that suspect because the witness will generally assume that the police "would not have presented an innocent individual" for identification. Leach et al., *supra*, at 161. The perception of police-determined guilt increases the likelihood that a witness will make a false identification. *Id. See also* Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 Mo. L. Rev. 377, 399 (2016) (citing research findings that showups "simultaneously increase the rate of misidentification and reduce the rate of accurate identification").

The malleability of memory further undermines the reliability of eyewitness identifications. Elizabeth F. Loftus, *The Malleability of Human Memory: Information Introduced After We View an Incident Can Transform Memory*, 67 Am. Sci. 312, 312 (1979). Memory is particularly likely to be corrupted when the circumstances of an identification suggest a suspect's guilt. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. Applied Psychol. 112, 115 (2002). Showing

an isolated suspect to an eyewitness in a showup is exactly the kind of suggestive circumstance that alters memory so that the suspect observed in the showup becomes a "match" with the person the witness observed prior to the showup.

Nor is there a strong positive correlation between the accuracy of an identification and the confidence a witness expresses when making the identification. N. Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification*, 8 J. Experimental Psychol. Applied 44, 44-45 (2002) (citing studies). "In the area of eyewitness identification, witness' confidence in their identifications provides jurors with a false sense of reliability." Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Jury Needs to Know About Cognitive Psychology and Witness Credibility*, 64 Am. Univ. L. Rev. 1331, 1368 (2015). Research has persuaded science-receptive courts that "there is at best a weak correlation between a witness's confidence in his or her identification and its accuracy." *State v. Guilbert*, 49 A.3d 705, 721 (Conn. 2012). *Accord, Krist v. Eli Lilly & Co.*, 897 F.2d 293, 296 (7th Cir. 1990) (recognizing that an "important body of psychological research undermines the lay intuition that

confident memories . . . are accurate"); *Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005) ("In light of the scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification . . . we can no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification."). A confident eyewitness is therefore just as likely to be mistaken as an uncertain witness — a counterintuitive conclusion that lay jurors are unlikely to draw unless they are given that information.

An instruction would have been particularly necessary in Heard's case. Heard is black but was identified by a white witness who initially saw a suspect briefly while the witness was traveling in a moving car. The identification was made during a suggestive showup while a spotlight was shining on Heard's face after the police told the witness that they had a suspect in custody. Heard's hands were handcuffed behind his back when he exited the squad car. The witness expressed confidence in his identification. The jurors in his case likely did not understand the perils of cross-racial identification, the risk of

misidentification created by a showup, or the weak link between confidence and accuracy. The criminal justice system can only achieve more reliable outcomes by providing cautionary eyewitness identification instructions in cases like Heard's.

B. Mistaken Identifications Are a Leading Cause of Wrongful Convictions.

The significance of mistaken identifications is heightened by the prevalence of eyewitness identifications in criminal prosecutions. The criminal justice system places heavy reliance on eyewitness testimony. Police investigators ask thousands of eyewitnesses every day to make identifications. Police Executive Research Forum, *A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies* iii (2014). A 1989 survey estimated that 77,000 felony cases are prosecuted each year in which the only critical evidence is eyewitness identification. Alvin G. Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 Bull. of Psychonomic Soc. 71, 73 (1989). That number has surely grown in the last thirty years. Given the criminal justice system's dependence on eyewitness identification testimony and the documented risk of misidentifications, it is not surprising that so many wrongful

convictions are tied to a jury's acceptance of incorrect eyewitness identification testimony.

The recently deceased criminologist C. Ronald Huff was one of the first scholars to develop a database of wrongful convictions. He concluded that a minimum of 6,000 innocent defendants are convicted of serious crimes each year. C. Ronald Huff, *Wrongful Conviction: Social Tolerance of Injustice*, 4 Research in Soc. Problems & Public Policy 99, 103 (1987). He identified eyewitness error as the "single most important factor leading to wrongful conviction." *Id.* at 103. Huff found that mistaken eyewitness identifications occurred in nearly 60% of the wrongful convictions in his database. *Id.*

Improvements in DNA technology since Huff compiled his database have contributed to an understanding of the wrongful convictions that plague the criminal justice system. Scholars who analyze wrongful convictions to determine where the system went wrong have determined that mistaken eyewitness identifications are "the leading cause of wrongful convictions in the United States." Katherine R. Kruse, *Wrongful Convictions and Upstream Reform in the Criminal Justice System*, 3 Tex. A&M L. Rev. 367 (2015). *See also* Gary

R. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603, 605 (1998) ("cases of proven wrongful convictions of innocent people have consistently shown that mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined"). The Innocence Project reports that mistaken eyewitness identification "contributed to approximately 69% of the more than 375 wrongful convictions in the United States overturned by post-conviction DNA evidence." *Eyewitness Identification Reform*, Innocence Project, https://www.innocenceproject.org/eyewitness-identification-reform/ (last visited Aug. 25, 2020). Given the frequency with which mistaken identifications cause the innocent to be convicted, scholars have warned that mistaken identifications "present what is conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished." Carl McGowan, *Constitutional Interpretation and Criminal Identification,* 12 Wm. & Mary L.Rev. 235, 238 (1970).

Many courts have expressed concern with the contribution that mistaken eyewitness identifications make to the rising toll of wrongful convictions. *See, e.g.*, *Dennis,* 834 F.3d at 313 (McKee, C.J., concurring)

(noting that wrongful convictions are a consequence of the "failure to incorporate the teachings of scientific research [regarding eyewitness identification] into judicial proceedings"); *United States v. Brownlee*, 454 F.3d 131, 141–42 (3d Cir. 2006) (citing the "overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications"); *Guilbert*, 49 A. 3d at 730 ("mistaken eyewitness identification testimony is by far the leading cause of wrongful convictions"). The New Jersey Supreme Court has warned that "7,500 of every 1.5 million annual convictions for serious offenses may be based on misidentifications." *Romero*, 922 A.2d at 701.

C. The Supreme Court Should Adopt a Uniform Standard for Deciding Whether to Give a Cautionary Eyewitness Identification Instruction.

While judges understand that eyewitness testimony is "the least reliable" form of evidence, *Jackson v. Fogg*, 589 F.2d 108, 112 (2d Cir. 1978), "jurors attach great significance to such testimony," Huff, *supra*, at 103. Lay jurors do not have the experience or data that is needed to overcome the "commonsense" belief that people are reliable reporters of what they see. *Brownlee*, 454 F.3d at 142. "Jurors who *think* they understand how memory works may be mistaken, and if these mistakes

influence their evaluation of testimony then they may convict innocent persons." *United States v. Hall*, 165 F.3d 1095, 1118 (7th Cir. 1999) (Easterbrook, J., concurring).

Cautionary instructions about the risks associated with eyewitness identification are a crucial means of assuring that jurors evaluate identifications in light of reliable principles of science rather than relying on their "common sense," as juries are so often instructed to do. Studies establish that "common sense" causes jurors to "rely on inaccurate assumptions and misconceptions when they assess the credibility of others. This renders the notion of 'common sense' as a tool for accurately deciding credibility not only a 'myth' but also a tool for 'erroneous assessments of credibility'." Bennett, *supra,* at 1368 (footnotes omitted).

The first widely cited decision to require a cautionary instruction regarding eyewitness identification was *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972). Responding to "the very real danger of mistaken identification as a threat to justice," 469 F.2d at 555, the court held that it is "imperative that trial courts include, as a matter of routine, an identification instruction," *id.* at 555 n.11.

The proposed instruction that is appended to the *Telfaire* decision was the initial model for eyewitness identification jury instructions in state and federal courts. Based on research that questioned the instruction's effectiveness, several state courts have adopted modified versions of the cautionary instruction. *See, e.g.*, *State v. Henderson*, 27 A.3d 872, 925-26 (N.J. 2011) (instructing Committee on Model Criminal Jury Charges to revise the charge on eyewitness identification); *Commonwealth v. Gomes*, 22 N.E.3d 897 (Mass. 2015) (suggesting model instruction in appendix to decision). Federal circuits have typically adopted their own model instructions for evaluating eyewitness identifications. *See, e.g.*, Eighth Circuit Model Jury Instructions 4.08 (2017).

This petition does not ask the Court to assess the merits of competing instructions. Nor does it ask the Court to limit the discretion of district courts as they craft the language of an instruction that should be given in any particular case. *See Boyle v. United States*, 556 U.S. 938, 946 (2009) ("A trial judge has considerable discretion in choosing the language of an instruction so long as the substance of the relevant point is adequately expressed."). Rather, this petition addresses the

more fundamental question of whether some form of the instruction must be given when the prosecution relies on an eyewitness identification as proof of guilt.

The Supreme Court has long recognized that it is "the duty of the court to expound the law, and that of the jury to apply the law as thus declared to the facts as ascertained by them." *Sparf v. United States*, 156 U.S. 51, 106 (1895). Expounding the law appropriately includes disabusing juries of the common but incorrect understanding that eyewitness identifications are inherently reliable. Yet federal courts have widely divergent views about whether or when a cautionary instruction must be given. While the D.C. Circuit required cautionary instructions to be given "as a matter of routine," *Telfaire*, 469 F.2d at 555 n.11, other federal appellate courts have adopted an irrational array of inconsistent standards.

The First Circuit has held that "general instructions on witness credibility" suffice to cover the possibility of a mistaken eyewitness identification. *Wright v. Marshall*, 656 F.3d 102, 111 (1st Cir. 2011). The Ninth Circuit has gone so far as to hold that a cautionary instruction is "unavailable" because witness credibility is covered by

general credibility instructions. *See, e.g.*, *United States v. Castillo*, 189 F. App'x 648, 649 (9th Cir. 2006) (recognizing circuit split while reaffirming that "such an instruction is unavailable in this jurisdiction"); *United States v. Miranda*, 986 F.2d 1283, 1286 (9th Cir. 1993) ("Even where the only evidence is identification evidence, general instructions on the jury's duty to determine the credibility of the witnesses and the burden of proof are fully adequate."). Yet "general credibility instructions do not educate the jury as to many key factors that make eyewitness testimony vulnerable." Christian Sheehan, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C.L. Rev. 651, 670 (2011). A witness who makes a misidentification in good faith may be credible but nevertheless mistaken. *See Henderson*, 27 A.3d at 888 (recognizing that most mistaken identifications are made in good faith).

Moreover, credibility instructions often tell juries to use their own knowledge and life experiences when evaluating credibility. Since a juror's "knowledge" about the reliability of eyewitness identification is typically wrong, a credibility instruction may reinforce the risk that jurors will accept questionable identifications at face value. *Sheehan,*

supra, at 679-80. *See also Bennett*, *supra*, at 1368 (explaining that instructions telling jurors to use their "common sense" leads to erroneous assessments of eyewitness credibility). Finally, while cross-examination is the usual means of testing credibility, "[t]o the extent that a mistaken witness may retain great confidence in an inaccurate identification, cross-examination can hardly be seen as an effective way to reveal the weaknesses in a witness' recollection of an event." *Downing*, 753 F. 2d at 1231 n.6.

The Sixth Circuit requires a cautionary instruction when the eyewitness identification is "crucial," which apparently means that there was a "limited opportunity for identification" and the risk of misidentification is not substantially mitigated by corroborating evidence. *United States v. Tipton*, 11 F.3d 602, 606 (6th Cir. 1993). The court has thus approved the failure to give the instruction when a second eyewitness corroborates the identification. *United States v. Jennings*, 40 F. App'x 1, 6 (6th Cir. 2001). Unfortunately, the existence of a second eyewitness may simply reinforce the witnesses' mutual but erroneous beliefs that they have identified the correct person. Bradfield et al., *supra*, at 116-17.

The Tenth Circuit does not require a cautionary instruction if there are two eyewitnesses plus corroborating evidence. *United States v. Cueto*, 628 F.2d 1273, 1276 (10th Cir. 1980). The Tenth Circuit has also stated that courts should "consider whether identification was the sole or primary issue in the case, whether the evidence consisted mainly of eyewitness identification testimony, and whether that testimony was uncertain, qualified, or suggested a serious question whether the witnesses had an adequate opportunity to observe." *United States v. Thoma*, 713 F.2d 604, 608 (10th Cir. 1983). The court's language suggests that a cautionary instruction is unnecessary only if a witness is "uncertain" of an identification, a holding that flies in the face of the evidence cited above that certainty is not a predictor of accuracy. Courts should not disregard the consensus of scientific evidence when they decide whether to require cautionary instructions. *See Hall*, 165 F.3d at 1120 (Easterbrook, J., concurring) (urging courts to "employ social science to improve the trial process").

The Fourth Circuit requires a cautionary instruction "when the *only* evidence of a defendant's criminal agency is eyewitness identification testimony." *United States v. Greene*, 704 F.3d 298, 301 n.1

(4th Cir. 2013) (emphasis added). Yet a jury might regard other evidence of guilt as unconvincing in the absence of the powerful (albeit mistaken) testimony given by an eyewitness. There is no scientific basis for believing that other evidence in the case makes an eyewitness identification more reliable.

The Eighth Circuit rule is a variation of the Fourth Circuit rule. A cautionary instruction is required only if the government's case rests "solely" on an eyewitness identification, and even then, a cautionary instruction is required only if the trial judge deems the identification to be "questionable." *United States v. Mays*, 822 F.2d 793, 798 (8th Cir. 1987). That is the rule that was applied in Heard's case. *Heard*, 951 F.3d at 926.

Yet neither the trial court's evaluation of the strength of the identification (in *Heard*, the district court judge determined that the identification instruction would not be given *prior* to even hearing the testimony of the eyewitness or most other witnesses) nor the judge's belief that guilt could be established by "other evidence" should affect the defendant's right to a cautionary instruction. It is the role of the jury, not the trial judge, to evaluate evidence. *See Neder v. United*

States, 527 U.S. 1, 34 (1999) (Scalia, J., concurring in part and dissenting in part) (no matter how "overwhelming" the evidence might be, it is the function of the jury, not the judge, to decide whether the evidence proves guilt). The Eighth Circuit rule allows a judge who assesses a defendant as "probably guilty" to deny the defendant a jury instruction that is specifically designed to prevent wrongful convictions.

Like the D.C. Circuit, the Seventh Circuit has adopted a simple rule that protects the right to a fair trial, that is easy for trial courts to implement, and that assures uniformity: "In cases where witness identification is an issue, the trial judge must, at the defendant's request, instruct the jury about eyewitness identification testimony." *Anderson*, 739 F.2d at 1258. In other words, if the prosecution relies on an eyewitness identification as part of its proof of guilt, the jury must be given a cautionary instruction to guide its evaluation of the identification. That rule minimizes the risk of a wrongful conviction without prejudicing the government. Giving the jury important and accurate information about eyewitness reliability does not harm the government's interest in convicting the guilty while sparing the innocent, while hiding that essential information from juries can only

add to the growing number of wrongful convictions that are based on eyewitness misidentifications.

There is no principled reason that a federal defendant's entitlement to a cautionary instruction should depend on the circuit in which the defendant is tried. An eyewitness in Iowa is just as likely to be mistaken as an eyewitness in the neighboring state of Illinois. A jury in Iowa is just as likely as a jury in Illinois to rely on misconceptions when evaluating an eyewitness identification. Yet a defendant who is tried in the Eighth Circuit may not benefit from a cautionary instruction (as Heard did not) while the jury that decides the guilt of a defendant under identical circumstances in the Seventh Circuit will receive the instruction. That lack of uniformity cannot be justified, given the impact of misidentifications on the criminal justice system and the public's perception of the system's fairness.

The Supreme Court should exercise its superintending authority by adopting a uniform standard that district courts should follow when deciding whether to give an eyewitness identification instruction. A standard that requires a cautionary instruction whenever an eyewitness identification is part of the government's proof of guilt will

assure that all defendants in all federal courts receive the same protection against a wrongful conviction. The Supreme Court should grant review to replace the prevailing inconsistent standards for giving cautionary instructions with a simple uniform standard.

II. Circuit Conflict Exists as to Whether Appellate Review of a Decision on a Suppression Motion Should Be Confined to the Evidence That Was in the Record When the Trial Judge Decided the Motion.

This Court has recognized the importance of "a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." *Perry*, 565 U.S. at 232. When suggestive circumstances exist, the trial judge must "screen the evidence for reliability pretrial." *Id.*

There is no doubt that the circumstances of Heard's showup were arranged by law enforcement officers. The officers detained Heard and instructed eyewitness Summers to return to the place where Summers saw the damaged car that he had reported to the police. The officers told Summers they had a suspect in custody. The officers removed Heard from the squad car in handcuffs, shined a spotlight on Heard's face, and asked Summers if he was or wasn't the man that Summers

saw throwing a gun. Heard was the only person displayed for Summers' identification and was the only black person in Summers' line of sight. Those circumstances establish a police-involved identification procedure — specifically, a showup — that requires a due process analysis.

Relying on circuit precedent, the Court of Appeals decided that telling Summers that the police had a suspect in custody, having that suspect exit a squad car with his hands handcuffed behind his back, and shining a spotlight on the suspect's face were not impermissibly suggestive circumstances. In fact, since Heard was the only person not wearing a uniform and the only black person at the scene, his appearance in a spotlight while wearing handcuffs after being removed from a squad car plainly suggested his guilt. A neon sign saying "This is the man we want you to identify" would scarcely do more to suggest that Heard was a criminal who was spotlighted with the expectation that Summers would identify him. Yet Eighth Circuit precedent holds, with scant analysis, that handcuffs and spotlights are not unnecessarily suggestive, so those identification techniques have become routine in the Eighth Circuit. *See, e.g., United States v. Mitchell,* 726 F. App'x 498, 501 (8th Cir. 2018) (shining light on handcuffed suspect near squad car

is not unnecessarily suggestive); *United States v. Pickar*, 616 F.3d 821, 828 (8th Cir. 2010) (same).

Other courts disagree with the Eighth Circuit view that shining a light on a handcuffed suspect is not an unnecessarily suggestive identification procedure. *See, e.g.*, *Patterson v. LeMaster*, 21 P.3d 1032, 1037 (N.M. 2001) (showup identification was impermissibly suggestive because the police spotlighted petitioner with the headlights of a police vehicle); *People v. Dubinsky*, 289 A.D.2d 415, 416, 734 N.Y.S.2d 245 (N.Y. App. Div. 2001) (shining spotlight on suspect rendered identification impermissibly suggestive); *Bias v. State*, 784 P. 2d 963, 965 (Nev. 1989) (identification procedure was unnecessarily suggestive when spotlight was directed into suspect's face while he stood handcuffed in front of the squad car). That division of opinion bears resolution by the Supreme Court.

Apart from the division of authority regarding the suggestive nature of a showup that displays a handcuffed suspect in a spotlight, this case raises a compelling procedural question that has divided federal courts. When an appellate court moves beyond (or decides not to address) the suggestive nature of the showup and asks whether the

identification is admissible because it is reliable, may the appellate court look beyond the facts placed into evidence during the suppression hearing and consider trial evidence that only became part of the record after the suppression motion was denied?

The Court of Appeals for the Seventh Circuit has reasoned that an appellate review of a decision on a suppression motion should ordinarily be confined to the evidence that was before the trial judge at the time the decision was made. *United States v. Howell*, 958 F.3d 589, 596-97 (7th Cir. 2020). At the suppression hearing in Howell's case, a police officer testified that Howell placed his hands in his pockets, an act the officer deemed suspicious. On appeal, the government attempted to bolster its argument that reasonable suspicion supported Howell's detention with the officer's trial testimony that Howell disregarded an order to remove his hands from his pockets. *Id.* at 594. The court of appeals noted that the trial testimony, which was not before the district court when it ruled on the suppression motion, might have an impact on the outcome. The question was whether the appellate court should consider evidence that was not in the record when the district court decided the suppression motion.

In a carefully reasoned analysis, the court of appeals noted the different roles played by trial courts, which have a duty to find facts, and appellate courts, which review the application of the law to facts that are determined by trial courts. *Id.* at 595. The court observed that "limiting the facts we review to those considered by the district court . . . ensures that we perform our role as a court of review while also respecting the district court's role as factfinder." *Id.* The court concluded that it has "discretion to consider trial evidence bearing on a district court's ruling on a motion to suppress where that evidence came into play in the district court's consideration of the motion." *Id.* at 596. When a suppression motion is renewed during trial, for example, both the trial and appellate court might properly consider trial evidence that is relevant to the suppression issue. When the appellate court exercises that discretion, the court must balance prejudice to the government by granting the defendant a "windfall reversal" of a conviction against prejudice to the defendant by basing an appellate decision on findings that were never made by the district court drawn from evidence that the district court never considered at the suppression hearing. *Id.* at 596.

The court balanced those factors in Howell's favor for two reasons. First, the evidence presented at trial was not considered by the district court when it ruled on the suppression motion. In fact, the district court "never hinted that the trial evidence was even relevant, much less that it in any way affected any dimension of the court's prior reasoning." *Id.* at 597. Second, the trial testimony "contained a new, material representation—that Howell disregarded a clear direction from Officer Kelly to remove his hands from his pockets." *Id.* Rely upon that evidence on appeal would be prejudicial to Howell because "Howell had little incentive at trial to focus on factual details pertinent to a pretrial motion that the district court resolved before trial even began." *Id.* Since it would have been unfair to Howell to consider evidence that was not presented to the district court and about which the district court made no finding when it ruled on the suppression motion, the court of appeals confined its analysis to the record made at the suppression hearing. *Id.*

Heard asked the court of appeals to confine its review to the facts that were adduced at the suppression hearing. Heard argued that facts developed at trial were not before the district court when the court

denied his suppression motion and should not be considered on review of the suppression ruling. Brief of Appellant at 21-22 n.7. The court of appeals impliedly rejected that argument when it ruled that Summers' identification was reliable. The court of appeals found that Summers' identification of Heard was reliable because: (1) "Summers paid close attention to Heard due to the severe damage to his car"; (2) "Summers observed [Heard] at a close distance, in good light, and "could see his face really good"; and (3) "Summers testified that Heard gave him 'a threatening hard look' and 'made it very clear that he didn't want us there'." *Heard*, 951 F.3d at 926. Yet Summers did not testify at the suppression hearing. *All* of the evidence that was material to the court's analysis of reliability was presented at trial. The district court judge did not pass on its veracity, and could not have done so in deciding the suppression motion, because that testimony did not exist until long after the motion was decided.

This case raises a compelling question about the relative roles of trial and appellate courts. The court of appeals necessarily engaged in fact-finding when it credited Summers' trial testimony. This Court has admonished reviewing courts not to overstep their role by finding facts.

See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985) (a reviewing court "oversteps the bounds of its duty" when it decides factual issues de novo). Yet the court of appeals rested its decision on facts that were never considered by the district court. No court with fact-finding authority decided whether Summers' testimony was credible. There is no way to know whether the jury credited that testimony in reaching its verdict, but we do know that Summers' testimony played no role in the district court's denial of the suppression motion. The court of appeals accordingly overstepped its authority, to the prejudice of Heard, by determining the reliability of Summers' identification de novo based on testimony that was not offered at the suppression hearing and that Summers had no opportunity to challenge in that context.

The holding of the Seventh Circuit in *Howell* is directly at odds with the actions taken by the Eighth Circuit in *Heard*. The Supreme Court should grant review to resolve those conflicting approaches to the consideration of evidence outside the record made at a suppression hearing when reviewing a trial court's decision on a suppression motion.

III. Circuit Conflict Exists as to Whether it Is Plain Error to Fail to Instruct a Jury that the Government Must Prove the Defendant's Knowledge of His Status as a Felon.

With regard to the charge of being a felon in possession of a firearm, the jury was instructed that the government must prove three elements beyond a reasonable doubt before the jury could find Heard guilty:

> *One*, on or about July 30, 2017, the defendant knowingly possessed a firearm, namely, a Taurus, Model PT 145 Pro, .45 caliber pistol;
>
> *Two*, at the time the defendant possessed the firearm, he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year; and
>
> *Three*, the firearm was transported across a state line at some point during or before the defendant's possession of it.

(Pet. App. C.) Conspicuously missing from the instruction was the requirement that the jury find that Heard knew he had been convicted of a felony.

When the government charges a violation of 18 U.S.C. § 922(g), it "must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. In this case, conviction of a prior felony is the "relevant category." 18 U.S.C. §

922(g)(1). The failure to instruct the jury that Heard's knowledge of his felony status was an element of the offense was therefore error.

Rehaif announced an "old rule" that is dictated by precedent, but even if the holding is regarded as a "new rule," it applied retroactively to the pending direct review of Heard's conviction. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) ("an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review'). The court of appeals recognized the applicability of *Rehaif* but concluded in a footnote that the failure to instruct Heard's jury as to a critical element of the offense did not constitute plain error. *Heard*, 951 F.3d at 929 n.1.

The court of appeals' analysis is in conflict with *United States v. Green*, 2020 WL 5087916 (4th Cir. Aug. 28, 2020) and *United States v Medley,* 2020 WL 5002706 (4th Cir. Aug. 21, 20200. Green was convicted of being a felon in possession of a firearm. On appeal, Green argued on appeal that the conviction violated his Fifth and Sixth Amendment right to be informed of the nature and cause of the accusation in the indictment and his Sixth Amendment right to a jury determination of each element of the offense. *Green*, 2020 WL 5087916,

at *2. *See Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("all facts legally essential to the punishment" must be proved to the jury); *Apprendi v. New Jersey*, 530 U.S. 466, 476-78 (2000) (facts essential to punishment must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt).

The court of appeals agreed with Green that his right to notice by indictment and his right to a jury instruction that submits each element of the offense to the jury were violated. *Green*, 2020 WL 5087916, at *2. The court of appeals also held that "the failure of an indictment to provide proper notice combined with an improper jury instruction that omits an element of a crime are substantial errors that ought to be corrected under plain error review." *Id.* at *1.

One week earlier, a different panel of the Fourth Circuit court of appeals reached the same conclusion in *United States v. Medley, supra,* (remanding and directing the district court to dismiss the charge without prejudice).

Appellate authority to review forfeited errors is established by Rule 52(b) of the Federal Rules of Criminal Procedure. That rule limits review to errors that actually occurred, that are plain, and that affect

the defendant's substantial rights. *United States v. Olano*, 507 U.S. 725, 732-34 (1993). The court of appeals in *Green* had no difficulty concluding that, in light of *Rehaif*, the failure to instruct the jury that the defendant needed to know of his status as a felon was plain error. The error was obvious in light of the Rehaif decision, the "flawed indictment" was prejudicial because it failed to provide sufficient notice of the accusation, and the improper jury instruction violated the right to a jury's determination of guilt because only a jury can determine whether each element of the offense was proved beyond a reasonable doubt. *Green*, 2020 WL 5087916, at *2-3.

In Heard's case, the court of appeals agreed that an error was committed and that the error was plain. It held, however, that the error did not deprive Heard of his substantial rights. *Heard*, 951 F.3d at 929 n.1. That holding disregards the central role that the Constitution gives to juries in criminal prosecutions. *See United States v. Gaudin*, 515 U.S. 506, 522–23 (1995) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged"). Deprivation of the right to a jury determination of guilt beyond a reasonable doubt as

to an essential element of the offense was necessarily a deprivation of Heard's substantial rights.

The court of appeals regarded the error as insubstantial because it believed that a properly instructed jury would have found that Heard knew of his prior conviction. But Heard had no notice that knowledge of his prior conviction would be a fact that the government would need to prove. If that fact had been charged in the indictment, Heard's trial strategy would likely have changed. He may have decided not to testify, depriving the government of the admissions that the court of appeals accepted as proof of guilt. *See Heard*, 951 F.3d at 929 n.1 (citing Heard's admissions as proof of guilt). The government cannot be permitted to take advantage of a defense strategy that it induced by failing to charge all the elements that it needed to prove at trial.

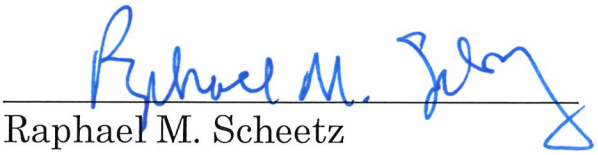
"To decide whether an instruction that omitted an element of the crime affected substantial rights, the reviewing court asks whether it appeared beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Maez*, 960 F.3d 949, 964 (7th Cir. 2020) (citations and quotation marks omitted). The *Heard* decision did not apply the "beyond a reasonable doubt" standard

but asked whether it was reasonably probable that, in the absence of the error, the outcome would have been different. *Heard*, 951 F.3d at 929 n.1. Nor did the *Heard* decision consider whether the failure to charge an element of the offense in the indictment contributed to the outcome by depriving Heard of notice of the elements that the government would need to prove. Because the *Heard* decision conflicts with the Fourth Circuit's decision in *Green* and the Seventh Circuit's decision in *Maez*, granting review to unify the law among the circuits is warranted.

Conclusion

For the reasons stated above the petition for a writ of certiorari should be granted.

Respectfully submitted,



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