

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TYRIUS GREEN
Petitioner

v.

ATTORNEY GENERAL, STATE OF NEW JERSEY AND
STEPHEN M. D'ILIO, ADMINISTRATOR, NEW JERSEY
STATE PRISON

Respondents

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Tyrius Green was convicted of murder based solely upon witness identification testimony as there was no physical evidence presented at his trial that tied him to the offense. While there was highly contested testimony regarding the out-of-court identification of Mr. Green, it is undisputed that no witness identified Mr. Green in-court as the person who committed the offense. Nonetheless, the trial judge utilized the New Jersey Model Jury Instructions for both in-court and out-of-court identifications, telling the jury that “witnesses” had identified Mr. Green in-court as the assailant and further that the jury could consider those in-court identifications in determining whether the state proved beyond a reasonable doubt that Mr. Green committed the crime. In *United States v. Breitling*, 61 U.S. 252 (1857), this Court stated that it was clear error to instruct the jury on a “conjectural or supposed state of facts.” This Court has also found that a defective reasonable doubt instruction vitiates the entire verdict and constitutes a structural error not subject to harmless error review. *Sullivan v. Louisiana*, 508 U.S. 275, 280-81 (1993).

The question presented is:

Whether giving a jury charge on eye witness identification that lacked a factual basis in the evidence produced at trial was contrary to clearly established federal law regarding and constituted a structural error where identification was the determinative issue at trial.

INTRODUCTION

The trial judge's identification instructions to the jury were defective. The judge was clearly mistaken that there had been an in-court identification of Mr. Green. Due to this mistake, the judge utilized the wrong jury instruction for identification. The judge instructed the jury in accordance with the New Jersey Model Charge for both in-court and out-of-court identifications rather the instruction for just out-of-court identification. The error gave the jury a separate avenue to convict the petitioner, unsupported by the evidence, in violation of Mr. Green's right to due process and right to a trial by jury.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Tyrius Green, was the habeas petitioner in the United States District Court for the District of New Jersey and the Appellant in the Third Circuit Court of Appeals.

Respondents are the Attorney General of the State of New Jersey and the Administrator, New Jersey State Prisons.

STATEMENT OF RELATED PROCEEDINGS

State of New Jersey v. Tyrius Green, Superior Court of New Jersey, Law Division, Mercer County, Ind. No. 04-05-0329. Judgment entered July 11, 2005.

State of New Jersey v. Tyrius Green, Superior Court of New Jersey, Appellate Division, Docket No. A-2832-05T4. Judgment entered June 17, 2008.

State of New Jersey v. Tyrius Green, Supreme Court of New Jersey, C-189, September Term, 2008. Judgment entered October 3, 2008

State of New Jersey v. Tyrius Green, Superior Court of New Jersey, Law Division, Mercer County, Ind. No. 04-05-0329. Judgment entered April 26, 2012.

State of New Jersey v. Tyrius Green, Superior Court of New Jersey, Appellate Division, Docket No. A-1277-12T1. Judgment entered April 30, 2014.

State of New Jersey v. Tyrius Green, Supreme Court of New Jersey, C-237, September Term, 2014. Judgment entered October 14, 2014.

Tyrius Green v. Attorney General, State of New Jersey, et al., U.S. District Court for the District of New Jersey, No. 3-15-cv-01886. Judgment entered September 23, 2019.

Tyrius Green v. Attorney General, State of New Jersey, et al., U.S. Court of Appeals for the Third Circuit, No. 19-3325. Judgment entered January 27, 2021.

Tyrius Green v. Attorney General, State of New Jersey, et al., U.S. Court of Appeals for the Third Circuit, No. 19-3325. Judgment entered March 2, 2021.

TABLE OF CONTENTS

	PAGE
Question Presented	1
Introduction	2
Parties to Proceedings Below	2
Statement of Related Proceedings	2
Table of Contents	4
Table of Authorities	5
Index of Appendices.....	7
Opinions Below.....	8
Jurisdiction	8
Constitution and Statutory Provisions Involved.....	8
Statement of the Case	9
Reasons for Granting the Petition	18
1. The trial court's instruction on identification was legally improper, not a mere passing factual misstatement.	18
2. The instruction error here is analogous to the error identified in <i>Sullivan</i> as structural.....	21
3. The erroneous instruction removed the issue of identification from any meaningful jury consideration.....	24
4. The identification error was fundamentally unfair.	25
Conclusion.....	27

TABLE OF AUTHORITIES

	Page
Federal Cases	
<i>Arizona v. Fulminante</i> 499 U.S. 279 (1991)	21
<i>Bollenbach v. U.S.</i> 326 U.S. 607 (1946)	25
<i>Brech v. Abrahamson</i> 507 U.S. 619 (1993)	21
<i>California v. Trombetta</i> 467 U.S. 479 (1984)	26
<i>Carella v. California</i> 491 U.S. 263 (1989)	23
<i>Cavazos v. Smith</i> 565 U.S. 1 (2011)	25
<i>Chapman v. California</i> 386 U.S. 13 (1967)	21
<i>Parker v. Randolph</i> 442 U.S. 62 (1979)	24
<i>Quercia v. United States</i> 289 U.S. 46 (1933)	24
<i>Rose v. Clark</i> 478 U.S. 570 (1986)	21
<i>Sullivan v. Louisiana</i> 508 U.S. 275 (1993)	1, 21, 22, 25
<i>United States v. Breitling</i> 61 U.S. 252 (1857)	1, 18, 19, 26

Federal Statutes

28 U.S.C. § 2254(a)	9
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INDEX OF APPENDICES

	PAGE
Appendix A:	
Judgment of the U.S. Court of Appeals for the Third Circuit (January 27, 2021).....	1a
Appendix B:	
Opinion of the U.S. Court of Appeals for the Third Circuit (January 27, 2021).....	3a
Appendix C:	
Order of the U.S. District Court for the District of N.J. (September 10, 2019).....	12a
Appendix D:	
Opinion of U.S. District Court for the District of N.J. (September 10, 2019).....	14a
Appendix E:	
Order of the U.S. Court of Appeals for the Third Circuit, (March 2, 2021).....	48a
Appendix F:	
Opinion of the N.J. Appellate Division (June 17, 2008).....	50a
Appendix G:	
Opinion of the N.J. Appellate Division (April 30, 2014).....	79a
Appendix H:	
Excerpts from trial transcript containing jury charge (May 11, 2005).....	91a

OPINIONS BELOW

The United States District Court for the District of New Jersey issued an opinion denying Petitioner's habeas corpus petition on September 10, 2019. The opinion is unpublished (Pet. App. 14a-47a). On January 27, 2021, the United States Court of Appeals for the Third Circuit issued an unpublished opinion affirming the District Court decision. (Pet. App. 3a-11a). The Third Circuit's March 2, 2021 order denying panel and en banc rehearing is unpublished. (Pet. App. 48a-49a)

JURISDICTION

The Third Circuit entered its judgment on January 27, 2021. The order denying rehearing was issued on March 2, 2021. On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part: "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 . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment provides in relevant part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ” U.S. Const. amend. XIV, §1.

Title 28 U.S.C. § 2254(a) provides in relevant part “[A federal] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” Section 2254(d) provides in relevant part, “An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

STATEMENT OF THE CASE

Tyrius Green, was convicted by a jury in the Superior Court of New Jersey, Mercer County, of knowing or purposeful murder relating to the 2003 shooting of Edgerton Munroe. (ROA 48)¹. Identification testimony was the determinative issue at the trial as there was no physical evidence that tied Mr. Green to the offense. The trial court erroneously instructed the jury that “several witnesses” had identified Mr. Green in-court as the person who committed the offense. (ROA 328). The jury was given a printed copy of the entire charge and encouraged to refer to and rely upon the instructions should they have any questions or confusion. (ROA 320, 333, and 340). Mr. Green’s trial counsel did not object to the identification instruction. While there was contested evidence regarding out-of-court identifications of Mr. Green, it is undisputed that no in-court identification occurred.

The Trial of Tyrius Green

On the evening of August 14, 2003, Edgerton Munroe was shot in an area of Trenton that was referred to as the “Hole”, a secluded place where people would go to get high and be away from the police. (ROA 144). Mr. Munroe died the following day. Several people were in and around the Hole that night including three women who claimed to have witnessed the shooting; Avia Fowler, Carol Guerra and Linda

¹ ROA citations are to the record on appeal in the Third Circuit, specifically petitioner’s appendix, docket document number 30.

Brown. All three were interviewed by the Trenton Police Department within a few days of the shooting and provided written statements. The police ultimately obtained an arrest warrant for Mr. Green and he was arrested at his sister's house in the Bronx.

Brown, Guerra and Fowler all testified at Mr. Green's trial. None of these witnesses got a good look at the shooter's face because he was wearing a scarf or mask that covered his mouth and nose, as well as a hat or hoodie over his head. Linda Brown testified that she was in the Hole getting high when "two guys came through the alleyway." (ROA 193). Although Brown could not see who they were, she initially thought that the taller man was Tyrius Green, so she called out to him by his nickname "Young'n", but the man did not respond. (ROA 197). She called to him three or more times, yet got no response and concluded that it was not Mr. Green after all.

Carol Guerra testified that she was in the Hole at the time of the shooting but said she was high and had been up for a couple of days straight smoking crack. (ROA 142). Guerra recalled giving a statement to the police but had little recollection about the substance of what was in the statement. (ROA 143). Her statement was admitted into evidence. According to Guerra's statement she saw two men, one taller than the other, pass through. The men were dressed all in black, from head to toe and the taller man was wearing a black fedora and the other had a black ski mask on. Both of the men had their faces covered. At first, Guerra thought that

the taller man was Mr. Green but when Linda Brown called out “Young’n” and neither man had any reaction, she concluded it was not Tyrius after all. (ROA 351).

The sum of Ms. Guerra’s testimony and statement was that she first thought the assailant was Mr. Green because of the way he walked. However, when she heard Ms. Brown call out to him by his nickname and he did not respond, she thought it wasn’t him. Ms. Guerra did not identify Mr. Green as the shooter.

The third witness, Avia Fowler, gave a statement to the police in which she refers to Mr. Green as the shooter but also states that he was dressed in all black and was wearing a mask across the bottom of his face. Fowler allegedly claimed in the statement that “I know Tyrius anywhere. The mask covered his mouth and the bottom of his nose. I even know his walk. We call him Young’n.” (ROA 357).

In her testimony at trial under oath, Fowler disavowed the statement she had given to police. She testified: “No, I never seen this man (Mr. Green) back there in the Hole with a gun shooting or none of that. None of that.” (ROA 179). When asked by the prosecutor, Fowler could not describe the gun used in the shooting because, “I didn’t give a description because I didn’t see no guy named Tyrius. I didn’t see no gun. How could I give a description if I didn’t see one? You’re just like the cop, you keep saying you know what happened. I don’t know what happened.” (ROA 175). Fowler also denied she knew Tyrius Green for long time,

testifying that she knew him from the neighborhood and had seen him pass through the Hole, but did not know him by name and ever had a conversation with him.

Fowler testified that although she did not remember telling the police what was included in her statement, it was possible she said those things because she “wasn’t in (her) right frame of mind” when she spoke to the police. She testified, “I don’t remember saying it. I was really on crack. Really bad, I was cracked out. I would have probably said anything to get up out of there. I mean, ain’t had no sleep when they got me.” (ROA 128). Fowler further stated that she would suffer from delusions when she was high on crack. “I see things ain’t there. Um, like, I can say, for instance, my husband, he was incarcerated, but I take a hit off crack and I swear to God he is in the building, he is around the corner, he is in the house with another woman.” (ROA 181).

The record establishes that Linda Brown did not believe Mr. Green was shooter because he did not respond when she called out his nickname. Carol Guerra doubted that the shooter was Mr. Green for the same reason. The only actual identification of Mr. Green as the shooter was included in the statement Avia Fowler gave to the police that was admitted into evidence. She disavowed the statement during her testimony, denying she saw Mr. Green shoot Monroe, and stated she was a crack addict at the time and was high both when the incident occurred and when she spoke with the police.

The prosecutor also asked each of these witnesses if they knew Tyrius Green and did they see him in the courtroom. Each said they knew Mr. Green and identified him in the courtroom. (ROA 132-3; 171 and 195). None of these three witnesses (or any other witness) identified Mr. Green in-court as the person that shot Edgerton Munroe.

Following the close of all the evidence, the trial court held a conference with the prosecutor and defense attorney to review the charge he would give to the jury. At the conference, the judge indicated that he would be giving both in-court and out-of-court identification instructions to the jury. (ROA 292). Neither counsel raised an issue with the proposed identification instructions.

As part of his charge, the judge instructed the jury that several witnesses “identified the defendant in court as the person who committed the offense charged.” (Pet. App. 101a). Further, the judge instructed the jury that “[I]f you determine that the out-of-court identification is not reliable, you must still consider the witness’s in-court identification of the defendant, if you consider it reliable.” (Pet. App. 101a). After he had concluded the jury instructions, the judge asked both counsel if they had “concerns about the charge.” Neither counsel offered any objection. (Pet. App. 117a).

It is important to note that the judge did not simply read the instructions to the jury but provided the jury with a printed copy as well. At the outset of the charge,

the judge told the jury that they would not have to take notes because “you’ll have copies of these instructions for you so that you’ll have all of the definitions that I’m reading …”. (ROA 320). Throughout the entire charge the judge repeatedly advised the jury to refer to the written instructions should they have any questions or need clarification.

Following deliberations, the jury returned a verdict of guilty on knowing or purposeful murder, possession of a firearm for an unlawful purpose and unlawful possession of a handgun. (ROA 349). On July 8, 2005, the court sentenced Mr. Green to life in prison with a 30-year parole disqualifier. The court merged the two weapons charges and sentenced Mr. Green to a ten-year prison term to run consecutively to the sentence imposed for murder. (ROA 48-9).

Direct Appeal

Mr. Green appealed his conviction to the New Jersey Appellate Division, claiming, among other things, that the trial court’s erroneous charge on in-court identification deprived him of a fair trial in violation of the Fourteenth Amendment. Since Mr. Green’s trial counsel had not objected to the instruction, the Appellate Division reviewed Mr. Green’s claim under the plain error standard. The court recognized that the trial judge erroneously instructed the jury that several witnesses identified the defendant as the person who committed the offense charged, but treated it as a passing factual error finding that “the misstatement was fleeting and it

did not concern an element of an offense or some other legal issues.” (Pet. App. 67a-68a). The court also found that any potential confusion that may arise from the identification charge was ameliorated by the general instruction given to the jurors that they are the sole judges of the facts and they should rely on their own recollections of the evidence regardless of what the judge or the attorneys may say. The Appellate Division concluded that the error did not have the “clear capacity to produce an unjust result” and affirmed the conviction. (Pet. App. 68a).

The New Jersey Supreme Court denied Mr. Green’s petition for certification. (ROA 403).

Post-Conviction Review

Thereafter, Mr. Green filed a petition for post-conviction relief asserting that his trial counsel’s failure to object to the identification instruction constituted ineffective assistance of counsel. The Superior Court of New Jersey found that many of Mr. Green’s claims were procedurally barred. The court, nonetheless, reviewed the petition on the merits and denied each claim. (ROA 404-35). Mr. Green appealed the denial of his PCR petition. His appellate counsel argued that the trial court utilized the wrong jury instruction in charging the jury and had misstated the testimony regarding in-court identification of Mr. Green. (ROA 456-7). The Appellate Division affirmed the denial of the PCR petition. (Pet. App. 79a). Mr.

Green sought certification with the New Jersey Supreme Court, which was denied. *State v. Green*, 220 N.J. 42 (2014).

Federal Habeas Proceedings

Mr. Green filed a *pro se* petition for a writ of habeas corpus in the District Court, again asserting that he was denied the right to due process as a result of the trial court's improper identification instruction. He also claimed the denial of his Sixth Amendment right to counsel as a result of his trial attorney's failure to object to the identification instructions. (ROA 66-100). The District Court found that the Appellate Division's decision was not contrary to federal precedent nor an unreasonable application of that law. Looking at the charge as a whole, the District Court concluded that the erroneous identification instruction was unlikely to have an effect on the outcome of the trial. (Pet. App. 28a). The District Court noted in its opinion that all of the transcripts from the trial had not been filed with the court so it was relying on the Appellate Division's summary of the testimony. (Pet. App. 22a, ft nt 2). The transcript of the entire jury charge was one that had not been filed with the District Court. The court did grant a certificate of appealability as to two issues: "whether the trial court's jury instruction on identification violated the Petitioner's rights under the Fifth and Fourteenth Amendments ... and whether Petitioner's counsel was ineffective for failing to object to the identification instruction." (Pet. App. 12a).

On appeal, the Third Circuit found that it was an error for the trial court to instruct the jury that witnesses had identified Mr. Green in court as the person who committed the offenses charged, but concluded that the error was harmless since there was considerable evidence proving Mr. Green's guilt. (Pet. App. 9a).² The Third Circuit did not address Mr. Green's argument that the judge's error was not simply a factual misstatement but, contrary to *Breitling*, was an instruction lacking any factual basis in the record and allowed the jury to convict Mr. Green on facts that were not in evidence.

REASONS FOR GRANTING THE WRIT

This case raises an important question whether a jury instruction on identification, which has no basis in the record, constitutes a structural error requiring reversal without harmless error review. The Third Circuit chose not to address this issue despite the fact that this Court has long held that it is clear error to instruct a jury on a supposed or conjectural state of facts. *Breitling* *supra*. Accordingly, the Third Circuit's decision conflicts with this Court's precedents.

1. The trial court's instruction on identification was legally improper, not a mere passing factual misstatement.

The trial court should not have given the in-court identification instruction because there was no in-court identification. The instruction included not only the

² This in contrast to the Appellate Division's characterization of the evidence against Mr. Green as "not overwhelming".

factual assertion that there had been in-court identifications of Mr. Green, but also provided the jury with the entire Model Criminal Jury charge on in-court identifications including the factors to consider when evaluating those identifications and directing that they could rely on the in-court identifications to find Mr. Green guilty. A printed copy of the charge was distributed to the jury and the judge encouraged them to rely upon it. If the trial court had merely made a factual error and noted that there had been in-court identifications of Mr. Green but did not give the jury the legal instruction on how to evaluate and utilize those identifications, that charge would still be problematic but the error and impact would be much less significant than is present here. Instead, the trial court told the jury that the evidence showed that Mr. Green was identified in-court as the shooter and that the law allows them to rely on those identifications to find him guilty.

This action by the trial court was more than a mistaken comment on the evidence. The judge charged the jury that they could consider the in-court identifications of Mr. Green in determining whether he was guilty of the crime charged. The charge was contrary to the holding in *Breitling* where this Court stated that it was “clearly error to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered.” *Breitling*, 61 U.S. at 254-5. The problem, the Court said, was that the instruction presupposes there is evidence in the record to support the charge, but “if there is no evidence which they have a right to

consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony.” *Id.* The instruction here went beyond inducing the jury to indulge in conjectures to directing the jury to consider evidence not in the record in reaching its determination of guilt or innocence.

Moreover, the general instruction given by the trial judge, that the jurors should rely upon their own recollection of the facts, does not cure, or really even address, the improper identification charge. While the charge obviously was factually inaccurate, it also included substantive legal instruction on evaluating and relying on the identifications. The general instruction only addressed the factual portion of the improper instruction. Further, it is highly unlikely that jurors recognized the subtle distinction between witnesses identifying Mr. Green in court as someone they knew from the neighborhood as opposed to the person who committed the offense. Clearly the judge was confused about this issue since he chose to give both the in-court and out-of-court instructions to the jury.

Finally, the trial court also instructed the jurors that they were bound to follow the law as he gave it to them. The trial judge gave the jurors the legal instruction that they “must consider” the in-court identifications when determining if Mr. Green was the shooter. When combined with the confusing nature of the testimony, it is likely

that, as the Court warned in *Breitling*, the instructions mislead the jury to believe that Mr. Green had, in fact, been identified in court as the assailant.

2. The instruction error here is analogous to the error identified in *Sullivan* as structural.

The Court has recognized a limited class of fundamental constitutional errors that “defy analysis by ‘harmless error’ standards.” *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991) Errors of this type are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome. *Chapman v. California*, 386 U.S. 13, 23 (1967). These errors are “structural defects” which affect “the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Fulminante*, 499 U.S. at 310. Such structural errors “infect the entire trial process,” *Brecht v. Abrahamson*, 507 U.S. 619, 630, (1993), and “necessarily render a trial fundamentally unfair,” *Rose v. Clark*, 478 U.S. 570, 577 (1986).

In *Sullivan v. Louisiana*, 508 U.S. 275, 280-81 (1993), the Court held that an erroneous reasonable doubt instruction was such a structural error that could not be harmless because it undermines an essential premise of harmless error analysis, the existence of an actual verdict of guilty beyond a reasonable doubt. Consistent with the holding in *Sullivan*, the error in the jury instruction in this case is a structural error that cannot be deemed to be harmless.

The Court’s reasoning in *Sullivan* illuminates why the jury instruction error here is not amenable to harmless error review. In *Sullivan*, the trial court gave 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. The Court found that the error vitiated all of the jury’s findings such that there was no jury verdict within the meaning of the Sixth Amendment. *Id.* at 278. Under harmless error analysis, the reviewing court is to consider the actual effect the constitutional error had on the guilty verdict in the case at hand. *Id.* at 279. Since the Court determined there was no jury verdict, the object of the harmless error analysis was absent. In those circumstances a reviewing court could only speculate on what a reasonable jury may have done. “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.” *Id.* at 280. The Court concluded that harmless-error analysis cannot be applied in the case of a defective reasonable-doubt instruction. While the offending instruction here did not concern reasonable doubt, it is still the case that the identification instruction vitiated the entire verdict.

The identification charge here concerned the sole and central issue at the trial that was contested by the defense. To convict Mr. Green, the state had the burden to prove the identification of the shooter beyond a reasonable doubt. The issue of

identification was highly contested during the trial and was the basis of Mr. Green's defense. The court instructed the jury it could consider out-of-court identifications, which did occur but were highly suspect, and in-court identifications, which did not occur even though the judge told the jury they did. The instruction offered the jury an unsubstantiated alternate pathway to find Mr. Green guilty. While the jury returned a guilty verdict, there is no way to know whether the jury relied upon the improper in-court identification instructions in reaching its conclusions. If they had, then the state would not have proved the identity of the shooter beyond a reasonable doubt since the verdict was based on a theory that had no support in the record. For this reason, the verdict itself is suspect and not amenable to harmless error review because a reviewing court has no basis upon which to determine what affect the erroneous identification instruction had on the guilty verdict.

The defective jury instruction in this case can be distinguished from those cases where the Court has held that jury instructions that erroneously contain a mandatory presumption or misdescribe an element of the offense may be harmless if the remaining unaffected jury findings are "functionally equivalent to finding" the lacking element. *Carella v. California*, 491 U.S. 263, 271 (1989).

Here, the jury did not make specific findings of facts, but it did find Mr. Green guilty on three counts; first degree murder, second degree possession of a firearm for an unlawful purpose, and third degree unlawful possession of a handgun. The

trial judge instructed the jury on the elements of each of these crimes and, presumably, the jury found each of the elements beyond a reasonable doubt. Finding those elements, however, is not the functional equivalent to finding that Mr. Green was the person who committed the crimes nor do they shed any light on the basis for the jury's determination of the identification issue. At best, these findings confirm that a crime was committed but offer no insight into how the jury determined who committed the crime. The defective jury instruction here clearly "infected the entire trial process" and rendered the trial fundamentally unfair.

3. The erroneous instruction removed the issue of identification from any meaningful jury consideration.

In *Quercia v. United States*, 289 U.S. 46 (1933), the Court recognized that "[T]he influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.'" Moreover, it is a crucial assumption underlying the system "that juries will follow the instructions given them by the trial judge." *Parker v. Randolph*, 442 U.S. 62, 73 (1979). The trial court's instructions essentially directed the jury to accept that Mr. Green had been identified as the person who committed the murder. The judge told the jury that it must follow the law as he gave it to them. He told them Mr. Green was identified both in court and out of court as the assailant. There was no other evidence produced to establish the identity of the shooter, such as DNA or fingerprints. There was nothing but the testimony of the eye witnesses. As a result,

the jury was left with no real choice but to find that Mr. Green was the person that committed the offense.

Credibility was the basis of Mr. Green's defense arguing at trial that the jury could not trust the testimony of the eye witnesses since they said one thing in court but told the police something else in their out of court statements. By instructing the jury that there were both in court and out of court identifications of Mr. Green, the judge removed any basis for a credibility determination and undermined Mr. Green's defense. The judge's instruction gave the jury no meaningful choice on whether the state had proven that Mr. Green was the person who killed Mr. Munroe.

This Court's cases make clear that the Sixth Amendment secures a defendant's right to have a jury determine his guilt or innocence. *See Sullivan*, 508 U.S. at 277. That is why a trial court cannot "direct a verdict for the State, no matter how overwhelming the evidence." *Id.* It is well-established that it is "the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). Here, the judge invaded the province of the jury to decide guilt or innocence and thus denied Mr. Green his right to trial by jury under the Sixth Amendment.

4. The identification error was fundamentally unfair.

In *Bollenbach v. U.S.*, 326 U.S. 607, 612, the Court recognized that "particularly in a criminal trial, the judge's last word is apt to be the decisive word."

The last word the jury heard here regarding identification was the judge's instruction that they consider the in-court identifications that never occurred. As discussed above, this instruction eviscerated Mr. Green's defense. It also came at a time when the opportunity to address the evidence had passed. There was no more argument or evidence presented to the jury. Clearly, this instruction was unfair to Mr. Green as it prevented him from presenting his defense to the jury, *see, California v. Trombetta*, 467 U.S. 479(1984), and also denied him the right to have an impartial jury assess the merits of his case. *Sullivan*, 508 U.S. at 277. The identification instruction infringed upon the then jury's role to be the arbiter of the facts and make the ultimate determination on guilt or innocence. The instruction violated Mr. Green's Sixth Amendment rights but it also undermined the integrity of the trial itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: July 30, 2021

Respectfully submitted,

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