

No. 25-_____

SUPREME COURT OF THE UNITED STATES

Eric Rogers,

Petitioner,

vs.

United States of America,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

James W. Amberg (P68564)
CJA Panel Attorney for the Petitioner
Amberg & Amberg, PLLC
32121 Woodward Ave., Suite PH
Royal Oak, MI 48073
(248) 681-6255

Question Presented

Does the Due Process Clause of the Fourteenth Amendment require a new trial when a witness's in-court identification of the defendant is tainted by suggestive pretrial conduct by the prosecution, undermining the defendant's primary defense, and the trial court's curative instructions fail to mitigate the prejudicial impact?

Related Proceedings

United States District Court (EDMI)

United States v Eric Rogers, No 2:18-cr-20542-2

United States Court of Appeals (6th Cir)

United Staes v Eric Rogers, No 23-1663

Table of Contents

| | |
|---------------------------------------|-----|
| Question Presented..... | ii |
| Related Cases | iii |
| Table of Authorities | vi |
| Petition for Writ of Certiorari | 1 |
| Opinions Below..... | 1 |
| Jurisdiction | 1 |
| Statutory Provisions Involved..... | 1 |
| Statement of the Case..... | 1 |
| Reasons for Granting the Writ | 5 |
| Conclusion and Prayer for Relief..... | 8 |

INDEX OF APPENDICES:

| | |
|------------|--|
| APPENDIX A | United States Court of Appeals Order Affirming the District Court 1a |
|------------|--|

Table of Authorities

| United States Supreme Court Cases | Page Number |
|--|--------------------|
| <i>Manson v Brathwaite</i> , 432 US 98 (1977) | 5 |
| <i>Neil v Biggers</i> , 409 US 188 (1972)..... | 5 |
| <i>Perry v New Hampshire</i> , 565 US 228 (2012)..... | 5 |
| <i>Richardson v Marsh</i> , 481 US 200 (1987)..... | 6 |
| <i>Simmons v South Carolina</i> , 512 US 154 (1994)..... | 6 |
| <i>Stovall v Denno</i> , 388 US 293 (1967) | 5 |

| Sixth Circuit Court Cases | Page Number |
|---|--------------------|
| <i>United States v Harvel</i> , 115 F4th 714 (6th Cir 2024) | 4 |
| <i>United States v Howard</i> , 621 F3d 433 (6th Cir 2010)..... | 4,7 |

I. Petition for Writ of Certiorari

Eric Rogers petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

II. Opinions Below

The Sixth Circuit's unpublished opinion affirming the district court's judgment is attached as Appendix A.

III. Jurisdiction

The Sixth Circuit entered judgment on November 14, 2024. *See* Appendix A This petition is timely filed pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 USC §1254(1).

VI. Statutory Provisions Involved

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

“No State shall ... deprive any person of life, liberty, or property, without due process of law.”

V. Statement of the Case

A. Introduction

This petition arises from the Sixth Circuit's decision affirming the district court's denial of a mistrial following an in-court identification of Eric Rogers by a witness, Ashley Jones. The identification, which was tainted by suggestive pretrial conduct by the prosecution, undermined Rogers's primary defense that no victim

had identified him as a perpetrator. Despite the trial court's curative instructions, the identification irreparably prejudiced Rogers's defense.

B. Factual Background

Eric Rogers was charged with conspiracy to commit carjacking, multiple counts of carjacking, and brandishing a firearm during a crime of violence. During her direct examination at trial, Ashley Jones, a victim of one of the carjackings, identified Rogers as the perpetrator, stating, "That's him. I recognize the eyes." This identification occurred after a prosecutor had pointed out Rogers to Jones during a pretrial courtroom walkthrough, after the opening statements, where Rogers was shackled and escorted by US Marshals. The prosecutor pointed out Rogers to Jones, telling her "that was him" two hours before her in-court identification of Rogers. Prior to this moment, Jones had never identified Rogers in any manner.

Jones's identification directly contradicted Rogers's defense, which emphasized that no victim had identified him. Defense counsel highlighted this point during opening statements, projecting it on a courtroom screen. Although the Government presented other circumstantial evidence, no other witness identified Rogers.

Rogers objected, eventually requesting a mistrial. Although the trial court considered the issue a close call, it ultimately gave a limiting instruction, to which

Rogers objected. Counsel for Rogers summed the argument to the trial court as follows:

“that none of the victims will identify Mr. Rogers, and the first thing that happens is within 15 minutes the victim identifies Eric Rogers. My credibility was shot in front of the jury, our defense was destroyed. And what happens is Mr. Rogers he wept. He wept when he heard that. And I totally understand why.”

C. Procedural History

Rogers moved for a mistrial, arguing that the identification was unduly suggestive and violated his due process rights. The district court denied the motion, reasoning that the identification was not impermissibly suggestive and that curative instructions were sufficient to mitigate any prejudice. The court struck Jones’s identification from the record and instructed the jury to disregard it. After his conviction, Rogers appealed.

Rogers argued to the Sixth Circuit that the trial court erred in not granting the mistrial and argued for a new trial due to the identification issue, amongst other issues. Although receptive to parts of this argument, the Sixth Circuit ultimately denied Rogers appeal. (Appendix A) This Writ now follows.

D. Arguments in the Sixth Circuit

In dealing with the improper identification and subsequent curative instruction issue, the Sixth Circuit reasoned that “to be entitled to a new trial, a defendant must show that the claimed error caused serious or incurable prejudice

to the defense.” *United States v Harvel*, 115 F4th 714, 738 (6th Cir 2024)(Appendix A; Pg 5) The Sixth Circuit first looked to the issue of whether the challenged testimony was improper, to which they assumed it was. (Appendix A; Pg 5)

Assuming the testimony was improper, the Sixth Circuit then sought to “determine if the testimony was so clearly improper and prejudicial to the defendants that the harm could not be erased by any instruction which the court might give.” *United States v Howard*, 621 F3d 433, 458 (6th Cir 2010)(Appendix A; Pg 6) The Sixth Circuit viewed the following factors from *Howard* in making this determination:

“(1) whether the remark was unsolicited, (2) whether the government’s line of questioning was reasonable, (3) whether the limiting instruction was immediate, clear, and forceful, (4) whether any bad faith was evidenced by the government, and (5) whether the remark was only a small part of the evidence against the defendant.” (Appendix A; Pg 5)

The Sixth Circuit found that factors (1) and (2) favored Rogers, finding that “[i]t was unreasonable to solicit Jones’s identification of Rogers by asking if she recognized Rogers in this manner.” (Appendix A) However, regarding the remaining factors, the Sixth Circuit found they favored the Government, finding that the curative instruction given by the Trial Court was forceful, that the prosecutor had not acted in bad faith, and the remaining evidence was overwhelming. (Appendix A; Pg 6) Although they noted that Rogers took issue

with the evidence being overwhelming, as he has always argued it was circumstantial at best, the Sixth Circuit denied Rogers appeal. (Appendix A)

VI. Reasons for Granting the Writ

A. The Sixth Circuit’s Decision Conflicts with This Court’s Precedents on Due Process and Eyewitness Identification

This Court has long held that an identification violates due process when it is the product of unnecessarily suggestive procedures that create a substantial likelihood of misidentification. *Neil v Biggers*, 409 US 188, 198 (1972); *Manson v Brathwaite*, 432 US 98, 114 (1977) Here, the prosecutor’s conduct—pointing out Rogers to Jones while he was shackled—was inherently suggestive and created a significant risk of misidentification. The Sixth Circuit failed to adequately address this issue, instead deferring to the trial court’s curative instructions to un-ring the bell of this clear Due Process violation.

The facts of this case are analogous to *Stovall v Denno*, 388 US 293 (1967), where the Court recognized that suggestive identification procedures can violate due process. In *Stovall*, the Court emphasized the importance of avoiding procedures that unnecessarily influence a witness’s identification. Similarly, in *Perry v New Hampshire*, 565 US 228 (2012), the Court reiterated that due process concerns arise when law enforcement arranges suggestive identification procedures.

In this case, the prosecutor took Jones into the courtroom, after Rogers' opening statement where his counsel indicated that no person would identify Rogers, and pointed Rogers out to Jones, saying "that's him." Even worse, Rogers was handcuffed and escorted by US Marshalls. This identification procedure was far worse than any identification procedure case this Court has ever reviewed and decided.

Beyond this, it was the prosecutor, who told Jones, now on the stand, to look at Rogers and then asked if she could identify him. Counsel can think of no more egregious an identification based Due Process violation than that, as the prosecutor had literally told Jones an hour or so before who Rogers was by pointing him out.

B. The Curative Instructions Were Insufficient to Mitigate the Prejudice

Juries are generally presumed to follow instructions. *Richardson v Marsh*, 481 US 200, 211 (1987) However, it is argued that this presumption is not absolute. This Court has reasoned that "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Simmons v South Carolina*, 512 US 154, 171 (1994)(internal citations omitted) In this case, the identification struck at the heart of Rogers's defense and irreparably damaged his credibility before the jury. The trial court's delayed and confusing instructions could not undo the harm caused by the identification.

The Sixth Circuit's findings related to the *United States v Howard* factors was misplaced. Here, all rather than two of the factors weigh heavily in Rogers's favor: (1) the identification was solicited by the prosecution; (2) the line of questioning was unreasonable given the suggestive pretrial conduct; (3) the curative instructions were delayed and insufficient; (4) the prosecution acted in bad faith by pointing out Rogers to Jones; and (5) the identification was a critical part of the evidence against Rogers.

The curative instruction was insufficient here as the gravity of the Due Process violation was so massive. There was no remedy available to save the trial once the Constitutionally impermissible identification took place. The only remedy was for a new trial, and that is what Rogers requests this Court grant him.

C. The Sixth Circuit's Decision Undermines the Integrity of the Judicial Process

The government's conduct in this case—pointing out Rogers to Jones and then eliciting an in-court identification—raises serious concerns about prosecutorial overreach. Allowing such conduct to stand unchallenged sets a dangerous precedent and undermines public confidence in the fairness of criminal trials. Ask somebody on the street if they think a trial would be fair if the prosecutor pointed out to a witness who the defendant was, and then an hour or so later ask that same witness on the stand if they knew who the defendant was. Nobody would think this fair. The identification here was beyond tainted, it was

created by the Government, who then argues that the result of Rogers conviction should stand, a result which gave Rogers 36 years in prison.

VII. Conclusion

The Sixth Circuit's decision to uphold the trial court's denial of a mistrial in Eric Rogers's case represents a profound miscarriage of justice. The in-court identification of Rogers, tainted by the prosecution's suggestive pretrial conduct, irreparably undermined his defense and violated his constitutional right to a fair trial. The delayed and unclear curative instructions failed to mitigate the prejudice caused by this improper identification, which struck at the heart of Rogers's primary defense that no victim had identified him. The government's actions, coupled with the trial court's insufficient remedy, created a prejudicial environment that no jury could reasonably be expected to disregard. This Court must intervene to correct this grave error, reaffirm the principles of due process, and ensure that Rogers receives the fair trial to which he is constitutionally entitled.

For these reasons, this Court should grant certiorari to review the Sixth Circuit's judgment and reverse and remand to the District Court for a new trial, or grant such other relief as justice requires.

Respectfully submitted,

/s/ James Amberg
AMBERG & AMBERG, PLLC
James W. Amberg P68564
CJA Attorneys for the Petitioner
32121 Woodward Ave. St PH
Royal Oak, MI 48073
248.681.6255 office
248.681.0115 fax

Dated March 20, 2025