

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Anibal PAGAN ROMERO,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

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

**PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

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QUESTION PRESENTED FOR REVIEW

A. Whether the Petitioner was denied due process of law where the District Court, over the objection of Defendant provided the jury with a dictionary which the jury used to look up the word “knowingly” and whether the First Circuit erred in not applying the presumption of prejudice set forth in *Remmer v. United States*, 347 US 227, 229 (1954).

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- A. the Petitioner was denied due process of law where the District Court, over the objection of Defendant, provided the jury with a dictionary which was used to look up the word “knowingly” and which conviction was upheld by the First Circuit Court of Appeals and the First Circuit refused to apply the presumption of prejudice set forth in *Remmer v. United States*.

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I. PETITION FOR WRIT OF *CERTIORARI*

The Petitioner, Anibal Pagan-Romero, respectfully requests that a Writ of *Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on July 9, 2018, in the above proceeding.

II. OPINIONS BELOW

United States v. Anibal Pagan-Romero, 894 F.3d 441 (1st Cir. 2018) (No. 16-1396). (App. A, below)

United States v. Anibal Pagan-Romero, No. 3:14CR00333 (Dist. of Puerto Rico, March 22, 2016), Judgment in a Criminal Case. (App. B, below)

III. JURISDICTIONAL STATEMENT

The Petitioner seeks a writ of *certiorari* to the First Circuit Court of Appeals which affirmed a sentence of 120 months, imposed in the United States District Court for the District of Puerto Rico, No. 3:14CV00333, District Court Gustavo A. Gelpi presiding. Judgment in the District Court entered on March 22, 2016. The sentence was affirmed by the First Circuit Court of Appeals on July 9, 2018.

The District Court had jurisdiction pursuant to 18 U.S.C. §3231 (“The district courts of the United States shall have original jurisdiction ... of all offenses against the laws of the United States”). The First Circuit Court of

Appeals had jurisdiction pursuant to 18 U.S.C. §3742(a)(1) and (2) (“A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence ... was imposed in violation of law,” or “was imposed as a result of an incorrect application of the guidelines”) and 28 U.S.C. §1291 (“The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States....”).

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) (“Cases in the courts of appeals may be reviewed by the Supreme Court by ... writ of certiorari granted upon the petition of any party to a ... criminal case ... after rendition of judgment”).

IV. CONSTITUTIONAL PROVISION INVOLVED

A. Due Process Clause of the Fifth Amendment to the United States Constitution

No person ... shall be ... deprived of life, liberty, or property, without due process of law.

V. STATEMENT OF THE CASE

A. The Indictment

The indictment in this case was filed on May 8, 2014, and charged 21 co-Defendants with conspiracy to defraud the American Family Life Insurance Company (“AFLAC”). Defendant Anibal Pagan-Romero was charged with 21 counts of conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 1349 and 1341 and 60 counts of mail fraud against AFLAC in violation of 18 U.S.C. §§ 2

and 1341.

The conspiracy counts alleged that between January 2004 and November 2009, Defendant conspired and agreed with others to defraud AFLAC by submitting or causing to be submitted false and fraudulent claim forms for non-existing injuries or represented injuries in order to receive a benefit by mail. The mail fraud counts alleged that during 2009, Defendant fraudulently and knowingly and willfully submitted false and fraudulent claim forms for non-existing injuries or representing injuries and caused AFLEC to issue payments for false claims mailed from Columbus Georgia to various locations in Puerto Rico.

B. The Trial

On August 31, 2015, trial commenced for 10 of the 42 individuals who had been charged in the indictment. Presentation of evidence lasted eleven days. The Government presented a series of witnesses who testified that the defendant owned the Policlínica Familiar Shalom (“Policlínica”), a medical clinic and pharmacy in Quebradillas, Puerto Rico, where he also practiced medicine. According to the Government witnesses, various patients and employees of the Policlínica filed false claims with AFLAC under accidental injury policies.

Defendant testified on his own behalf. Defendant admitted that fraudulent claim forms were submitted to AFLEC, but denied that he was aware of the fraudulent form and testified that the fraud was committed without his authorization or knowledge.

C. Jury Deliberations and Verdict

The jury began deliberations on October 1, 2015. Judge Gelpí was absent during deliberations, so rather than delay the proceedings, Judge Pérez-Giménez presided over jury deliberations and the verdict. On October 5, 2015, the jury orally requested and received a dictionary from Judge Pérez-Giménez. Shortly thereafter, the jury rendered a verdict of guilty on all counts. Defense counsel noted her contemporaneous objection. There was no note, despite the trial court's clear instructions that "no member of the jury should ever attempt to communicate with me or any member of my staff by any means other than a signed writing."

On February 23, 2016, Judge Gelpí held an initial hearing on the defense's motion for new trial. On that date, the court questioned the jury foreperson. He remembered one juror requesting the dictionary, but could not recall which juror requested it, what she used it for, or whether anyone read aloud from the dictionary.

On March 14, 2016, the Court held an evidentiary hearing on the parties' motions regarding jury bias from the dictionary. The trial judge questioned four jurors. First, the juror who requested the dictionary stated that they used the dictionary during deliberations to look up the word "knowingly." She further stated that the dictionary did not influence her deliberations, and that the entire panel of jurors discussed the definition.

Based on this, the court decided to question each juror individually.

The second juror remembered that the definition of “knowingly” was read aloud to the entire jury. She stated that it did not influence the jury deliberations. The third juror, when asked whether the dictionary definition of “knowingly” influenced the jury, stated: “Yes, it did. It helped us out.” She clarified: “It was just a few persons that were confused with the word ‘knowingly,’ what it should – what was the meaning of knowingly.” She indicated that the jury decided solely on the evidence and jury instructions, not the dictionary definition. The final juror questioned that day recalled defining “knowingly,” and stated that it did not influence jury deliberations.

At sentencing on March 21, 2016, Judge Gelpí questioned each juror about his or her use of the dictionary. The first juror requested the dictionary along with another juror, and used it to define “‘knowingly’ the word. Knowingly. Knowingly. What it means knowingly.” She explained: “I word knowingly because we have trouble of interpretation what it means.” She recalled possibly looking up another word, but could not remember. She denied that the dictionary had affected deliberations.

The second juror questioned that day remembered looking up “knowingly,” and denied that it influenced deliberations. The third juror

remembered the request for the dictionary, but could not recall what words were defined; he denied that it affected deliberations. The fourth, fifth, and seventh jurors remembered using the dictionary to define “knowingly,” and denied that it affected the jury’s use of the Court instructions. The sixth juror remembered the dictionary and defining the word “knowingly;” he described it as “the word that one of the juror didn’t understand.” He denied that the dictionary influenced the verdict.

Next, the judge noted that he called the twelve jurors individually . He ruled that “the use of the dictionary to look up the word ‘knowingly’ in no way affected or brought in any extraneous evidence or information to the jury which would affect their deliberations.” He stated that “the definition of knowing is consistent [with the jury instruction] and in no way does the Court find it could affect the definition read by the Court.” “Knowingly” was defined as “having knowledge – and it also says shrewd, clever, implying a secret understanding The judge found that this set a higher bar for guilt “that goes even beyond the jury instruction not to the detriment of Dr. Pagán -Romero but the jury would to then determine not only that he acted knowingly but that – it’s a greater degree of proof that would have to be required, if the jury relied on the dictionary definition.” He went on to note that there was no error, but even if there were it would be harmless because all jurors stated that they followed the jury instructions. Finally, he ruled that overwhelming evidence supported the jury verdict.

The defense attorney objected strenuously, on grounds that a juror was confused by the word “knowingly” and that this was the core issue at dispute in the case and the focus of her defense: whether Dr. Pagán knew what was happening in the clinic. She noted that the jury had deliberated for three days, yet rendered their verdict within an hour after receiving the dictionary.

VI. REASONS FOR GRANTING THE WRIT

- A. The Petitioner was denied due process of law where the District Court, over the objection of Defendant, provided the jury with a dictionary which was used to look up the word “knowingly” and which conviction was upheld by the First Circuit Court of Appeals and whether the First Circuit erred in not applying the presumption of prejudice set forth in *Remmer v. United States*.

The First Circuit noted that *Remmer v. United States* suggested that any jury exposure to extrinsic material should be deemed to be presumptively prejudicial. *United States v. Pagan-Romero, supra*. 894 F.3d at 447. The Court then held that under subsequent First Circuit law, the presumption was no longer viable. *Id* Instead, the Court applied a less stringent abuse of discretion standard for less serious instances. Less serious instances were determined to be those where exposure was inadvertent (not present here) or where the trial court had conducted an inquiry and taken remedial steps and where egregious circumstances were absent. *Id*. The Court based its decision not to apply the presumption because it determined that even though the trial judge had intentionally provided the dictionary to the jury, it was not an egregious violation because the judge conducted an energetic and probing inquiry of the use of the dictionary. *Id*.

In so ruling, the First Circuit diminished the due process rights of defendant to a reasonable assurance that jury verdict was based solely upon the contents of the criminal trial. The First Circuit determination that the presumption only applied in “egregious” cases is squarely contrary to the *Bremmer* holding. *Bremmer* held that the presumption applies in all cases where the offensive materials were introduced to the jury unless they were “made in pursuance of known rules of the court and the instructions and

directions of the court made during the trial, with full knowledge of the parties.” *Id.* At 229.

Such was not the case here. The dictionary was given to the jury after conclusion of the trial, during deliberations. The jury’s confusion over and its interpretation of the term “knowingly” was the critical question before the jury. In his testimony and as presented by defense counsel at closing, defendant did not deny that there had been fraudulent submissions to the insurance carrier, but that the defendant did not know of the submissions. If the defendant were to be believed, the jury would have grounds to render a non-guilty verdict. That determination was ultimately tainted by the trial court’s presentation of the dictionary to the jury. The voir-dire conducted by the court substantially after the jury verdict could not cure the taint of the jury’s use of the dictionary. The Court erred in concluding that the inquiry cured any question of the use of the dictionary. While the jurors denied that their use of the dictionary to define “knowingly” affected their deliberation, such conclusion was belied by their admission that they read the definition out loud and as admitted by some of the jurors, the definition helped to make their decision. Moreover, whether a juror was influenced by an additional definition of a legal term is a question of law for the trial judge not one for interpretation by the juror who asked for and heard the definition. The only reasonable interpretation of the juror’s request is that the jury was unsure of whether the evidence established that the defendant knowingly participated in the unlawful scheme and their review of the dictionary definition led inexorably to the jury verdict rendered shortly after they received the dictionary. Thus, the presentation of the dictionary to the jury could not

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have withstood the application of the *Bremmer* presumption.

VII. CONCLUSION

Wherefore, for all the above reasons, the Petitioner prays his Petition for Writ of *Certiorari* be granted.

Respectfully submitted

Anibal Pagan Romero,

/s/_____

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