

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE E. ASHE, JR.

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Question presented

Whether the District of Columbia Court of Appeals erred in failing to reverse petitioner's convictions pursuant to the Sixth Amendment to the United States Constitution as interpreted by *Geders v. United States*, 425 U.S. 80 (1976), and its progeny.

List of related proceedings

United States v. Willie E. Ashe, Jr., No. 2018 DVM 00795 – collateral proceeding pending in D.C. Superior Court on motion for new trial pursuant to D.C. Code § 23-110 based upon an allegation of ineffective assistance of trial counsel

Citation of the opinions and orders entered below

Willie E. Ashe, Jr. v. United States, No. 18-CM-1197, mem. op. & jdgmt (D.C. June 12, 2020)

Willie E. Ashe, Jr. v. United States, No. 18-CM-1197, order (D.C. Sept. 23, 2020)

United States v. Willie E. Ashe, No. 2018 DVM 00795 (D.C. Super. Ct. Nov. 8, 2018)

Jurisdictional statement

On November 8, 2018, Willie E. Ashe, Jr., was convicted in the District of Columbia Superior Court of an assault upon and attempted threat to do bodily harm to Kenise Smith. On June 12, 2020, the District of Columbia Court of Appeals affirmed the convictions. Ashe's petition for rehearing or rehearing *en banc* was denied on September 23, 2020. Proceeding *in forma pauperis*,¹ Ashe requests this Court determine whether the affirmance of his convictions conflicted with *Geders v. United States*, 425 U.S. 80 (1976), and/or subsequent caselaw interpreting *Geders*. See Supreme Court Rule 10 (b), (c). In the alternative, he argues his case presents an important question of federal law that has not been, but should be, settled by this Court. See Supreme Court Rule 10 (c). This Court has jurisdiction pursuant to 28

¹ The undersigned has prepared this petition pursuant to her appointment to represent the indigent criminal defendant on appeal under D.C. Code § 11-2601 *et seq.*

U.S.C. § 1257, as Ashe claims the decision of the “highest court of a State” violated a right established by the Constitution of the United States.

Constitutional provision at issue

The Sixth Amendment to the United States Constitution states as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statement of the case

At trial, the government presented evidence that on May 12, 2018, Ashe struck Smith on the head with a metal pole and threatened to shoot her. Tr. 11-12, 20-21 (Oct. 25, 2018). By contrast, Ashe testified Smith assaulted him with a knife, threatened to have him killed, and injured her head when she fell due to intoxication. *Id.* at 33-43; Tr. 4-5 (Nov. 2, 2018).

The trial judge interrupted Ashe’s cross-examination to excuse defense counsel to another courtroom. Tr. 50-51 (Oct. 25, 2018); Tr. 17-18 (Nov. 2, 2018). The judge instructed Ashe as follows: “Don’t discuss your testimony with anybody and we’ll call you back up as soon as Mr. Irving returns.” Tr. 51 (Oct. 25, 2018). After a while, the court broke for lunch, but Ashe could not be found to be informed of the break. *Id.* at 52. The court later adjourned for the day without lifting its sequestration order and without Ashe having returned to the courtroom. *Id.* at 52-54. When trial resumed several days later, the judge verified that defense counsel “had a chance to talk to”

Ashe. Tr. 2 (Nov. 2, 2018). No party raised any issue at trial as to the sequestration order.

On appeal, the undersigned argued the trial court committed plain error in failing to lift its sequestration order prior to or during the several-day break in Ashe's cross-examination. The Court of Appeals disagreed, stating Ashe was not present when his trial adjourned for the day so need not be presumed to have believed the sequestration order remained in place. On petition for rehearing and/or rehearing *en banc*, the undersigned argued the violation of *Geders* was presumptively prejudicial. The petition was denied.

Argument

Pursuant to *Geders v. United States*, 425 U.S. 80, 85-86 (1976), the trial court's directive that the testifying defendant not "discuss [his] testimony with anybody" during the break in his trial was a violation of his Sixth Amendment right to the assistance of counsel that did not require a showing of actual prejudice. The order initially applied only to a short break, likely permissible under *Perry v. Leeke*, 488 U.S. 272 (1989). However, the subsequent application of that order to a several-day break in trial brought it within *Geders*. See *United States v. Cobb*, 905 F.2d 784, 791-92 (4th Cir. 1990) (examining the difference between *Perry* and *Geders*).

District of Columbia caselaw required reversal of Ashe's convictions regardless of trial counsel's failure to object and without the need for a showing of prejudice. See *Martin v. United States*, 991 A.2d 791 (D.C. 2010) (noting the burden lies with the government to show a valid waiver of the right to the assistance of counsel, not on

the defendant to show a desire to exercise that right); *Jackson v. United States*, 420 A.2d 1202 (D.C. 1979). Likewise, this Court has rejected the contention that a defendant sequestered during his testimony must show actual prejudice. *See Geders*, 425 U.S. at 85-86; *see also Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986); *United States v. Triumph Capital Group, Inc.*, 487 F.3d 124, 131 (2d Cir. 2007). Further, the structural error was not cured by inquiring of counsel upon the return to trial whether he had time to speak with Ashe. *Cf. Triumph*, 487 F.3d at 133-34.

For these reasons, the Court of Appeals' decision in this case conflicted with *Geders*, with prior decisions of the highest court of the District of Columbia, and with prior decisions of United States Courts of Appeals interpreting *Geders*. To the extent this case presents a novel issue of federal law, this Court should settle the question.

Signed,



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