

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY MICHAEL D'AMICO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a person's Sixth Amendment right to a fair trial is violated when a juror witnesses a critical defense witness arrested outside the courtroom after his testimony.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Anthony Michael D'Amico respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 20-13320-DD in that court on August 1, 2022, *United States v. Anthony Michael D'Amico*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on August 1, 2022. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances, and regulations:

The Due Process Clause of the Fifth Amendment mandates that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

In all criminal prosecutions, the accused shall enjoy the right . . . ; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

In his case-in-chief, Mr. D'Amico called Steven Harbison as a defense witness. During a break in his testimony, the prosecutor informed the district court that Harbison had an outstanding arrest warrant and the FBI intended to arrest him "outside the courtroom." (DE156:55).

After Harbison completed his testimony, the district court recessed and excused the jury for a break. (DE156:55). Inexplicably, the district court did not heed the prosecutor's warning about Harbison's arrest and did not inform the jury that they needed to stay inside the jury room during the break.

When the parties reconvened, the prosecutor told the district court that while the agents were escorting Harbison from the courthouse, a juror was present, and the case agent—Agent Mis—told her to "go back inside [the jury room]." (DE156:82). Mis later explained to the court: "When we were – when we confronted [Harbison], a juror had already walked past and was exiting the glass sliding door." (DE156:84). While the juror was near, Harbison was "kind of yelling." (DE156:85). Mr. D'Amico's wife saw the encounter. (DE156:89). She said there were jurors in the vicinity when the agents had Harbison "in cuffs." (DE156:89).

Eventually, the court questioned the juror if she saw Harbison and Mis "interacting." (DE156:88). She told the court: "No, not really" and that she "tried not to look." (DE156:88). The court further asked her whether what she saw would influence her, and she said no. (DE 156:88). The court never asked the juror whether she had seen Harbison "in cuffs."

The district court then brought in the entire jury and asked whether—other than the juror he had questioned—any other juror had seen “any interaction between any of the agents and [Harbison].” (DE156:89). No juror responded. (DE156:92).

On appeal, the Eleventh Circuit Court of Appeals affirmed. The court held that plain error review applied because Mr. D’Amico did not object in the district court. *United States v. D’Amico*, No. 20-13320, 2022 WL 3023694, at *3 (11th Cir. Aug. 1, 2022). The court held: “Even if it was erroneous for the court to not *sua sponte* grant a mistrial because one juror might have seen Steven Harbison get arrested, that error would not be plain because no precedent supports that proposition.” *Id.* Because Mr. D’Amico cannot meet the plain error standard, the court affirmed. *Id.*

REASONS FOR GRANTING THE WRIT

ANTHONY'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN A JUROR SAW A CRITICAL DEFENSE WITNESS ARRESTED OUTSIDE THE COURTROOM.

After Steven Harbison—a critical defense witness completed his testimony, the district court recessed and excused the jury for a break. (DE 156:55). During a subsequent conference, the prosecutor told the district court that while the agents were escorting Harbison from the courthouse, a juror was present, and Mis told her to “go back inside [the jury room].” (DE 156:82). Mis explained to the court: “When we were – when we confronted him, a juror had already walked past and was exiting the glass sliding door.” (DE 156:84). While the juror was near, Harbison was “kind of yelling.” (DE 156:85).

Eventually, the court questioned the juror if she saw Harbison and Mis “interacting.” (DE 156:88). She told the court: “No, not really” and that she “tried not to look.” (DE 156:88). The district court never asked the juror what triggered her decision “not to look”—whether she saw or heard *anything*.

The district court’s decision not to engage in a meaningful inquiry with the juror is perplexing. Mis proffered that the juror was in the vicinity when he and other agents “confronted” Harbison, who started yelling. Anthony’s wife also saw the encounter. (DE 156:89). She said there were jurors in the vicinity when the agents had Harbison “in cuffs.” (DE 156:89). The juror must have seen and heard this confrontation, but the court failed to examine the issue scrupulously.

In *Washington v. Texas*, 388 U.S. 14 (1967), this Court held that the Sixth Amendment right to compulsory process to obtain witnesses “is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth is.” *Id.* at 18. The defendant's right to present their own witnesses to establish a defense, the Court held, “is a fundamental element of due process of law.” *Id.* The Fifth Amendment Due Process Clause “guarantees that a criminal defendant will be treated with the fundamental fairness essential to the very concept of justice.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (internal quotations and citation omitted). At its core, the right to due process is the right to fairly “present a defense.” *Webb v. Texas*, 409 U.S. 95, 98 (1972) (per curiam) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)). This Court has recognized that the government may not substantially interfere with the testimony of defense witnesses. *Webb*, 409 U.S. at 98.

The events at Mr. D'Amico's trial plainly violated these fundamental rights. First, the government acted recklessly in arresting Harbison outside the courtroom while the jury was in recess. The case agent was present in the courtroom when the district court recessed the jury without requesting they stay inside the jury room. Therefore, the case agent who executed Harbison's arrest in the lobby outside the courtroom knew that one or more jurors might leave the room and step into the lobby at any moment. Instead of delaying Harbison's arrest when he walked to a

different part of the courthouse—away from the courtroom and jury room—he decided to engage in a confrontation right then and there.

Second, the district court failed to engage in a meaningful inquiry. The uncontested evidence showed that (1) agents “confronted” Harbison outside the courtroom; (2) during the confrontation, Harbison was “yelling”; and (3) a juror was nearby and gave equivocal answers about what she saw and heard. The district court’s decision not to ask the juror what she meant by “no, not really” and what triggered her decision “not to look” resulted in a manifest injustice to Mr. D’Amico.

Based on the court and the government’s actions in this case, this Court should vacate Mr. D’Amico’s convictions.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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