

NO:

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IN THE  
SUPREME COURT OF THE UNITED STATES

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ANTHONY MICHAEL D'AMICO,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **A P P E N D I X**

## **APPENDIX**

Decision of the Court of Appeals for the Eleventh Circuit, <i>United States v. D'Amico</i> , .....	A-1
Judgment imposing sentence .....	A-2

## **APPENDIX A-1**

2022 WL 3023694

Only the Westlaw citation is currently available.  
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,  
v.

Anthony Michael D'AMICO, Defendant-Appellant.  
United States of America, Plaintiff-Appellee,  
v.

Anthony Michael D'Amico, Defendant-Appellant.

No. 20-13320, No. 21-10752

|

Non-Argument Calendar

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Filed: 08/01/2022

Appeals from the United States District Court for the Southern District of Florida, D.C. Docket No. 9:18-cr-80179-JJC-1

#### Attorneys and Law Firms

Nicole D. Mariani, Lisa Tobin Rubio, U.S. Attorney Service—Southern District of Florida, U.S. Attorney Service, Miami, FL, Emily M. Smachetti, Elizabeth Young, U.S. Attorney's Office, Miami, FL, Brandy Brentari Galler, U.S. Attorney's Office, West Palm Beach, FL, for Plaintiff-Appellee.

Huda Ajlani-Macri, Assistant Federal Public Defender, Brenda Greenberg Bryn, Federal Public Defender's Office, Fort Lauderdale, FL, Michael Caruso, Federal Public Defender, Federal Public Defender's Office, West Palm Beach, FL, for Defendant-Appellant.

Before Wilson, Newsom, and Black, Circuit Judges.

#### Opinion

PER CURIAM:

\*1 Anthony D'Amico appeals (1) the district court's denial of his motion for a new trial and an evidentiary hearing following his convictions for wire fraud and money laundering, based on *Giglio* and *Brady*<sup>1</sup> violations and on newly discovered evidence that a Government witness was under investigation for fraud, under Fed. R. Crim. P. 33; (2) the court's determination the loss amount exceeded \$2,700,000; (3) the court's failure to *sua sponte* order a mistrial because a juror might have seen a defense witness get

arrested after testifying; and (4) the court's order of restitution without a jury finding. After review, we affirm the district court.

#### I. MOTION FOR A NEW TRIAL

##### A. Giglio

To prove a *Giglio* violation—which is a subset of *Brady* violations—the defendant must show: “(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material *i.e.*, that there is any reasonable likelihood that the false testimony could have affected the judgment.” *United States v. Stein*, 846 F.3d 1135, 1147 (11th Cir. 2017) (quotation marks omitted).

D'Amico's *Giglio* claim fails because, regardless of materiality, D'Amico's motion for a new trial did not explain how Fernando Mendez's fraud resulted in Mendez's testimony being false, and he did not identify any specific statements by Mendez that were allegedly false. *See id.* Based on the argument D'Amico made to the district court in his motion for a new trial, the court did not abuse its discretion by denying his *Giglio* claim. *See United States v. Vallejo*, 297 F.3d 1154, 1163 (11th Cir. 2002) (reviewing a district court's denial of a Rule 33 motion for a new trial, including those where the motion is based on a *Brady* or *Giglio* violation or newly discovered evidence, for an abuse of discretion).

##### B. Brady

In a criminal proceeding, the Due Process Clause of the Fifth Amendment requires the government to produce all evidence, upon request, that is favorable to the accused. *Brady*, 373 U.S. at 87. To establish a *Brady* claim, a defendant must show: (1) the government possessed evidence favorable to the defendant, including impeachment evidence; (2) the defendant did not possess the evidence, nor could he have obtained it himself with any reasonable diligence; (3) the government suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists the outcome of the proceedings would have been different. *United States v. Hansen*, 262 F.3d 1217, 1234 (11th Cir. 2001). Evidence is material if there is a reasonable probability that a different result would have occurred had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995).

The district court did not abuse its discretion by denying D'Amico's *Brady* claim. When Mendez testified and the jury returned its verdict on November 7, 2019, the only information that could have been known to the Government about Mendez was that a subpoena had been drafted, but had not been served, for Mendez Digital as part of the McNeal case. Thus, the only thing the Government could have disclosed to D'Amico would have been that Mendez's company was somehow related to the McNeal case. D'Amico would not have been able to cross-examine Mendez about the subpoena, or the health care fraud, because Mendez would not have known about either at the time he testified. D'Amico's arguments that Mendez somehow knew about the McNeal case and would have understood he was under investigation for health care fraud at the time of his testimony is speculative, and this speculation is not enough to support his arguments that he would have presented a more robust defense and attacked Mendez's credibility.

\*2 Additionally, the Government had a strong case against D'Amico. For example, Alan Redmond testified D'Amico got him to switch from buying leads from Exact Media Match (EMM) to Fuel Avenue. Soyoung Ham testified that D'Amico's Invoca login credentials were logged in at the time and on the page where the direct inward dial (DID) numbers for eHealth, VelaPoint, and HII were changed. Nicholas Karabetsos testified that D'Amico paid and registered the ehealthinsurance.com e-mail domain, which was listed in Invoca as eHealth's contact information despite Brian Taylor's testimony that it had a different e-mail domain. These examples, among many others, combined with the jury's ability to believe that the opposite of D'Amico's own testimony was true, shows the court did not abuse its discretion by determining the information about Mendez was not material. *See United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995) (stating when a defendant takes the stand and testifies in his own defense, the jury may disbelieve his testimony, and he runs the risk that if disbelieved the jury might conclude the opposite of his testimony is true).

Next, D'Amico cannot show that, had the Government disclosed information about Mendez, the result of his sentencing would have been different. When D'Amico was sentenced on August 25, 2020, the only thing the Government would have known about Mendez was that a criminal information alleging health care fraud was filed against him a month prior. D'Amico argues this information would have somehow affected the court's calculation of the loss amount and its decision to impose an enhancement for obstructing

justice but does not explain how it would have affected it, and he did not explain how in his motion for a new trial. Thus, D'Amico does not show the court abused its discretion by determining the result of his sentencing would not have been different if he had known that Mendez had been indicted for health care fraud.

### C. Rule 33

To justify the grant of a new trial under [Fed R. Crim. P. 33](#) based on newly discovered evidence, a movant must satisfy four elements: "(1) the evidence must be newly discovered and have been unknown to the defendant at the time of trial; (2) the evidence must be material, and not merely cumulative or impeaching; (3) the evidence must be such that it will probably produce an acquittal; and (4) the failure to learn of such evidence must be due to no lack of due diligence on the part of the defendant." *United States v. Sjeklocha*, 843 F.2d 485, 487 (11th Cir. 1988).

D'Amico cannot satisfy the materiality element of his *Brady* claim, which means he also cannot satisfy [Rule 33](#)'s materiality element. These tests share a common materiality element that addresses what effect the withheld exculpatory evidence or newly discovered evidence had on the defendant's case. In order of the difficulty of meeting these materiality elements, [Rule 33](#)'s materiality standard is more difficult to prove than *Brady*'s. *Compare Sjeklocha*, 843 F.2d at 487 (stating [Rule 33](#) evidence must probably produce an acquittal), *with Hansen*, 262 F.3d at 1234 (stating *Brady* standard is whether a reasonable probability exists that the outcome of the proceedings would have been different).

### D. Evidentiary Hearing

Lastly, the district court did not abuse its discretion by denying D'Amico's motion for an evidentiary hearing. *See United States v. Isaacson*, 752 F.3d 1291, 1308 (11th Cir. 2014) (reviewing the denial of a motion for an evidentiary hearing for an abuse of discretion). Motions for a new trial are typically decided without an evidentiary hearing, and D'Amico's allegations did not require an evidentiary hearing. *See United States v. Hamilton*, 559 F.2d 1370, 1373 (5th Cir. 1977)<sup>2</sup> (explaining motions for new trial are ordinarily decided without an evidentiary hearing, but hearings are appropriate for allegations of jury tampering, prosecutorial misconduct, or a third-party confession); *United States v. Espinosa-Hernandez*, 918 F.2d 911, 913-14 (11th Cir. 1990) (allowing an evidentiary hearing where it was discovered that a government agent who testified was indicted for making

false statements and distributing cocaine because it involved “serious and disturbing breaches of the public trust”).

\*3 Accordingly, we affirm the district court's denial of D'Amico's motion for a new trial based on Rule 33, *Brady*, and *Giglio*, and its denial of D'Amico's motion for an evidentiary hearing.

## II. LOSS AMOUNT

The government has the burden to prove the losses attributed to the defendant by a preponderance of the evidence. *See United States v. Cavallo*, 790 F.3d 1202, 1232 (11th Cir. 2015). Loss is calculated as the greater of actual loss or intended loss. U.S.S.G. § 2B1.1, comment. (n.3(A)). Actual loss is the “reasonably foreseeable pecuniary harm that resulted from the offense.” *Id.* § 2B1.1, comment. (n.3(A)(i)).

The court did not clearly err by determining D'Amico caused a loss amount of \$2,700,000. *See Cavallo*, 790 F.3d at 1232 (reviewing a district court's determination of the loss amount for clear error). Jeremy Attick, All Web Leads' (AWL) vice president of business development and former vice president of sales, testified that EMM lost approximately \$3,000,000 in business based on the rerouted leads, and Jessica Lopez, AWL's director of finance and CPA, testified that during her due diligence of AWL's acquisition of EMM she discovered eHealth, VelaPoint, and HII each had outstanding invoices and the total amount lost was \$2,767,000. Because the court stated it relied on Lopez's testimony when determining the loss amount, it did not clearly err by finding the Government proved the loss amount by a preponderance of the evidence.

Even if these figures are hypothetical, the guidelines permit the actual loss amount to be a reasonable estimate of the loss. *See id.* (stating the guidelines do not require that the sentencing court make a precise determination of loss, and a sentencing court need only make a reasonable estimate of the loss, given the available information). Accordingly, the district court did not clearly err by determining the Government proved the loss amount by a preponderance, and we affirm.

## III. MISTRIAL

Plain error review applies because D'Amico did not object on this basis in the district court. *See United States v. Nash*, 438 F.3d 1302, 1304 (11th Cir. 2006) (explaining issues raised for the first time on appeal are reviewed for plain error). 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. *See United States v. Lange*, 862 F.3d 1290, 1296 (11th Cir. 2017) (stating “there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it”). Thus D'Amico cannot meet the plain error standard, and we affirm.

## IV. RESTITUTION

*Apprendi* held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Apprendi* does not apply to restitution orders because the restitution statute, 18 U.S.C. § 3663, does not have a prescribed statutory maximum. *Dohrmann v. United States*, 442 F.3d 1279, 1281 (11th Cir. 2006). *Southern Union* held that *Apprendi* applies to criminal fines, but did not address restitution. *Southern Union Co. v. United States*, 567 U.S. 343, 350 (2012).

\*4 Plain error applies because D'Amico did not raise an *Apprendi* issue when he objected to the restitution amount. Even if it was erroneous for the court to order restitution without a jury finding, any error would not be plain. Under *Dohrmann*, *Apprendi* does not apply to restitution orders. The court would have had no indication that *Southern Union* abrogated *Dohrmann* because *Southern Union* did not address restitution. Thus, D'Amico cannot meet the plain error standard and we affirm. *See Lange*, 862 F.3d at 1296.

## AFFIRMED.

### All Citations

Not Reported in Fed. Rptr., 2022 WL 3023694

## Footnotes

- 1 *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).
- 2 In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

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## **APPENDIX A-2**

**UNITED STATES DISTRICT COURT**  
**Southern District of Florida**  
**Fort Lauderdale Division**

**UNITED STATES OF AMERICA**  
v.  
**ANTHONY MICHAEL D'AMICO**

**JUDGMENT IN A CRIMINAL CASE**

Case Number: **9:18-80179-CR-COHN**  
USM Number: **19207-104**

Counsel for Defendant: **Huda Ajlani Macri, AFPD**  
Counsel for The United States: **Elizabeth Young, AUSA**  
Court Reporter: **Ilona Lupowitz**

**The defendant was found guilty on Counts 1 through 7 of the Indictment.**

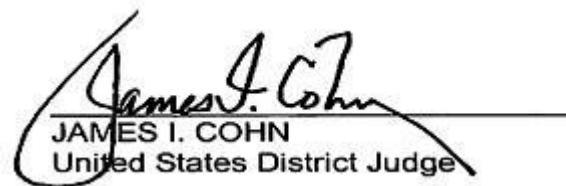
The defendant is adjudicated guilty of these offenses:

<b><u>TITLE &amp; SECTION</u></b>	<b><u>NATURE OF OFFENSE</u></b>	<b><u>OFFENSE ENDED</u></b>	<b><u>COUNTS</u></b>
18 U.S.C. § 1343	Wire Fraud	02/01/2018	1-5
18 U.S.C. § 1957	Money Laundering	03/26/2018	6-7

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **8/25/2020**



JAMES I. COHN  
United States District Judge

Date: August 25, 2020

DEFENDANT: ANTHONY MICHAEL D'AMICO  
CASE NUMBER: 9:18-80179-CR-COHN

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **87 months as to Counts One through Seven of the Indictment, all such terms to run concurrently.**

**The court makes the following recommendations to the Bureau of Prisons: That the Defendant be designated to a facility in the Middle District of Florida**

**The defendant is remanded to the custody of the United States Marshal.**

## RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

## UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

**DEFENDANT: ANTHONY MICHAEL D'AMICO**  
**CASE NUMBER: 9:18-80179-CR-COHN**

### **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years. This term consists of three years as to Count One through Seven, all such terms to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

**The defendant shall cooperate in the collection of DNA as directed by the probation officer.**

**The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

### **STANDARD CONDITIONS OF SUPERVISION**

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

**DEFENDANT: ANTHONY MICHAEL D'AMICO**  
**CASE NUMBER: 9:18-80179-CR-COHN**

### **SPECIAL CONDITIONS OF SUPERVISION**

**Financial Disclosure Requirement** - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

**No New Debt Restriction** - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

**Permissible Search** - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

**Self-Employment Restriction** - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

**Substance Abuse Treatment** - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

**Unpaid Restitution, Fines, or Special Assessments** - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: ANTHONY MICHAEL D'AMICO  
CASE NUMBER: 9:18-80179-CR-COHN

### CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$700.00	\$0.00	\$2,822,359.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>NAME OF PAYEE</u>	<u>TOTAL LOSS*</u>	<u>RESTITUTION ORDERED</u>
<i>Victim names and amounts to be provided by U.S. Probation and/or U.S. Attorney</i>		

**Restitution with Imprisonment** - It is further ordered that the defendant shall pay restitution in the amount of \$2,822,359.00. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of \$25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

\*\*Assessment due immediately unless otherwise ordered by the Court.

**DEFENDANT: ANTHONY MICHAEL D'AMICO**  
**CASE NUMBER: 9:18-80179-CR-COHN**

**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

**A. Lump sum payment of \$700.00 due immediately.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE**  
**ATTN: FINANCIAL SECTION**  
**400 NORTH MIAMI AVENUE, ROOM 08N09**  
**MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

<b><u>CASE NUMBER</u></b>	<b><u>TOTAL AMOUNT</u></b>	<b><u>JOINT AND SEVERAL AMOUNT</u></b>
<b>DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)</b>		

**The defendant shall forfeit the defendant's interest in the following property to the United States:**  
**The defendant's right, title and interest to the property identified in the preliminary order of forfeiture at docket entry [143], which has been entered by the Court and is incorporated by reference**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.