

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TOU THAO
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

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QUESTION PRESENTED

The Petitioner was convicted of two counts of deprivation of rights under color of law resulting in bodily injury and death in connection with the death of George Floyd, pursuant to 18 U.S.C. § 242. This section makes it a crime to “willfully subject any person ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution of the United States.” 18 U.S.C. § 242 (emphasis added). To prove willfulness the jury had to find that the government has proven that the petitioner acted with the specific intent to deprive Mr. Floyd of his constitutional rights. In this case the prosecution failed to present sufficient evidence to prove that petitioner’s actions and inactions were willful or specifically for a bad purpose. Was the evidence at trial sufficient to establish the willfulness of the petitioner?

The United States Constitution guarantees the right to a fair trial to a criminal defendant. In this case the prosecution engaged in numerous, varied, and pervasive acts of misconduct at trial beginning with its opening statement, continuing throughout the presentation of evidence, and culminating in the closing arguments. Did the prosecutorial misconduct act to deprive the petitioner of his right to a fair trial?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

OPINION BELOW.....	1
JURISDICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE.....	5
REASONS TO GRANT A WRIT OF CERTIORARI.....	7
CONCLUSION.....	8
APPENDIX:	
Appendix A:	Court of Appeals Opinion below United States v. Thao, 76 F.4th 773 (8 Cir. 2023)
Appendix B:	United States District Court Order on Motion for New Trial

TABLE OF AUTHORITIES

	Page(s)
United States Constitution	
United States Constitution, 6th Amendment.....	4
Cases	
<i>United States v. Conrad</i> , 320 F3rd 851 (8 Cir. 2003)	8, 9
<i>United States v. Thao</i> , 76 F4th 773 (8 Cir. 2023)	7
Statutes	
18 U.S.C. § 242.....	I, 4, 5
18 U.S.C. § 1254(1)	3

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DECEMBER TERM, 2023

TOU THAO
Petitioner,

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE
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The petitioner Tou Thao respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on August 4, 2023.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 76 F.4th 773 (8th Cir. 2023), and is reprinted in the appendix hereto (Appendix A).

The district court's order denying Thao's motion for a new trial is unpublished. This order is document number 334 on the district docket sheet.

A copy of this order is reprinted in the appendix hereto (Appendix B).

JURISDICTION

Petitioner Tou Thao was convicted of two counts of deprivation of rights under color of law resulting in bodily injury or both. He moved for a new trial. The District Court denied his motion. He appealed. The United States Court of Appeals for the Eighth Circuit affirmed in a published opinion filed August 4, 2023.

The jurisdiction of this Court to review the judgement of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

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.

Title 18 U.S.C. § 242 provides:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire,

shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

STATEMENT OF THE CASE

In this case a grand jury indicted the petitioner on two counts of deprivation of civil rights under color of law resulting in bodily injury and death in violation of 18 U.S.C. § 242. This section makes it a crime to “willfully subject any person ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution of the United States”. U.S.C. § 242 (emphasis added). The first count required proof beyond a reasonable doubt that the petitioner willfully deprived Mr. Floyd of his right to be free from unreasonable seizure by failing to intervene in an officers use of unreasonable force. The second count required proof that the petitioner willfully deprived Mr. Floyd of his right to be free from an officers deliberate indifference to his serious medical needs. Both counts required proof of willfulness on the part of the petitioner: To prove willfulness the Government had to prove that the petitioner acted with the specific intent to deprive Mr. Floyd of his constitutional rights. In its most simple term, willful as defined in U.S.C. § 242 means either a particular purpose or reckless disregard.

In this case the petitioner presented evidence of his training and experience as a police officer recognizing and dealing with persons suspected of experiencing excited

delirium, as exhibited by Mr. Floyd. This training and experience required the restraint of the person until medical personnel arrived and sedated the person for medical reasons.

At trial the government engaged in numerous, varied, and pervasive acts of prosecutorial misconduct, beginning with its opening statement, continuing throughout the presentation of evidence, and culminating in its closing arguments. These acts were intentional, pervasive, and so unfairly persistent as to deprive the petitioner of his right to a fair trial. The court sustained many, but not all, of the defendants many objections, but failed to efficiently cure the prejudice to the petitioner.

Mr. Thao moved for a judgement of acquittal and for a mistrial which was denied by the court in a Memorandum and Order, in which the court noted its "... grave concerns about the possibility that the jury's verdicts were based upon their fear of repercussions-social, political, and personal from a different outcome..." (Appendix A at 4-5), and that the government's evidence "was not overwhelming" (Appendix A at 4).

The petitioner appealed, arguing that his convictions should be overruled due to insufficiency of the evidence and the prosecutorial misconduct which violated his right to a fair trial. The Eighth Circuit panel disagreed with the merits of the petitioner's arguments.

First, with regard to the petitioner claims as to the sufficiency of the evidence, the appellate court upheld the verdicts as to both charges. The Eighth Circuit panel concluded that “while a jury could reasonably take these facts an inference to find that Thao did not act willfully, ‘reversal is not appropriate even when the evidence rationally supports two conflicting hypotheses, and is required only is no reasonable jury could have found guilty beyond a reasonable doubt.’” (Appendix B at 6-7). The Eighth Circuit panel agreed with the District Court that the government’s evidence on count two was “not overwhelming”, it nonetheless held that a jury could reasonably find that the petitioner acted willfully.

With regard to the petitioner’s claims regarding prosecutorial misconduct, the Eighth Circuit found that the District Court did not abuse its discretion in denying the petitioner’s motion for a mistrial. The Eighth Circuit utilized a three-part test in its analysis as set forth in *United States v. Conrad*, 320 F.3rd 851 (8th Cir. 2003): The panel first ruled that although the petitioner alleged a great deal of misconduct, “This was a 21-day trial that involved over 30 witnesses” (Appendix B at 8). Further, the Eighth Circuit panel found that the District Court’s curative actions remedied any potential prejudice, individual or cumulative, caused by the government actions. The Eighth Circuit panel did not specifically address the second element in the *Conrad* test, the strength of the properly admitted evidence of the defendant’s guilt, but indicated that “... any prosecutorial misconduct was not so prejudicial as to warrant a new trial” (Appendix B at 9).

REASONS TO GRANT THE WRIT

This Court should grant the petition to ensure the fundamental principle that every defendant is guaranteed the right to a fair trial. Moreover, when an overzealous prosecution commits serious and pervasive misconduct such that its cumulative effect operates to deprive a defendant a fair trial, this Court must act to uphold the constitutional guarantee of a fair trial.

CONCLUSION

This Court should grant the petition to ensure that the constitutional guarantee of the right of a criminal defendant to a fair trial is enforced. The lack of sufficient evidence to support the convictions in this case must be reviewed. Additionally, the prosecutorial misconduct which occurred acted to deprive the petition of his right to a fair trial. The combination of these factors must be addressed by this Court to uphold the constitution guarantee of a fair trial.

Dated: November 6, 2023

/s/ Thomas C. Plunkett

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