

No.

IN THE SUPREME COURT OF THE UNITED STATES

JESSE GREGORY FAIRLEY,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Whether reversal of a criminal conviction is required when counsel for the government interferes with a defendant's Fifth and Sixth Amendment right to call a witness by misrepresenting or substantially exaggerating the witness' criminal exposure for the purpose of changing the witness' mind about testifying?

LIST OF PARTIES

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

RELATED CASES

There are no cases related to the case that is the subject of this petition.

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Petitioner Jesse Gregory Fairley (“Petitioner” or “Fairley”) respectfully requests that a writ of certiorari will issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in Case No. 22-3923 on May 8, 2025.

OPINION BELOW

On May 8, 2025, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed an opinion and judgment affirming Petitioner’s drug trafficking and firearms convictions. (App. 1a). The opinion is reported at 137 F.4th 503. The United States District Court entered an unpublished criminal judgment on October 27, 2022. (App. 25a).

JURISDICTION

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on May 8, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1), which permits a party to petition the Supreme Court of the United States to review any civil or criminal case before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

United States Constitution, Fifth Amendment:

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

United States Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor [.]

18 U.S.C. §5032:

A juvenile alleged to have committed an act of juvenile delinquency . . . shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), (3)), section 922(x) or section 924(b), (g), or (h) of this title, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

. . . .

STATEMENT OF THE CASE

An undercover vice detective observed unusual activity in the parking lot of the Little Eagle Food Market, an inner-city corner store located in Cleveland, Ohio. He could see an adult male (later identified as Fairley) and a 16-year old male (later identified as Terrez Wilson) engaging in suspicious “hand to hand” exchanges with others in the parking lot. Each individual was also seen entering and exiting a brown BMW parked on the street in front of the store.

The detective suspected Fairley and Wilson were selling drugs. He recognized a “rock shaped” white object that Wilson had sold to one customer as crack cocaine. Yet even with the aid of binoculars, the detective could not discern the identity of the product sold by Fairley.

When the female driver of the BMW left the vehicle to enter the store, the detective decided it was an opportune time to initiate an investigatory stop. Other detectives of the vice squad as well as uniformed patrol officers arrived to assist him.

As marked police vehicles pulled behind the BMW, Fairley jumped out of the front passenger seat “rather quickly.” Meanwhile Wilson threw a bag of crack cocaine into the rear compartment of the vehicle.

One of the detectives detained Fairley. He seized the cash that Fairley was holding in his hand, handcuffed him, and walked him back to a patrol cruiser. A pat-down search of Fairley did not yield drugs or weapons.

A different detective removed Wilson and three females from the back seat of the BMW. A search of the vehicle resulted in the seizure of two loaded handguns, crack cocaine, marijuana, a digital scale, and cash.

The lead detective made a special trip to district headquarters for the express purpose of obtaining a kit for collecting DNA evidence from the handguns. His effort proved futile. When he

returned to the crime scene, the detective was shocked to learn that a trainee in the vice squad had contaminated the surfaces of the firearms by handling them with his bare hands.

Fairley agreed to discuss his activities at the store. He told a detective he was selling only marijuana in the parking lot. He denied possessing the crack cocaine or the handguns that were seized from the BMW.

The prosecution of Fairley and Wilson took markedly different paths. County authorities filed delinquency charges against Wilson in the juvenile court. Wilson entered admissions to charges of trafficking in crack cocaine and unlawful possession of a firearm. The juvenile court placed him on probation.

The United States Attorney for the Northern District of Ohio elected to prosecute Fairley in federal district court. A grand jury indicted him for counts of possession with intent to distribute cocaine base, felon-in-possession of a firearm, and possession of a firearm in furtherance of a drug trafficking crime. The indictment did not charge him with any crime involving possession of or trafficking in marijuana.

Fairley exercised his right to a trial. His attorney portrayed his client to the jury as a marijuana dealer. The thrust of the defense was the lack of any proof connecting Fairley to the crack cocaine and firearms seized from the BMW. The attorney criticized investigators for the botched effort to obtain DNA evidence from the firearms.

During cross-examination of the police witnesses, defense counsel elicited testimony that 1) the vehicle was registered to the female driver, 2) Fairley did not possess a key to the vehicle, 3) the vehicle was occupied by as many as four females and another male, and 4) the detectives never observed Fairley in possession of crack cocaine or a firearm.

During the defense case, Fairley's attorney announced his intention to call Terrez Wilson (by this time an adult) to the witness stand. His expected Wilson to testify that the crack cocaine and firearms in the BMW belonged to him exclusively.

This development enraged the Assistant United States Attorney ("AUSA") representing the government. He asked the district judge to admonish the witness about his Fifth Amendment privilege against self-incrimination.

The judge issued a relatively benign warning to Wilson about the possibility of federal charges if he admitted to any crimes. The witness acknowledged his understanding of this risk and confirmed his intention to testify for Fairley. He declined the judge's offer to appoint him an attorney for advice before testifying.

These responses only served to further anger the AUSA. He insisted that the judge give him an opportunity to "address him directly." The AUSA confronted Wilson with the following: "Sir, do you understand that in testifying that you possessed a gun and drugs together, and that you were dealing drugs while possessing guns, [you] could subject you[rself] to a five-year mandatory minimum sentence consecutive to anything you get for the drugs by themselves? Do you understand that sentence?"

The government's threat worked. The witness did not testify. The jury returned verdicts of guilty on all counts. The district judge sentenced Fairley to a 360-month aggregate prison term and a five-year term of supervised release.

A panel of the Sixth Circuit Court of Appeals denied Fairley's constitutional challenge to the AUSA's interference with his right to present the testimony of Terrez Wilson. The opinion soft-pedaled the prosecutor's misconduct by characterizing it as a "neutral warning" "consistent with the prosecutor's ethical obligation."

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

A criminal defendant's right to present his own witnesses in order to establish a defense to a charge is a fundamental element of the Due Process Clause and is protected by the Compulsory Process Clause of the Sixth Amendment. *Washington v. Texas*, 388 U.S. 14, 19 (1967). *See also Chambers v. Mississippi*, 410 U.S. 284, 302 (1972) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.")

This Court has ruled that a state trial judge in Texas violated a criminal defendant's constitutional rights when he "effectively drove [a] witness off the stand" by telling him: "If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve." *Webb v. Texas*, 409 U.S. 95, 96, 98 (1972).

May a federal prosecutor admonish a defense witness in a manner that a trial judge is prohibited from doing? To be more specific, may counsel for the government interfere with a defendant's Fifth and Sixth Amendment right to call a witness by misrepresenting or substantially exaggerating the witness' criminal exposure for the purpose of changing the witness' mind about testifying?

Surprisingly, in the 53 years since *Webb* was decided, "[t]here is no Supreme Court case law holding that a prosecutor commits misconduct when he or she threatens a defense witness with prosecution and thereby causes the witness to either refuse to testify or invoke the Fifth Amendment." *Graves v. Swarthout*, 471 Fed. Appx. 768, 771 (9th Cir. 2011). This petition for a writ of certiorari presents the Court with an opportunity to resolve this important issue.

Standard 3-3.4(6) of the American Bar Association Standards for the Prosecution Function (4th Ed. 2017) encourages a prosecutor to inform a witness about his or her privilege against self-incrimination and right to independent counsel if "the witness appears not to know his or her

rights.” But the same standard admonishes a prosecutor that he may not manipulate that advice in a manner designed to discourage a witness from testifying for the accused:

However, a prosecutor should not so advise, or discuss or *exaggerate the potential criminal liability of*, a witness with a purpose, or in a manner likely, to intimidate the witness, to influence the truthfulness or completeness of the witness’s testimony, or to change the witness’s decision about whether to provide information. (Emphasis supplied).

The AUSA’s threat to prosecute Terrez Wilson and subject him to a mandatory five-year prison term was more than an exaggeration. It was an outright misrepresentation of the witness’s actual exposure to federal prosecution.

Wilson was 16 years old at the time of the events at the Cleveland corner store. “The continuing basic premise of federal juvenile law is that juvenile matters, even those arising under federal law, should be handled by state authorities whenever possible.” Charles Doyle, *Juvenile Delinquents and Federal Criminal Law: The Federal Delinquency Act and Related Matters in Short*, Congressional Research Service 1 (May 9, 2023). “The Federal Juvenile Delinquency Act (JDA) permits federal delinquency proceedings when state courts cannot or will not accept jurisdiction or, in the case of a limited number of crimes, when there is a substantial federal interest.” *Id.*

To overcome the statutory presumption favoring prosecution of juvenile offenders in state courts, the United States Attorney for the district must certify that one of the following circumstances exist:

- (1) The state courts are unwilling or unable to proceed against the juvenile for the misconduct in question; or
- (2) The juvenile programs of the state are unavailable or inadequate; or
- (3) The offense is a drug dealing or drug smuggling violation, possession of an undetectable firearm, or a felony and crime of violence and [] a substantial federal interest exists warranting the exercise of federal jurisdiction.

(*Id.* at 3, citing 18 U.S.C. §5032).

The first two circumstances did not exist at the time Wilson was called to testify as a witness in Fairley's trial. The witness' prosecution for drug trafficking and firearm charges in the state juvenile court had concluded two years earlier.

The language of the third circumstance was added to the JDA by the Comprehensive Crime Control Act of 1984 "in an effort to expand federal authority to proceed against juveniles charged with particularly serious, violent offenses in criminal prosecutions rather than juvenile delinquency proceedings." *United States v. Juvenile No. 1*, 118 F.3d 298, 303-04 (5th Cir. 1997). Wilson's conduct did not involve a serious violent offense.

The third circumstance implicated ethical considerations that would have precluded Wilson's prosecution for federal crimes relating to his activity at the corner store. The AUSA may well have had a *personal* interest in retaliating against Wilson if he testified on behalf of Fairley. But surely the United States Attorney for the Northern District of Ohio would realize that certifying Wilson for prosecution in federal court for retaliatory purposes would violate his oath to uphold the Constitution.

The Sixth Circuit commented that "it is *not impossible* that Wilson could have been bound over for adult prosecution on charges for his conduct in the Little Eagle parking lot on September 17, 2020." (App. 18a, emphasis supplied). However this Court's opinion in *Webb* noted that "some of the[] threats [against the witness] may have been beyond the power of this judge to carry out." *Id.* 409 U.S. at 97-98. The Sixth Circuit panel's "not impossible" standard is inconsistent with the quoted language from *Webb*.

CONCLUSION

Fairley fully satisfied the requirements of the plain error rule. The Sixth Circuit panel acknowledged the existence of Circuit precedent adopting the American Bar Association standard regarding a prosecutor's ethical duties when warning a witness about his or her Fifth Amendment rights. (App. 18a, citing *United States v. Meda*, 812 F.3d 502, 517(6th Cir. 2015)).

The government was unable to place Fairley in actual possession of the crack cocaine and the firearms found in the BMW. Wilson's testimony would have undermined the government's speculative theory that Fairley jointly possessed the contraband with the juvenile. For this reason, the government's interference with Fairley's effort to call Wilson as a defense witness affected the outcome of the trial to his detriment.

The AUSA lacked a legal or factual basis for telling a young witness that he faced federal prosecution and a mandatory five-year prison term if he testified for the defense. To allow Fairley's convictions and 30-year prison sentence to stand, despite the flagrancy of the government's effort to keep a witness with first-hand knowledge from testifying, surely would adversely affect the fairness, integrity and public reputation of the federal criminal adjudication process.

For these reasons, Fairley asks the Court to issue a writ of certiorari to the court of appeals for the purpose of deciding the important question presented for review by this petition.

Respectfully submitted,

s/Dennis C. Belli

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